

# Law Behind Bars

## PILCH Report on Prisoner Legal Assistance

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## About PILCH

PILCH is a leading Victorian not-for-profit organisation. It is committed to furthering the public interest, improving access to justice and protecting human rights, by facilitating the provision of pro bono legal services and undertaking law reform, policy work and legal education. In carrying out its mission, PILCH seeks to address marginalisation and disadvantage, effect structural change to address injustice and foster a strong pro bono culture in Victoria.

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### PILCH Report on Prisoner Legal Assistance

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# Abbreviations

## Organisations

|        |  |
|--------|--|
| ABS    | Australian Bureau of Statistics  |
| BOH    | Bridge of Hope Foundation  |
| CHCLC  | Central Highlands Community Legal Centre                                 |
| CHRIP  | Centre of Human Rights for Imprisoned Persons                            |
| CLC    | Community Legal Centres  |
| DOJ    | Department of Justice, Victoria  |
| HRLC   | Human Rights Law Centre (formerly, the Human Rights Law Resource Centre) |
| LIVLAS | Law Institute of Victoria Legal Assistance Scheme                        |
| MHLC   | Mental Health Legal Centre   |
| OCSR   | Office of Correctional Services Review                                   |
| PILCH  | Public Interest Law Clearing House (Vic) Inc                             |
| PLSV   | Prisoners' Legal Service Victoria  |
| VACRO  | Victorian Association for the Care and Resettlement of Offenders         |
| VALS   | Victorian Aboriginal Legal Service                                       |
| VBPBS  | Victorian Bar Pro Bono Scheme  |
| VLA    | Victoria Legal Aid   |

## Legislation and Case Law

|  |  |
|--|--|
| <i>Castles</i>   | <i>Castles v Secretary to the Department of Justice and Ors</i> [2010] VSC 310 (9 July 2010) |
| <i>Charter</i>   | <i>Charter of Human Rights and Responsibilities Act 2006</i> (Vic)                           |
| <i>Corrections Act</i>   | <i>Corrections Act 1986</i> (Vic)  |
| <i>Corrections Regulations</i>   | <i>Corrections Regulations 2009</i> (Vic)  |
| <i>International Covenant on Civil and Political Rights</i>  | ICCPR  |
| <i>International Covenant on Economic, Social and Cultural Rights</i>                                    | ICESCR   |
| <i>Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment</i> | CAT  |
| <i>Optional Protocol to the Convention against Torture</i>   | OPCAT  |

# 1. Executive Summary and Recommendations

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Prisoners experience significant unmet legal needs. Many legal issues experienced by prisoners are similar to those experienced by the general public, including; credit, debt, family law and housing matters. Other legal needs relate specifically to prisoner status, including; complaints, parole hearings, access to medical treatment, adverse prison conditions and disputes with other prisoners. Both types of legal issues are compounded and exacerbated by the considerable barriers prisoners experience in accessing the justice system.

Prisoner legal issues often have a human rights dimension, and frequently raise public interest considerations, including disadvantage, marginalisation, oppression (often by the State), and compromised access to the justice system.

There are limited legal services available to prisoners in Victoria, and these services universally face barriers in providing services. Those barriers include; limited resources and capacity, conflicts, and difficulties in gaining access to prisoners, obtaining instructions, and exchanging documents.

Prisoners have a higher rate of re-offending where their legal problems and debts are not resolved prior to release.<sup>1</sup> Ensuring prisoners receive effective access to legal assistance while in prison it therefore important to reduce recidivism and assist former prisoners to re-integrate into the community on release.

PILCH makes the following recommendations to positively respond to unmet prisoner legal need:

## **Recommendation 1**

**The VLA *Legal Help* telephone service should provide legal advice to prisoners on a priority basis and information about the VLA *Legal Help* telephone service should be given to prisoners to enable them to reach legal assistance when required. The following telephone numbers should be automatically included on all prisoners' telephone contact lists on free call basis and should be exempt from the maximum number of contacts each prisoner is allowed:**

- i. *Legal Help*;**
- ii. *Justice Health*; and**
- iii. the Health Services Commissioner.**

**All prisoners should be allowed to access *Legal Help*, *Justice Health* and the Health Services Commissioner regardless of their phone access status or privileges.**

## **Recommendation 2**

**VLA should provide access to its prison video conferencing facilities for other legal practitioners.**

## **Recommendation 3**

**Support should be given to non-legal services that engage with prisoners to enable those services to provide legal information and assistance to prisoners. This could include**

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<sup>1</sup> Law and Justice Foundation of NSW, *Taking Justice into Custody: The Legal Needs of Prisoners*, (July 2008), pg 122

conducting training sessions and providing materials and contact numbers to those services, which they could utilise during prisoner contacts and visits.

#### **Recommendation 4**

A review should be undertaken of legal information currently available to prisoners, including; the contents of law libraries, information services and fact sheets. Following this, improvements should be made in the provision of legal information to prisoners. For example, this may include the preparation of fact sheets setting out the process for making a complaint in prison or accessing information (such as prisoner's records).

#### **Recommendation 5**

PILCH should discuss prisoner legal need with the VBPBS, the LIVLAS and PILCH member law firms to identify practitioners and firms that have interest, capacity or expertise to provide civil legal services to prisoners. Once interest has been gauged, PILCH should organise training on prisoner issues and corrections law and build capacity for firms and barristers to accept prisoner referrals and/or establish specific prisoner clinics.

#### **Recommendation 6**

The Prisoners Legal Service Victoria should be re-established or a similar service established to provide specialised and targeted legal support for prisoners. This could take the form of a joint program with community legal centres or with VLA.

#### **Recommendation 7**

VLA should consider the provision of a comprehensive statewide prisoner legal service with extended VLA civil law eligibility guidelines. This should include, at a minimum, providing prisoners with information about ways to access civil legal assistance, including from CLCs and PILCH.

#### **Recommendation 8**

VLA should prepare reference materials to assist legal practitioners providing assistance to prisoners that is both practical and up to date, and which includes information about ways to access the legal assistance sector for civil advice, including CLCs and PILCH

#### **Recommendation 9**

Further consideration should be given to the idea of targeted legal services for prisoners about to be released, or recently released from prison, to address housing, debt, family and other civil law issues that these prisoners may have.

#### **Recommendation 10**

PILCH should enhance existing, and develop new, relationships with prisoner legal services to facilitate mutual referrals.

#### **Recommendation 11**

PILCH should provide referrals for pro bono legal assistance for organisations assisting prisoners or providing support for newly released prisoners that seek:

- i) general advice about prisoner legal rights that the organisation can use in assisting its clients; and

- ii) specific legal assistance on behalf of clients that falls outside the scope of the organisations' legal expertise (eg. FOI applications).

#### **Recommendation 12**

PILCH should continue to assist individual prisoners when other legal services are not available. These referrals should be prioritised in instances of:

- i) need as identified by prisoner services and relevant research (see Section 4); and
- ii) where there is an opportunity to advance the public interest on systemic prisoner issues or cases which raise human rights concerns (see Section 5).

#### **Recommendation 13**

PILCH should prepare or facilitate the preparation of position papers on prisoners' issues for future use and reference. These papers may be provided to prisoner assistance services and may cover areas such as:

- i) the obligations of prison authorities in relation to prisoner assault and avenues of redress for prisoners; and
- ii) the operation of the Parole Board, particularly in relation to types of disadvantage prevalent in the prisoner population.

#### **Recommendation 14**

PILCH should continue to support prisoner services with their policy work. This may include endorsing submissions, providing training, making pro bono referrals, facilitating assistance in drafting submissions and/or creating fact sheets.

It is recognised that agencies other than PILCH may also be well placed to adopt these Recommendations.



## 2. Introduction

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### 2.1. PILCH

PILCH is a leading Victorian not-for-profit organisation. It is committed to furthering the public interest, improving access to justice and protecting human rights, by facilitating the provision of pro bono legal services and undertaking law reform, policy work and legal education. In carrying out its mission, PILCH seeks to address marginalisation and disadvantage, effect structural change to address injustice and foster a strong pro bono culture in Victoria.

### 2.2. Project overview

In 2009/2010, PILCH recognised an increase in the number of requests for legal assistance that it was receiving from prisoners and requests from legal services providing assistance to prisoners. Coinciding with the increase in requests for assistance, PILCH was invited to, and attended, a number of forums discussing prisoner issues.<sup>2</sup>

In response to those events, PILCH conducted a *Prisoner Issues Scoping Project* (the **Project**) to determine the legal need of prisoners in Victoria, the availability, accessibility and appropriateness of legal services for prisoners in Victoria, and the future role PILCH might take in facilitating prisoner legal services and related policy.

The overarching aims of the Project are to:

- ▶ determine the areas of greatest importance and greatest unmet legal need for prisoners (within Victorian facilities) from the perspective of prisoners and prisoner advocates;
- ▶ identify human rights considerations, social change objectives and systemic issues that arise from prisoner legal need;
- ▶ use the above information to determine the best allocation of PILCH's resources to address broader issues affecting prisoners and its provision of legal services to individual prisoners;
- ▶ increase prisoner access to justice by increasing appropriate pro bono prisoner referrals by PILCH; and
- ▶ strengthen networks between PILCH and other legal and non-legal services available to prisoners (**prisoner services**) in order to facilitate pro bono referrals and operate collaboratively to support those services.

The findings and recommendations of the Project are documented in this report (**Report**).

### 2.3. Scope of the Report

This Report examines the variety of legal issues that affect prisoners, the legal services that assist them and the accessibility of those legal services. It further considers PILCH's role in assisting prisoners, and makes recommendations where appropriate.

For the purpose of this report, the term prisoner is defined to mean a person who is confined in a Victorian correction centre. It does not include periodic detainees, people on home detention, people detained by the Department of Immigration and Citizenship or juveniles. While prisoners held on remand are covered by this report, it doesn't consider particular circumstances or legal need experienced by that cohort.

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<sup>2</sup> See section 6.2.1 of this report.

Prisoners may face criminal or civil legal issues with which they require assistance. Criminal issues include dealing with the substantive criminal charge that has resulted in the person's imprisonment, appealing a conviction or sentence or other criminal charges unrelated to the primary conviction. While criminal issues are significant, the Project does not address the criminal legal need of prisoners. Criminal law needs typically fall within the scope of Victoria Legal Aid, which is the most appropriate body to assist those unable to afford their own representation. PILCH also acknowledges that, generally, pro bono assistance is not available in criminal matters.

Therefore this report deals solely with the civil legal needs a prisoner has while incarcerated. These civil needs can be broken down into two categories:

- ▶ general legal issues e.g. credit and debt, housing and child support issues; and
- ▶ prisoner specific legal issues e.g. classification, abuse and parole issues.

The report addresses both categories of civil legal need experienced by prisoners, including from a human rights perspective.

In relation to legal services meeting the needs of prisoners, the report examines the availability and accessibility of legal aid, specialist and generalist legal services, and pro bono services for prisoners in Victoria. It does not look at the availability of legal services for prisoners on a fee-for-service basis. It also does not examine the role that non-legal support services, such as counsellors and medical staff, family and friends and other prisoners may play in providing legal advice. Where appropriate, mention is made of these services and the report recommends exploring opportunities to work with such services to address legal need.

This report also considers the ability of prisoners to effectively access the legal services currently available to them. Those services will only be effective in meeting prisoners' legal needs insofar as they are readily accessible by prisoners and actually result in prisoners gaining an understanding of their legal rights and avenues of redress.

#### 2.4. Methodology

The report is largely informed by a series of consultations PILCH held with prisoner services in Victoria. The consultations were aimed at determining the extent of unmet prisoner legal need in Victoria, mapping the structure and service offered by each organisation, and gathering information about prisoner issues and the corrections system within Victoria.

Each organisation was asked about:

- ▶ areas of unmet prisoner legal need based on their organisational experience - see Section 4;
- ▶ its operations (funding, location, hours and contact details) and services (casework, outreach, policy, resettlement and reintegration);
- ▶ limits on its capacity to provide assistance to prisoners; and
- ▶ how the organisation thought PILCH could best use its resources to provide assistance to prisoners.

PILCH did not consult directly with prisoners. However, PILCH recognises the importance of giving voice to prisoners and the importance of their having ownership and input on decisions that affect them. The Project sought to represent the views of prisoners through its consultation with agencies that assist them.

PILCH did not consult directly with its member law firms as part of the Project. This report does, however, make recommendations for consulting with member firms based on its findings.

PILCH reviewed research and analysis on prisoner legal need, including reviewing reports from NSW, QLD and Canada. The report also draws on some 50 requests for pro bono legal assistance received by PILCH

from prisoners leading up to and during the conduct of the Project. Appendix 1 provides a summary of those inquiries.

## 2.5. Use of Report

The report is prepared to inform PILCH's response to the identified unmet legal need of prisoners. The report may also inform other organisations and legal practitioners addressing unmet prisoner legal need.

The Project informed PILCH's entry into the proposed Victoria Legal Aid (**VLA**) Prison Advice Manual, which is currently subject to review (see Section 7.2.3 and Appendix 4).

## 2.6. Report structure

References to 'Sections' are to sections of this Report.

Sections 1 and 2 provide an introduction and summary to the project and this report.

Section 3 provides a short explanation of prison management in Victoria and then considers the demographic profile of Victorian prisoners.

Section 4 examines legal need in the prisoner community, as identified in research, PILCH's own experience of inquiries and referrals, and PILCH's consultations with various agencies.

Section 5 considers the impact of incarceration on prisoners' human rights, and the protections that human rights afford to prisoners. It examines prisoners' rights under the *Corrections Act 1986* (Vic) (**Corrections Act**) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the **Charter**) and international treaty instruments.

Section 6 examines barriers faced by prisoners in accessing the legal system, and by prisoner legal services in providing assistance.

Section 7 surveys prisoner legal services and observes service gaps in responding to prisoner legal need.

Section 8 explores the role and ongoing assistance PILCH could provide to prisoners.

The following Appendices complete the report:

Appendix 1: De-identified list of prisoner inquiries and referrals from PILCH's case work

Appendix 2: Prisons attended by VLA lawyers and their attendance days

Appendix 3: *Corrections Act 1986* – section 47

Appendix 4: Draft PILCH entry to the proposed VLA Prisoner Advice Manual

## 3. Prisoners in Victoria

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In order to understand the context of prisoners' legal need, this Section provides a brief overview of the corrections system in Victoria and builds a brief profile of who is currently in prison in Victoria.

### 3.1. Legislation, guidelines and requirements

There is a variety of legislation, guidelines and operating rules that govern the operation of prisons in Victoria. The basic hierarchy of these is:

- ▶ *Corrections Act 1986* (Vic) (**Corrections Act**) and the *Corrections Regulations 2009* (Vic) (**Corrections Regulations**). These form the legislative basis for the operation of adult prisons in Victoria.
- ▶ National Standard Guidelines for Corrections in Australia. These guidelines are nationwide outcomes/goals to be achieved by correctional services rather than a set of absolute rules. They have been drafted to reflect the United Nations *Standard Minimum Rules for the Treatment of Prisoners*.
- ▶ Correctional Management Standards. These standards form the basis for prison operating procedures and provide the standards against which prison services are monitored by the Office of Correctional Services Review (separate business unit independent of Corrections Victoria). These standards are incorporated into the contracts for privately operated prisons.<sup>3</sup>
- ▶ Program and Service Specifications. Specification may be developed for specific programs and services e.g. offending behaviour programs, treatment programs for sexual and violent offenders.
- ▶ Commissioner's Requirements. Issued when a greater level of detail and specificity is required to ensure consistency across all prisons in Victoria.
- ▶ Director's Instructions (public prisons) and Operating Procedures (private prisons). These put into practice the Standards and Commissioner's Requirements.
- ▶ Local Operating Procedures (public prisons) and Operation Manuals (private prisons). Prepared individually for each prison.

### 3.2. Prison management

Prison management in Victoria falls under the responsibility of Corrections Victoria, within the Department of Justice (**DOJ**). Corrections Victoria is responsible for the management of all prisoners in Victoria, in both public and privately run prisons. The Office of Correctional Services Review (**OCSR**), an independent office within the DOJ, reports to the Secretary to the DOJ on Corrections Victoria's management of the Victorian prison system.

The OCSR also oversees the Independent Prison Visitors' Scheme. Independent Visitors are appointed to public and private prisons and all prisons have at least two Independent Prison Visitors. Each Independent Visitor is expected to visit their prison at least every month and compile a report on concerns and successes. Independent Visitors are available to any person in a prison and refer matters of concern identified by prisoners either to prison management or directly to the OCSR.

Each prison is managed by an individual Governor. Under the *Corrections Act* the Governor is responsible for the "management, security and good order of the prison and the safe custody and welfare of the

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<sup>3</sup> These are available on-line at <http://www.justice.vic.gov.au/wps/wcm/connect/justlib/DOJ+Internet/Home/Prisons/Prisons+in+Victoria/Prison+Management/JUSTICE+-+Correctional+Standards+for+Prisons+%28PDF%29>

prisoners".<sup>4</sup> As noted above, each prison also has its own *Local Operating Procedures* (known as *Operation Manuals* in privately operated prisons) which implement the Directors Instructions or Operating Procedures at a local level. These operating procedures are only available in the library of the relevant prison and cannot be accessed by the public.

### 3.3. Victorian prisons

There are currently 13 prisons and one transition centre in Victoria. Corrections Victoria operates 11 prisons and the transition centre while the remaining two prisons are privately operated. 33.4% of Victorian prisoners are housed in the two privately operated prisons.

#### Victoria's Prisons as at 30 June 2010<sup>5</sup>

| Prison                         | Operator                        | Security level | Operational capacity |
|--------------------------------|---------------------------------|----------------|----------------------|
| <b>Men's prisons</b>           |                                 |                |                      |
| Melbourne Assessment Prison    | Corrections Victoria            | Maximum        | 286                  |
| Metropolitan Remand Centre     | Corrections Victoria            | Maximum        | 663                  |
| Port Phillip Prison            | G4S Custodial Services Pty Ltd  | Maximum        | 804                  |
| Barwon Prison                  | Corrections Victoria            | Maximum        | 425                  |
| Ararat Prison                  | Corrections Victoria            | Medium         | 382                  |
| Mamgoneet Correctional Centre  | Corrections Victoria            | Medium         | 306                  |
| Fulham Correctional Centre     | The GEO Group Australia Pty Ltd | Medium         | 845                  |
| Loddon Prison                  | Corrections Victoria            | Medium         | 410                  |
| Beechworth Correctional Centre | Corrections Victoria            | Minimum        | 120                  |
| Dhurringile Prison             | Corrections Victoria            | Minimum        | 214                  |
| Langi Kal Kal Prison           | Corrections Victoria            | Minimum        | 122                  |
| <b>Women's Prisons</b>         |                                 |                |                      |
| Dame Phyllis Frost Centre      | Corrections Victoria            | Maximum        | 260                  |
| Tarrengower Prison             | Corrections Victoria            | Minimum        | 54                   |
| <b>Transition Centre</b>       |                                 |                |                      |
| Judy Lazarus Transition Centre | Corrections Victoria            | Minimum        | 25                   |

### 3.4. Prisoners in Victoria

As at 30 June 2010, there were 4,537 people in prison in Victoria and the prison operation utilisation rate was 92.3%. Of the total number of prisoners, 4,224 prisoners were men and 313 were women.<sup>6</sup> Over the last five years there has been a substantial increase in the prison population in Victoria, with the number of female prisoners growing at a faster rate than the male prisoner population.<sup>7</sup>

Prisoners may be held on remand (prior to trial or sentencing) or may be serving an imposed sentence. As at 30 June 2010, remand prisoners made up approximately 18% of the prison population.<sup>8</sup> Remand prisoners are given a security classification according to the procedures used to classify sentenced prisoners although a minimum security classification will only be given in exceptional circumstances.<sup>9</sup>

Research on prisoners has consistently shown that, as a whole, they are largely disadvantaged. Prisoners are less likely to have finished secondary education than the general populace and more likely to suffer from a mental illness and/or drug addiction. The proportion of Indigenous people and people from culturally and

<sup>4</sup> *Corrections Act 1986* (Vic), section 21(1).

<sup>5</sup> DOJ, Statistical Profile of the Victorian Prison System 2005-06 to 2009-10, pg 7

<sup>6</sup> DOJ, Statistical Profile of the Victorian Prison System 2005-06 to 2009-10, pg 11

<sup>7</sup> DOJ, Statistical Profile of the Victorian Prison System 2005-06 to 2009-10, pg 11

<sup>8</sup> DOJ, Statistical Profile of the Victorian Prison System 2005-06 to 2009-10, pg 22

<sup>9</sup> DOJ, Statistical Profile of the Victorian Prison System 2005-06 to 2009-10, pg 10-13

linguistically diverse backgrounds is greater in prison than it is outside prison. Prisoners are also less likely to have worked in paid employment prior to incarceration. All these factors can significantly impact a prisoner's ability to access legal services, advocate for themselves and/or understand any legal advice they receive.

The following is a quick snapshot of who is in prison in Victoria, and where appropriate, Australia. In outlining 'who is in prison' it attempts to highlight areas of disadvantage and informs the analysis of legal need in Section 4.

### 3.4.1. Gender

Male prisoners account for approximately 90% of all prisoner receptions and 94% of the prison population in Victoria.<sup>10</sup> Women comprise a relatively small proportion of the prison population<sup>11</sup> however the number of women in prison is increasing at a far greater rate than that of men.

There are a number of differences between the male prison population and the female prison population which may impact on the areas of legal need required by each gender and the ability of the prisoner to understand any legal advice they receive.

For instance, as at 30 June 2010:

- ▶ there is a larger proportion of men under 25 years of age than women currently in prison<sup>12</sup>
- ▶ men are more likely to have served a prior prison sentence than women<sup>13</sup>
- ▶ women are more likely to be charged or serving a sentence for drug related offences (particularly when property related offences are included) than men. While men are more likely to be charged or serving a sentence for offences against the person or property offences<sup>14</sup>
- ▶ while the proportion of prisoners who have completely secondary, tertiary or other post secondary education is extremely low, women are more likely to have completed further education<sup>15</sup>
- ▶ women are also more likely to have been married, in a de facto relationship, separated or divorced than men<sup>16</sup>
- ▶ a large proportion of prisoners are also unemployed, not part of the paid employment force or undertook home duties prior to being received in prison, however this applies almost equally to men and women<sup>17</sup>

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<sup>10</sup> DOJ, *Statistical Profile of the Victorian Prison System 2005-06 to 2009-10*, pg 12

<sup>11</sup> 313 female prisoners to 4,224 male prisoners as at 30 June 2010. DOJ, *Statistical Profile of the Victorian Prison System 2005-06 to 2009-10*, pg 13

<sup>12</sup> 14.6% of the male prison population was under 25 years of age compared to 10.5% of the female prison population. DOJ, *Statistical Profile of the Victorian Prison System 2005-06 to 2009-10*, pg 12 and 13

<sup>13</sup> 38% of women had previously been in prison compared to 50% of men. DOJ, *Statistical Profile of the Victorian Prison System 2005-06 to 2009-10*, pg 12 and 13

<sup>14</sup> The most serious offence men were charged or sentenced with indicates that men are most likely to be in prison for offences against the person (44.5%) or property offences (21.9%). Since June 2007 these two offence categories have represented more than 65% of the male prison population. Conversely, the most serious offence women were charged or sentenced with indicates that women are most likely to be in prison for offences against the person (31.3%), property related offences (30.4%), drug offences (20.4%) and offences against good order (9.9%). DOJ, *Statistical Profile of the Victorian Prison System 2005-06 to 2009-10*, pg 12-13

<sup>15</sup> Only 6.5% of male prisoners had completed secondary, trade or tertiary education prior to reception and a further 88% had undertaken some secondary-level schooling. In contrast, 18% of women prisoners had completed secondary, trade or tertiary education prior to reception and a further 74% had undertaken some secondary-level schooling. DOJ, *Statistical Profile of the Victorian Prison System 2005-06 to 2009-10*, pg 12-13

<sup>16</sup> 63.9% of men report they are single or have never married compared to 47.3% of women, 27% of men report they are married or in a de facto relationship compared to 33% of women and approximately 9% of men reported that they were separated or divorced compared to 12% of women. DOJ, *Statistical Profile of the Victorian Prison System 2005-06 to 2009-10*, pg 12-13

<sup>17</sup> About 65% of women prisoners and 66% of male prisoners did not undertake paid employment prior to being received in prison. DOJ, *Statistical Profile of the Victorian Prison System 2005-06 to 2009-10*, pg 12-13

### 3.4.2. Indigenous prisoners

Aboriginal and Torres Strait Islander people are significantly overrepresented in the prison population. As at 30 June 2010, there were 7,584 prisoners nationwide who identified as Aboriginal and Torres Strait Islander.<sup>18</sup> This equates to 26% of the national total prison population<sup>19</sup>, yet Aboriginal and Torres Strait Islander people make up only 2% of the Australian population aged over 18.<sup>20</sup>

The age standardised imprisonment rate for Aboriginal and Torres Strait Islander prisoners was 1,892 per 100,000 adult Aboriginal and Torres Strait Islander people. This was 14 times higher than for non-Indigenous prisoners at 30 June 2010.<sup>21</sup>

Victoria has the lowest proportion of Aboriginal and Torres Strait Islander prisoner population (6%)<sup>22</sup> and at 30 June 2010 there were 290 men and women in Victorian prisons who identified as Aboriginal and Torres Strait Islander people.<sup>23</sup> This equates to an age standardised rate of 1,137.2 per 100,000 adult Aboriginal and Torres Strait Islander people in Victoria which is 11.2 times higher than non-Indigenous prisoners.

As well as forming a disproportionately large section of the prison population, nationally Aboriginal and Torres Strait Islander prisoners were more likely to have served a prior prison sentence (74%) compared with the non-Indigenous prison population (49%).<sup>24</sup>

Further, Indigenous women are the fastest growing section of the prison population<sup>25</sup> and comprise 29% of the female prison population.<sup>26</sup> Indigenous women are also over-represented in terms of prisoners with mental health issues and being at risk of self-harm.<sup>27</sup>

The high rate of imprisonment can be linked to a range of social disadvantage factors, such as higher rates of unemployment, mental health issues and lower levels of formal education.<sup>28</sup> These disadvantages also hinder reintegration into the community following release from prison.<sup>29</sup>

### 3.4.3. Drug use

Research has shown that over half the prison population has experienced substance use prior to prison and many prisoners continue to use drugs in prison and post release.<sup>30</sup>

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<sup>18</sup> As at September 2010 this figure was 7,467 and Aboriginal and Torres Strait Islander prisoners represented 26% of the total full-time prisoner population. ABS, *Corrective Services Australia*, (Nov 2010), pg 5.

<sup>19</sup> ABS, *Prisoners in Australia*, (Dec 2010), pg 47.

<sup>20</sup> ABS, *Corrective Services Australia*, (Nov 2010), pg 5.

<sup>21</sup> ABS, *Prisoners in Australia*, (Dec 2010), pg 8.

<sup>22</sup> Compare this with the Northern Territory which is 81%. ABS, *Prisoners in Australia*, (Dec 2009), pg 47.

<sup>23</sup> 263 men and 27 women in prison as at 30 June 2010. DOJ, *Statistical Profile of the Victorian Prison System 2005-06 to 2009-10*, pg 12-13

<sup>24</sup> ABS, *Prisoners in Australia*, (Dec 2009), pg 49.

<sup>25</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner (ATSISJC) 2008. *Social justice report 2008*. Sydney: Human Rights and Equal Opportunity Commission. page 304.

<sup>26</sup> Australian Institute of Criminology 2010. *Indigenous Women's Offending Patterns: A literature review*. Canberra: Australian Institute of Criminology. page 9.

<sup>27</sup> Lorana Bartels 2010. *Indigenous Women's Offending Patterns: A literature review*. Canberra: Australian Institute of Criminology. page 12.

<sup>28</sup> Matthew Willis and John-Patrick Moore, *Reintegration of Indigenous Prisoners*. Canberra: Australian Institute of Criminology. page 31-36

<sup>29</sup> Matthew Willis and John-Patrick Moore, *Reintegration of Indigenous Prisoners*. Canberra: Australian Institute of Criminology. page 92.

<sup>30</sup> Antonette Gaffney, Warwick Jones, Josh Sweeney, Jason Payne, *Drug use monitoring in Australia: 2008 Annual Report on Drug Use amongst Police Detainees*. Canberra: Australian Institute of Criminology. 4;

[http://www.justice.vic.gov.au/wps/wcm/connect/e16ff400404a9d9090dffb5f2791d4a/Bridging\\_the\\_Gap\\_Final\\_Chapter2.pdf?MOD=AJPERES](http://www.justice.vic.gov.au/wps/wcm/connect/e16ff400404a9d9090dffb5f2791d4a/Bridging_the_Gap_Final_Chapter2.pdf?MOD=AJPERES) p15. Emma Ogilvie, *Post-release: the current predicament and the potential strategies*. Canberra



Recent research on the NSW prison population determined that 74% of women and 67% of men had used illicit drugs regularly in the 12 months before prison compared to 14.6% of the NSW population. In addition, over one third of women and half of men in the prison population drank alcohol in the hazardous or harmful range compared to 9.3% of the NSW population.<sup>31</sup> The Drug Use Monitoring in Australia (**DUMA**) project measures drug use among people who have been recently apprehended by police. DUMA have found that 83% of offenders charged with property offences and 65% of offenders charged with violent offences tested positive to a drug at the time they were detained by police.<sup>32</sup> Further, prisoners may not have adequate access to appropriate rehabilitation programs. For example, the 2011 investigation by the Victorian ombudsman concluded that Opioid Substitution Therapy programs (which treat dependencies such as heroin addiction) are under-resourced and recommended a review of the program to ensure that effective care is provided to prisoners.<sup>33</sup>

Substance problems are often exacerbated once prisoners are released because of the impact of issues including mental illness, poverty and unstable housing.<sup>34</sup>

#### 3.4.4. Mental illness

Research indicates that mental illness is more prevalent in the prison population than among the general public. Rates of major illnesses (schizophrenia and depression) are three to five times higher among Australian prisoners than the general public.<sup>35</sup>

A 2003 Victorian Prisoner Health Study found that the Victorian prisoner population has reduced mental health compared to the general Victorian community, a very high percentage of prisoners have attempted suicide or engaged in self-harm and the prevalence of addictive behaviour is extraordinarily high.<sup>36</sup> The investigation by the Victorian ombudsman found that almost a third of male prisoners have diagnosed mental health conditions and found the level of mental health services available for the male prison population to be “grossly inadequate”.<sup>37</sup>

In a report on NSW prisoners, 74% of the prisoner sample were identified as having had a mental disorder in the previous 12 months – a figure that is substantially higher than in the general community (22%).<sup>38</sup>

#### 3.4.5. Culturally and linguistically diverse backgrounds

Many prisoners also come from culturally and linguistically diverse (**CALD**) backgrounds, which can inhibit their ability to access information and participate in their culture when they are subject to the limitations of prison management. While approximately 80% of the people received in prison reported that they were born in Australia, 16% of men and 14% of women reported that they were

<sup>31</sup> Law and Justice Foundation of NSW, *Taking Justice into Custody: The Legal Needs of Prisoners*, (July 2008), pg 22-23

<sup>32</sup> Law and Justice Foundation of NSW, *Taking Justice into Custody: The Legal Needs of Prisoners*, (July 2008), pg 23

<sup>33</sup> Victorian ombudsman, *Investigation into prisoner access to health care* (August 2011), p13-14

<sup>34</sup> Antonette Gaffney, Warwick Jones, Josh Sweeney, Jason Payne, *Drug use monitoring in Australia: 2008 Annual Report on Drug Use amongst Police Detainees*. Canberra: Australian Institute of Criminology. 4; [http://www.justice.vic.gov.au/wps/wcm/connect/e16ff400404a9d9090dffb5f2791d4a/Bridging\\_the\\_Gap\\_Final\\_Chapter2.pdf?MOD=AJPERES](http://www.justice.vic.gov.au/wps/wcm/connect/e16ff400404a9d9090dffb5f2791d4a/Bridging_the_Gap_Final_Chapter2.pdf?MOD=AJPERES) p15. Emma Ogilvie, *Post-release: the current predicament and the potential strategies*. Canberra

<sup>35</sup> Law and Justice Foundation of NSW, *Taking Justice into Custody: The Legal Needs of Prisoners*, (July 2008), pg 23. Ogloff, J et al. 2007, *The identification of mental disorders in the criminal justice system*, Trends and Issues in Crime and Criminal Justice no. 334, Australian Institute of Criminology, Canberra; <http://www.aic.gov.au/documents/E/B/4/%7BEB4E29C4-4390-41C6-8EEF-93AB042C6BFC%7Dtandi334.pdf>

<sup>36</sup> Department of Justice Victoria, *Victorian Prisoner Health Study*, Deloitte Consulting (February 2003), pg 25 [http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/Prisons/Research+and+Statistics/JUSTICE+-+Victorian+Prisoner+Health+Study+\(PDF\)](http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/Prisons/Research+and+Statistics/JUSTICE+-+Victorian+Prisoner+Health+Study+(PDF))

<sup>37</sup> Victorian ombudsman, *Investigation into prisoner access to health care* (August 2011), p19

<sup>38</sup> Law and Justice Foundation of NSW, *Taking Justice into Custody: The Legal Needs of Prisoners*, (July 2008), pg 24



born in a country where English was not the first language.<sup>39</sup> A large proportion of these people were born in Vietnam although there has been a significant increase in the number of men born in the Horn of Africa and Asia.<sup>40</sup>

#### 3.4.6. Intellectual disadvantage and disability

As a group, prisoners are disproportionately affected by cognitive impairment and poor comprehension skills.<sup>41</sup> Levels of education among prisoners is relatively low compared with the general population. While most prisoners had undertaken some secondary-level schooling, as at 30 June 2010:

- ▶ only 6.5% of the male prison population had completed secondary, trade or tertiary education prior to entering prison; and
- ▶ 18% of the female prison population had completed secondary, trade or tertiary education prior to entering prison.<sup>42</sup>

In a report on NSW prisoners, 18% of women and 27% of men scored below the pass rate on the intellectual disability screener used, with further screening of those prisoners (using another test) revealing that 59% of women and 39% of men had either an intellectual disability or were functioning in the borderline range.<sup>43</sup> Prisoners are also more likely to suffer from an acquired brain injury.<sup>44</sup>

A lack of education and/or an intellectual disability may limit a prisoner's ability to participate in rehabilitation programs which in turn affects their chance at parole.<sup>45</sup> It may also result in them being less likely to access legal services. Corrections Victoria has previously identified that prisoners with a disability need more specialised services and have developed a Corrections Victoria Disability Framework 2010-2012 'Committing to the Challenges' which builds on their first Disability Framework (2007-2009).

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<sup>39</sup> 79% and 81% of women reported that they were born in Australia. DOJ, *Statistical Profile of the Victorian Prison System 2005-06 to 2009-10*, pg 12-13

<sup>40</sup> As at 30 June 2010, 4.6% of the male prison population and 12.8% of the female prison population were born in Vietnam. 1.3% of receptions of men are born in the Horn of Africa and 2% from Asia. DOJ, *Statistical Profile of the Victorian Prison System 2005-06 to 2009-10*, pg 12-13

<sup>41</sup> Law and Justice Foundation of NSW, *Taking Justice into Custody: The Legal Needs of Prisoners*, (July 2008), pg 126

<sup>42</sup> DOJ, *Statistical Profile of the Victorian Prison System 2005-06 to 2009-10*, pg 12-13

<sup>43</sup> Law and Justice Foundation of NSW, *Taking Justice into Custody: The Legal Needs of Prisoners*, (July 2008), pg 24

<sup>44</sup> Law and Justice Foundation of NSW, *Taking Justice into Custody: The Legal Needs of Prisoners*, (July 2008), pg 25

<sup>45</sup> DOJ, *Intellectual Disability in the Victorian Prison System: Characteristics of prisoners with an intellectual disability released from prison in 2003-2006*, (September 2007), pg 3

## 4. Prisoners Legal Need

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This Section maps the types and the extent of civil legal need experienced by prisoners across Victoria, with the following Section providing a human rights perspective.

As well as reviewing the research on prisoner legal needs, PILCH consulted with prisoner services to determine the level of legal need each service had observed. At these consultations, PILCH asked the services to identify the most imperative and common legal issues faced by prisoners and asked the following questions:

- ▶ What are the most common/ reoccurring issues that you see with prisoners?
- ▶ Are you seeing less common, but significant issues impacting prisoners (because of hardship or prisoner circumstances or human rights issue)?

From this, PILCH determined that prisoners' civil legal needs can be divided into two categories:

- ▶ general legal issues
- ▶ prison specific legal issues

These are examined below.

### 4.1. General legal issues

In addition to the legal issues prisoners face relating to their underlying criminal offence, they often face civil legal issues that either pre-date their incarceration, arise due to being in prison and/or develop post-release as a result of being incarcerated.

Research in this area, and PILCH's consultations, identified the following key concerns for prisoners. It is important to note that some of these may be more relevant for certain segments of the prison population than others. This section draws heavily on the NSW Law and Justice Foundation report, however it is reasonable to assume that Victorian prisoners experience similar legal issues to their NSW counterparts.

#### 4.1.1. Family law

Prisoners who are married, in a de-facto relationship or separated will commonly enter prison with existing family law issues<sup>46</sup> and in prison these issues may exacerbate and/or new issues may arise. A number of studies have identified family law issues to be of particular concern to prisoners.<sup>47</sup>

Most family law issues arise where the prisoner has a child.<sup>48</sup> This is particularly relevant to women in prison who are more likely to have a child than men in prison. Key issues include child support, access to children, and residency of children whilst a parent is incarcerated, particularly at the time of arrest.<sup>49</sup>

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<sup>46</sup> As noted earlier in Section 3.4.1, 63.9% of men report they are single or have never married compared to 47.3% of women, 27% of men report they are married or in a de facto relationship compared to 33% of women and approximately 9% of men reported that they were separated or divorced compared to 12% of women. DOJ, *Statistical Profile of the Victorian Prison System 2005-06 to 2009-10*, pg 12-13

<sup>47</sup> See Law and Justice Foundation of NSW, *Taking Justice into Custody: The Legal Needs of Prisoners*, (July 2008), pg 87-92, de Simone, Tracey and d'Aquino, Chris, *Inside Out: The Access of Women and Girls in Custody to Legal Aid Services*, Legal Aid Queensland (Jan 2004), pg 5 and 28-29, Lawrie, Rowena, *Speak Out, Speak Strong*, Aboriginal Justice Advisory Council (2002) and Department of Justice Canada, *Study of the Legal Services Provided to Penitentiary Inmates by Legal Aid Plans and Clinics in Canada*, (2002).

<sup>48</sup> Various studies have reviewed the number of prisoners with children. See Law and Justice Foundation of NSW, *Taking Justice into Custody: The Legal Needs of Prisoners*, (July 2008), pg 87-92, de Simone, Tracey and d'Aquino, Chris, *Inside Out: The Access of Women and Girls in Custody to Legal Aid Services*, Legal Aid Queensland (Jan 2004), pg 28-29

<sup>49</sup> See Law and Justice Foundation of NSW, *Taking Justice into Custody: The Legal Needs of Prisoners*, (July 2008), pg 87-92

For example, one organisation PILCH consulted noted an administrative problem with child support when persons enter prison, in that there is no automatic notification to the Child Support Agency of the change in a persons' status or address, nor is there an automatic reassessment of a person's child support payment obligations.

#### 4.1.2.Credit and debt

Credit and debt issues were noted as particularly problematic, because of their prevalence and the little resources available to prisoners to deal with debts. In the NSW Law and Justice Foundation study (**Law and Justice Foundation Report**) virtually all prisoners interviewed indicated that they were in debt, either incurred prior to incarceration or accumulated during their jail-time.<sup>50</sup> This is consistent with previous research in the area.

Prisoners frequently accrue debts without their knowledge to creditors who are not notified of their incarceration. Debt issues may expose prisoners to arrest warrants upon release and can have a significant impact on their ability to reintegrate post-incarceration.

#### 4.1.3.Tenancy and housing

Similar to credit and debt issues, prisoners often enter prison with existing tenancy or housing issues, including homelessness and housing debts.<sup>51</sup> Prisoners have limited resources to deal with these issues during incarceration and many will encounter difficulties accessing and arranging housing post-release.

In a recent NSW study, prisoners reported difficulties relating to public housing, including the loss of housing whilst inside; allowing friends and relatives to stay in the housing who then cause damage to the property or fail to pay rent; and being responsible for damage caused prior to entering prison. Similar issues were also faced in relation to private housing where prisoners had to vacate the house whilst in prison and may accrue rent related debts while in prison.<sup>52</sup>

#### 4.1.4.Social security

While not identified by organisations PILCH consulted with, previous research in other jurisdictions has found that social security issues are an important area of legal need for prisoners. Prisoners may incur debts to Centrelink upon entering prison and, as a result, experience difficulty in obtaining benefits upon release.<sup>53</sup>

#### 4.1.5.Other general legal issues

Other areas of concern for prisoners were personal property (including personal documentation, property outside jail and property confiscated in jail)<sup>54</sup>, discrimination (including in relation to employment<sup>55</sup>), immigration for non-Australian citizens<sup>56</sup> and victims compensation especially for women prisoners who have often experienced violence (particularly domestic violence).<sup>57</sup>

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<sup>50</sup> Law and Justice Foundation of NSW, *Taking Justice into Custody: The Legal Needs of Prisoners*, (July 2008), pg 76-80.

<sup>51</sup> Lawrie, Rowena, *Speak Out, Speak Strong*, Aboriginal Justice Advisory Council (2002), pg 29-31.

<sup>52</sup> Law and Justice Foundation of NSW, *Taking Justice into Custody: The Legal Needs of Prisoners*, (July 2008), pg 68-71.

<sup>53</sup> Law and Justice Foundation of NSW, *Taking Justice into Custody: The Legal Needs of Prisoners*, (July 2008), pg 74-76 and Lawrie, Rowena, *Speak Out, Speak Strong*, Aboriginal Justice Advisory Council (2002), pg 27-28.

<sup>54</sup> Law and Justice Foundation of NSW, *Taking Justice into Custody: The Legal Needs of Prisoners*, (July 2008), pg 71-73.

<sup>55</sup> Law and Justice Foundation of NSW, *Taking Justice into Custody: The Legal Needs of Prisoners*, (July 2008), pg 67-68 and de Simone, Tracey and d'Aquino, Chris, *Inside Out: The Access of Women and Girls in Custody to Legal Aid Services*, Legal Aid Queensland (Jan 2004), pg 5.

<sup>56</sup> Law and Justice Foundation of NSW, *Taking Justice into Custody: The Legal Needs of Prisoners*, (July 2008), pg 85-86

<sup>57</sup> de Simone, Tracey and d'Aquino, Chris, *Inside Out: The Access of Women and Girls in Custody to Legal Aid Services*, Legal Aid Queensland (Jan 2004) and Lawrie, Rowena, *Speak Out, Speak Strong*, Aboriginal Justice Advisory Council (2002), pg 27-28.

Organisations noted that prisoners also frequently request assistance with powers of attorney and disputes about wills.

#### 4.2. Prisoner specific legal issues

Organisations consulted by PILCH indicate that a majority of the important legal issues impacting upon prisoners were those that are specific to the corrections system. These were said to be of importance because they were unique to prisoners, were magnified due to prisoner circumstances, and affected prisoners' fundamental human rights. Corrections disputes are very rarely within VLA assistance guidelines and prisoners have great difficulty finding legal assistance with corrections issues.

External research confirms that internal prison issues are of major importance to prisoners, and that prisoners face particular barriers in dealing with them, for example fear of punishment and unfair treatment. Prisoner specific issues identified during the Project include:

##### 4.2.1. Access to medical treatment and services

Access to medical treatment and services was a primary concern identified by organisations. Prisoners had little knowledge about how to access medical treatment and often experienced unreasonable delay and cost when accessing medical services.<sup>58</sup> In NSW prisoners commented on the long delay to access a doctor, dentist or optometrist, or have medical procedures while they were in prison.<sup>59</sup>

Concerns were frequently raised about prison authorities not recognising external medical certificates and diagnoses, and that decisions relating to prisoner health were at the discretion of prison authorities, often at odds with those certificates and diagnoses.

For example, PILCH was contacted by a prisoner who had several medical concerns.<sup>60</sup> Firstly the prisoner had suffered a wrist injury prior to jail that was exacerbated on arrest and by engaging in prison work. He had been promised a specialist appointment and waited several months for this. During this time his condition worsened. Secondly the prisoner was been diagnosed as yeast intolerant yet the prison would not adjust his meals. Lastly the prisoner waited seven months for reading glasses. The delays the prisoner experienced in receiving specialised treatment is reflected in the findings of the Victorian ombudsman that there are insufficient resources to transfer prisoners to their scheduled appointments.<sup>61</sup>

The Victorian ombudsman's investigation also identified a number of other areas of concern, including the following.

- ▶ The prevalence of communicable disease is significantly greater within the prison population, however, there is no comprehensive communicable disease policy, condoms are not available in prisons and Hepatitis C treatment is only provided in 3 of the 14 Victorian prisons.
- ▶ While medical assessments are required to be conducted within 24 hours of entry into a prison, there is insufficient time to conduct those assessments. For example, doctors informed the ombudsman they often only have 5 to 10 minutes to perform assessments.
- ▶ Prisoners who need to be transferred to receive secondary health care (which is mostly provided at Port Phillip Prison) may experience loss of work related privileges and their allocated cell/bed, resulting in a large number of prisoners refusing medical treatment.

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<sup>58</sup> Prisoners do not have access to Medicare or the Pharmaceutical Benefits Scheme while in prison.

<sup>59</sup> Law and Justice Foundation of NSW, *Taking Justice into Custody: The Legal Needs of Prisoners*, (July 2008), pg 80-83

<sup>60</sup> See Appendix 1, matter PIL/09/0324.

<sup>61</sup> Victorian ombudsman, *Investigation into prisoner access to health care* (August 2011), p23 - 37

- ▶ Medical facilities in Victorian prisons are not sufficient to meet the needs of the growing prison population.<sup>62</sup>

Some organisations felt that strategic litigation would be necessary to clarify prisoners' right to medical treatment and services. The Prisoners' Legal Service Victoria (**PLSV**) requested legal advice through PILCH about the obligations of Corrections Victoria and Justice Health to provide adequate medical services and the rights of prisoners to healthcare.

#### 4.2.2. Adult Parole Board

Organisations also discussed the role of the Adult Parole Board (the **Board**) and the lack of accountability for decisions made by the Board. There is no requirement that the Board provide reasons for its decisions, no right of representation for prisoners before the Board and the Board is exempt from the application of the *Charter*.<sup>63</sup> Documents before the Board are also often exempt from Freedom of Information applications.<sup>64</sup>

Research in NSW indicated that prisoners with intellectual disabilities were not granted parole as readily as other inmates. Prisoners with intellectual disabilities have less opportunity to participate in educational and behavioural programs which then limit their opportunities for parole.<sup>65</sup> Prisoners can also fail to obtain parole if there is inadequate housing for them post release which is a particular issue in regional and rural areas.<sup>66</sup> Complying with parole conditions is also a concern for prisoners, with most breaches being of a technical nature.<sup>67</sup>

The problems with the Board identified in this Report are embedded in legislation<sup>68</sup> and may require policy and law reform as opposed to individual casework.

#### 4.2.3. Prisoner disputes against other prisoners

One organisation identified that prisoners often experience disputes with other prisoners, including assaults. Prisoners state that these types of assaults are commonplace.<sup>69</sup> Uncertainty was expressed as to how prisoners can complain about those assaults and their avenues for redress. In particular, organisations would like to clarify the obligations of prison authorities in relation to prisoner assault.

#### 4.2.4. Complaints process

A significant issue identified by organisations was ambiguity in the complaint process and the inefficacy of mechanisms for complaints against the prison system, including prison officers. For example, in respect of complaints regarding medical treatment, the investigation by the Victorian ombudsman found that prisoners do not have reasonable telephone access to the Health Services

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<sup>62</sup> Victorian ombudsman, *Investigation into prisoner access to health care* (August 2011) pp 8 – 10, pp 20 – 21, pp23 - 27 and pp 29 – 32. The Age has reported that a program to provide condoms to Victorian prisoners has commenced, see: <http://www.theage.com.au/victoria/condoms-for-inmates-20110826-1jewu.html>

<sup>63</sup> Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2009, reg 5.

<sup>64</sup> Freedom of Information Act 1982, s 31.

<sup>65</sup> Prisoners with an intellectual disability were more likely to be denied parole and less likely to receive parole at their earliest eligibility date - DOJ, *Intellectual Disability in the Victorian Prison System: Characteristics of prisoners with an intellectual disability released from prison in 2003-2006*, (September 2007), pg 3

<sup>66</sup> Law and Justice Foundation of NSW, *Taking Justice into Custody: The Legal Needs of Prisoners*, (July 2008), pg 62-65

<sup>67</sup> Law and Justice Foundation of NSW, *Taking Justice into Custody: The Legal Needs of Prisoners*, (July 2008), pg 62-65

<sup>68</sup> See for example the Freedom of Information Act 1982, s 31 & 38; Corrections Act 1986 (Vic), Division 5; Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2009, reg 5.

<sup>69</sup> Law and Justice Foundation of NSW, *Taking Justice into Custody: The Legal Needs of Prisoners*, (July 2008), pg 82

Commissioner or Justice Health. The ombudsman also expressed concern that systemic issues were not being investigated.<sup>70</sup>

Prisoners are often unaware of the formal process for lodging complaints against prison authorities or corrections facilities and, even if they do, will experience extreme delay in having their complaints determined or have difficulty accessing any remedy. Prisoners may also be reluctant to complain due to (perceived) repercussions on the part of prison authorities.

Organisations expressed the need to have Corrections Victoria clarify the complaints process, including forms for complaints and the person to be addressed.

Following its investigation, the Victorian ombudsman recommended that calls to the Health Services Commissioner and Justice Health be exempt from the maximum number of contacts each prisoner is allowed and that telephone access to these bodies be permitted regardless of the prisoner's phone access status or privileges.<sup>71</sup>

#### 4.2.5. Disciplinary offences

Prisoners are subject to prison rules and regulations, and breaching these rules can result in disciplinary action. As noted earlier, there are a mass of regulations and requirements that govern the operation of prisons and the management of prisoners. Each prison has its own local operating procedures that are not available to the public although prisoners may have access to them in the prison library.<sup>72</sup> In NSW this issue was mentioned by prisoners but was not considered a key issue, unlike in Canada where it was the key issue identified by prisoners.<sup>73</sup>

#### 4.2.6. Prison conditions and administrative processes

Other issues raised by prisoners related to conditions in prison and treatment during incarceration, including:

- ▶ strip searches, particularly as these can be applied even in the absence of a reasonable suspicion that the prisoner is carrying prohibited material;
- ▶ visitation rights;
- ▶ the expense of transportation;
- ▶ marginalisation and discrimination of particular demographic groups;
- ▶ lack of translation and interpretation services;
- ▶ security classification and transfers to other prisons; and
- ▶ administration surrounding warrants and having them called in.<sup>74</sup>

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<sup>70</sup> Victorian ombudsman, *Investigation into prisoner access to health care* (August 2011) pp36 - 44

<sup>71</sup> Victorian ombudsman, *Investigation into prisoner access to health care* (August 2011) p43

<sup>72</sup> See *Minogue v Department of Justice and Group 4 Correctional Services Ltd* [2004] VCAT 1194 (25 June 2004) which upheld the right of prisoners to access prison operation instructions (apart from documents concerning security matters) but did not support prisoners obtaining copies of such documents. This is particularly an issue where a prisoner is accused of breaking an operational rule where due to a lack of access to the rules, the prisoner does not have knowledge of the features of the broken rule. See also <http://www.craigminogue.org/humanrights>.

<sup>73</sup> Law and Justice Foundation of NSW, *Taking Justice into Custody: The Legal Needs of Prisoners*, (July 2008), pg 56-58 and Department of Justice Canada, *Study of the Legal Services Provided to Penitentiary Inmates by Legal Aid Plans and Clinics in Canada*, (2002).

<sup>74</sup> Law and Justice Foundation of NSW, *Taking Justice into Custody: The Legal Needs of Prisoners*, (July 2008), pg 60-62 and Department of Justice Canada, *Study of the Legal Services Provided to Penitentiary Inmates by Legal Aid Plans and Clinics in Canada*, (2002).



## 5. Human Rights and Systemic Issues

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By its nature, incarceration results in the limitation of a number of fundamental rights. Because prisoners have been deprived of their liberty, they are particularly exposed to the further erosion or violation of other rights, and these rights warrant commensurate protections.

Prisoners are subject to restrictions of their rights by prison authorities for reasons of order, management and security. Often these restrictions appear arbitrary. Many prison processes lack review or accountability, which is compounded by the operation of privatised corrections facilities and the opaqueness of private and public partnership commercial in-confidence agreements. This Section examines the human rights framework that applies to prisoners, and aspects of their incarceration that impact their enjoyment of those rights.

### 5.1. Prisoner rights framework

All prisoners are entitled to the same rights as general citizens, subject to the application of specific legislation that limits those rights. In the case of limitations, these are typically found in legislation that regulates the terms of their incarceration. Regulation and rights protection instruments include the following:

#### 5.1.1. The Corrections Act

The *Corrections Act* and *Corrections Regulations* govern the administration, security and management of Victorian prisons and prisoners. Section 47 of the *Corrections Act* (**section 47**) establishes specific prisoner rights (section 47 is set out in Appendix 3).<sup>75</sup> Section 47 rights are not freestanding and are subject to the discretionary management decisions of correctional administrators for maintaining the good order, management and security of prisons.<sup>76</sup> Those management decisions may, however, be subject to judicial scrutiny, and correctional considerations will not excuse unlawful limitations on prisoners' rights.

#### 5.1.2. The Charter

In Victoria, prisoners are protected by the rights set out in the *Charter*. The *Charter* obligates public and private operators of prisons to ensure their procedures and practices are compatible with its provisions, and the *Corrections Act* must be interpreted in light of the *Charter*. As noted earlier, prisons are governed by a number of different rules and requirements including the Correctional Management Standards, which are assessed to ensure they are compliant with the Charter.

*Charter* rights most likely to be relevant to prisoners include:

- ▶ recognition and equality before the law (s.8);
- ▶ right to life (s.9);
- ▶ protection from torture and cruel, inhuman or degrading treatment (s.10);
- ▶ freedom of movement (s.12);
- ▶ privacy and reputation (s.13);
- ▶ freedom of thought, conscience, religion and belief (s.14);
- ▶ freedom of expression (s.15);

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<sup>75</sup> Section 47 *Corrections Act* 1986 (Vic) [http://www.austlii.edu.au/au/legis/vic/consol\\_act/ca1986149/s47.html](http://www.austlii.edu.au/au/legis/vic/consol_act/ca1986149/s47.html)

<sup>76</sup> <http://www.lawhandbook.org.au/handbook/ch04s05s06.php>

- ▶ peaceful assembly and freedom of association (s.16);
- ▶ protection of families and children (s.17);
- ▶ taking part in public life (s.18);
- ▶ cultural rights (s.19);
- ▶ property rights (s.20);
- ▶ the right to liberty and security of the person (s.21); and
- ▶ humane treatment when deprived of liberty (s.22).

The recent case of *Castles*<sup>77</sup> is illustrative of judicial consideration of prisoner rights. Justice Emerton found in that case that the prisoner applicant had a right to continue IVF treatment in prison, despite the objections of correctional authorities. Justice Emerton found that this "right" to have IVF treatment was based in section 47(1)(f) of the *Corrections Act*. Although the *Charter* was not determinative of the issues, the Court encouraged a rights based approach by the decision-maker.

### 5.1.3. International human rights protections

In addition to the protections available at the domestic level, Australia is party to a number of international human rights treaties, which impose binding obligations it.<sup>78</sup> Australia has ratified and accepted obligations under all of the primary international human rights treaties. Those relevant to prisoners include the *International Covenant on Civil and Political Rights (ICCPR)*,<sup>79</sup> the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*<sup>80</sup> and the *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*.<sup>81</sup> The *UN Standard Minimum Rules for the Treatment of Prisoners* set out important, albeit non-binding, standards under the ICCPR.<sup>82</sup>

## 5.2. Protection of rights and systemic issues

Despite the protections afforded to prisoners by section 47, the *Charter* and international treaty instruments, prisoners face significant hurdles protecting and asserting their rights. In addition to the general barriers that prevent full recognition of their rights (for example, lack of knowledge of rights and remedies), prisoners have additional barriers that stem from the limitations on their access to resources, advocates and remedies.

Even if a prisoner is aware of his/her rights under the *Corrections Act* or the *Charter*, the prisoner must find an avenue to advocate their rights with prison authorities. The *Charter* provides no independent cause of action and a prisoner must have an existing legal cause of action to raise *Charter* protections. Section 47 rights do not provide explicit remedies or compensation for a breach, and, as discussed above, section 47 rights are limited by considerations of good order, security and management by correctional administrators.

<sup>77</sup> *Castles v Secretary to the Department of Justice and Ors* [2010] VSC 310 (9 July 2010).

<sup>78</sup> See art 26 of the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) (VCLT).

<sup>79</sup> *International Covenant Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 2. Australia became a signatory to the treaty on 10 December 1973 and ratified it on 10 September 1978.

<sup>80</sup> *International Covenant on Economic, Cultural and Social Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976) art 2. Australia became a signatory to the treaty on 18 December 1972 and ratified it on 18 December 1975.

<sup>81</sup> Opened for signature 4 February 1985, 1465 UNTS 85 (entered into force 26 June 1987).

<sup>82</sup> 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).



In the past, courts have demonstrated a reluctance to intervene in the decisions of prison authorities when balancing security and management considerations with prisoner rights.

The Australian Human Rights Commission has identified the following concerns in respect of prisoner rights in Australia:

- ▶ overcrowded and inhumane living conditions;
- ▶ inadequate physical and mental health services, including replacing services with solitary confinement that can and has exacerbated the symptoms of mental illness;
- ▶ prisoners being placed in cells with people they do not feel safe with;
- ▶ inadequate access to drug and alcohol rehabilitation and harm minimisation programs, leading to a high rate of blood-borne virus transmission;
- ▶ lack of access to educational and rehabilitative services;
- ▶ prisoners being subject to degrading, humiliating and traumatic strip searches (especially for women who have suffered from sexual abuse); and
- ▶ inadequate access to children and families (particularly for Indigenous women who can suffer from disruptions to their cultural responsibilities and dislocation from their communities).<sup>83</sup>

Female prisoners experience particular human rights issues. Women prisoners have complex backgrounds and social circumstances: many are primary carers for their children, more than half have been diagnosed with a specific mental illness, significant numbers have been drug users, more than 40% have been victims of non-consensual sexual activity, often as young girls,<sup>84</sup> and women prisoners are often victims of crimes as well as offenders. These factors make women prisoners particularly vulnerable to human rights violations of the types identified by the Australian Human Rights Commission.

In addition:

- ▶ Prison offences are defined as any contravention of the *Corrections Regulations* or *Corrections Act*, and prison offences that proceed to a charge may be prosecuted by a hearing conducted by the Prison Manager, known as a Governor's hearing.<sup>85</sup> Prisoners are not allowed to have a legal representative attend Governor's hearings, and there is a lack of opportunity for prisoners to respond to adverse evidence;
- ▶ There is insufficient oversight of the use of force as a measure of last resort. As noted by the Human Rights Law Centre (HRLC):<sup>86</sup>

Several international instruments specifically relevant to prisoners specify that the use of lethal force is only justified where it is a last resort. For example, article 54 of the *UN Standard Minimum Rules for the Treatment of Prisoners* states that prison officers 'shall not... use force except in self-defence or in cases of attempted escape, or active or passive physical resistance... Officers who have recourse to force must use no more than is strictly necessary'.
- ▶ There is no basis to challenge or ask for reasons in respect of classification decisions and transfers between prison facilities. Classification and transfer decisions significantly impact a broad range of important prisoner privileges, including visitation rights;

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<sup>83</sup> Australian Human Rights Commission, *Fact Sheet: Human Rights and Prisoners*, at [http://www.hreoc.gov.au/letstalkaboutrights/downloads/HRA\\_prisoners.doc](http://www.hreoc.gov.au/letstalkaboutrights/downloads/HRA_prisoners.doc)

<sup>84</sup> *Women in Prisoner*, A report by the Anti-Discrimination Commission Queensland, March 2006.

<sup>85</sup> <http://www.lawhandbook.org.au/handbook/ch04s05s09.php#> and *Corrections Act* s. 53 and *Corrections Regulations* regs. 51-59.

<sup>86</sup> Human Rights Law Resource Centre Ltd, Submission to the Scrutiny of Acts and Regulations Committee, *Justice Legislation Amendment Bill 2007*, 14 September 2007, 10 [44].

- ▶ The OCSR managed Independent Prison Visitors' Scheme provides insufficient oversight and monitoring to meet the standards of the *Optional Protocol to the Convention against Torture (OPCAT)*.<sup>87</sup>
- ▶ Prisoners from CALD backgrounds often experience discrimination, prejudice and isolation in prison. The lack of interpreter and translation services, access to religious or cultural services and inadequate education programs can mean that the prison experience for CALD prisoners is extremely punitive. CALD prisoners may also experience racism from what may appear to be neutral policies and practices, known as 'institutional racism'.<sup>88</sup>
- ▶ Further, difficulties in obtaining legal assistance and the practical barriers to judicial review of prisoner legal issues (as detailed in Section 6) breach the fundamental right of access to justice implied in the ICCPR and the ICESCR.<sup>89</sup>

The existence of systemic human rights issues in prison is illustrated by the large number of prisoner inquiries that come to PILCH and other services, as seen in Appendix 1. PILCH has received numerous inquiries from prisoners claiming they have inadequate or no access to medical treatment, education, rehabilitative services, and to children and families. Additionally, PILCH has had inquiries about the process of the Adult Parole Board and the lack of human rights protections and procedural and administrative fairness during the consideration of parole.

The HRLC also receives frequent inquiries from prisoners seeking assistance to protect their human rights; see Section 7.2.4.

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<sup>87</sup> *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 18 December 2002, 2375 UNTS 237 (entered into force 22 June 2006). Australia became a signatory to the treaty on 19 May 2009 but has yet to ratify it.

<sup>88</sup> For more information about CALD women prisoners, see *Culturally and Linguistically Diverse Women in Victorian Prisoners*, a report by CHRIP and the Springvale Monash Legal Service.

<sup>89</sup> See Article 2 of both the ICCPR and ICESCR

## 6. Access and barriers to justice

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The profile of prisoners set out in Section 3.4 is one of overwhelming disadvantage and many marginalised groups are over represented in the prison population. A significant proportion of prisoners and ex-prisoners come from, and return to, backgrounds with high levels of social and economic disadvantage.<sup>90</sup>

Due to this ingrained disadvantage and the operation of the prison system, for prisoners, obtaining access to legal services is often as much of a struggle as the legal problem itself. Therefore in assessing legal need, it is imperative to look at the barriers prisoners must overcome to access legal services, both environmental (being in prison) and personal (individual disadvantage).

### 6.1. Environmental barriers facing prisoners

The prison environment can have a significant impact on the ability of a prisoner to access the justice system. For example, unlike the general community, prisoners have express limitations on their access to the internet, libraries, phone calls and money to make phone calls. Prisoners have limited visitation rights and freedom of movement, even within the prison. The prison environment can also restrain the ability of the prisoner's lawyer to assist the prisoner and provide advice.

Environmental barriers experienced by prisoners include:

- ▶ Lack of access to documents relevant to their legal issue. In relation to their criminal matters, prisoners have minimal access to court documents and no access to court websites.
- ▶ Lack of access to computers, which prevents prisoners from obtaining legal information, communicating with legal representatives and advocates and from preparing documents to support their legal matters.
- ▶ Lack of access to telephones, limitations on the length of calls and the cost of calls. In order to make a call to a legal service, a prisoner must first add the service to their list of telephone contacts. Prisoners have a limited number of contacts and this process requires a prisoner to know the name of the person they are calling and the number. Lawyers face similar difficulties in contacting prisoners by phone. While VLA has video conferencing facilities at many prisons, correctional facilities, juvenile justice centres, remand centres and detention centres, these are limited to use by VLA lawyers and clients.
- ▶ Difficulty in reaching and obtaining information from VLA.
- ▶ Difficulty in accessing the prison law library and in obtaining photocopies of documents or information.
- ▶ The limited scope of prison law libraries and the ability of a prisoner to navigate the law library.
- ▶ Communication difficulties experienced between prisoners and their lawyer. Lawyers might be denied access to their clients, a confidential environment may not be provided for conversations, telephone communication is difficult, visiting rural or regional prisons poses problems for lawyers and prison access hours and lawyers' working hours are not aligned.
- ▶ Prisoners distrust the legal system and lawyers and have a low expectation of the delivery of justice through the legal system. The prison culture may stigmatise obtaining legal assistance and may be a disincentive to a prisoner seeking legal assistance.

It was noted by one organisation that even if a prisoner has the financial resources to engage a private lawyer, access issues might stymie their ability to find or properly engage those services.

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<sup>90</sup> See Law and Justice Foundation of NSW, *Taking Justice into Custody: The Legal Needs of Prisoners*, (July 2008), pg 21-22

The ability of a prisoner to obtain legal assistance may also be influenced by the stage they are at in the prison process. Prisoners on remand, facing criminal charges, are unlikely to prioritise civil matters, but it is precisely at this stage where access to lawyers may be easier to facilitate. Prisoners who are approaching release may need assistance to put their affairs in order to facilitate a smooth transition into the community, but at this stage they are likely to face all of the barriers listed above. In addition, prisoners have a higher rate of re-offending where their legal problems and debts are not resolved prior to release.<sup>91</sup>

In order to address some of these issues, PILCH recommends that the VLA Legal Information Service telephone number, or another suitable number, be automatically added to prisoners list of contacts. A similar action has been taken in NSW by LawAccess, a free statewide telephone service that provides legal information, advice and referrals similar to the VLA Legal Information Service in Victoria. The LawAccess telephone advice number is automatically programmed into prisoners' phone cards which allow prisoners to ring LawAccess from any prison in NSW for the cost of a local call. This was added following a study in NSW into the legal needs of prisoners with the aim of bringing quality legal assistance within more direct reach of inmates.<sup>92</sup> LawAccess treats prisoners as priority clients and will attempt to transfer a prisoner call to a solicitor to ensure advice can be provided prior to the phone call being cut off by time limits on phone calls.<sup>93</sup> As noted in section 4.2.4 above, the Victorian ombudsman has also made recommendations regarding telephone access to the Health Services Commissioner and Justice Health.

#### **Recommendation 1**

**The VLA *Legal Help* telephone service should provide legal advice to prisoners on a priority basis and information about the VLA *Legal Help* telephone service should be given to prisoners to enable them to reach legal assistance when required. The following telephone numbers should be automatically included on all prisoners' telephone contact lists on free call basis and should be exempt from the maximum number of contacts each prisoner is allowed;**

- i. *Legal Help***
- ii. Justice Health; and**
- iii. the Health Services Commissioner.**

**All prisoners should be allowed to access Legal Help, Justice Health and the Health Services Commissioner regardless of their phone access status or privileges.**

#### **6.2. Personal barriers**

The capacity of prisoners to identify and deal with their legal issues, to access legal services and understand legal advice may be limited by their own abilities and any disadvantages they face. As set out in Section 3.4, prisoners as a whole are a disadvantaged group and those disadvantages, individually and collectively, act as barriers to prisoners obtaining quality and timely legal assistance. These disadvantages are then often exacerbated by the prison culture and environment.

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<sup>91</sup> Law and Justice Foundation of NSW, *Taking Justice into Custody: The Legal Needs of Prisoners*, (July 2008), pg 122

<sup>92</sup> See Law and Justice Foundation of NSW, *Taking Justice into Custody: The Legal Needs of Prisoners*, (July 2008), pg xxvi

<sup>93</sup> See Law and Justice Foundation of NSW, *Taking Justice into Custody: The Legal Needs of Prisoners*, (July 2008), pg 175

The Law and Justice Foundation Report (NSW) considered the capacity of prisoners to identify and deal with legal issues while in prison.<sup>94</sup> Having reviewed prisoners' individual attributes, it identified the following as individual barriers to justice for prisoners:

- ▶ Prisoners' lives before prison, in particular the chaotic nature of their lives;
- ▶ financial capacity;
- ▶ previous experience in the legal system;
- ▶ ability to comprehend; and
- ▶ life skills.

The following uses the Law and Justice Foundation Report as a basis for considering how individual disadvantages act as barriers to prisoners obtaining justice.

### 6.2.1. Experiences before prison

Generally prisoners enter prison at a chaotic time in their life. They may have legal issues that exist prior to entering prison such as fines, child support and housing issues and due to their chaotic lifestyle, prisoners may not even be aware that they have these legal problems. As noted in the Law and Justice Foundation Report, "incarceration is not just a marker of criminal law issues, but is often an indicator of crisis more generally."<sup>95</sup> Once prisoners enter prison, they are cut off from their everyday lives and these problems exacerbate until on release prisoners return to the community facing significant disadvantage.<sup>96</sup>

For example:

- ▶ Relationships with family and friends and government and support agencies may be strained resulting in prisoners unable to access services in and post prison e.g. housing post release.
- ▶ Prisoners may also distrust those around them which leads to difficulty in resolving a prisoner's prior legal issue as they will be reluctant to seek assistance.
- ▶ Prisoners may rely on informal means to resolve issues, such as the informal sub-letting of housing and unofficial custody arrangements for children, and actively seek to avoid legal processes.<sup>97</sup> These informal arrangements may lead to legal problems while the individual is in prison and/or the individual may have no basis on which to enforce an informal arrangement.
- ▶ Women, particularly Indigenous women, are more likely to have been a victim of family and sexual violence. On arrival in prison they may have complicated family law issues, including the custody of children, which are not dealt with. On leaving prison, they may face returning to the violence which leads to a continuation of the same problems and a higher chance of reoffending.<sup>98</sup>

### 6.2.2. Financial capacity

As noted in Section 3.4.1, a large proportion of prisoners are not employed in paid work prior to entering prison. On entering prison, they have even less access to financial support and their

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<sup>94</sup> Law and Justice Foundation of NSW, *Taking Justice into Custody: The Legal Needs of Prisoners*, (July 2008), Chapter 6

<sup>95</sup> Law and Justice Foundation of NSW, *Taking Justice into Custody: The Legal Needs of Prisoners*, (July 2008), pg 111

<sup>96</sup> See Law and Justice Foundation of NSW, *Taking Justice into Custody: The Legal Needs of Prisoners*, (July 2008), pg 110

<sup>97</sup> Law and Justice Foundation of NSW, *Taking Justice into Custody: The Legal Needs of Prisoners*, (July 2008), pg 116-119

<sup>98</sup> For example, Indigenous women are more likely to have suffered family and sexual violence and they also have a high rate of reoffending - Australian Institute of Criminology 2010. *Indigenous Women's Offending Patterns: A literature review*. Canberra: Australian Institute of Criminology, page 26-29.

earning capacity is limited.<sup>99</sup> At the same time, prisoners may seek to engage legal representation which further depletes their limited resources. The result is that prisoners are often unable to obtain legal assistance or resolve legal problems due to financial constraints. As noted previously, prisoners have a higher rate of reoffending where their legal problems and debts are not resolved prior to release.<sup>100</sup>

### 6.2.3.Previous experience of the legal system

While previous experience of the legal system may result in prisoners having some knowledge of the criminal law and custodial systems, previous experiences may also impact on a prisoner's willingness to engage with legal services. They may have had a negative experience or not understood the legal process they were part of. They might not remember all of the advice they were previously given and legal service providers may over estimate the knowledge of the prisoner.

Further, prisoners' knowledge of civil and family law processes may be limited compared with their knowledge of criminal law, and criminal law matters may take precedence in their mind over civil and family law problems.<sup>101</sup>

### 6.2.4.Ability to comprehend

A number of attributes may affect a prisoner's ability to comprehend legal advice and the legal process, including;

- ▶ low level of literacy and education;
- ▶ intellectual disability;
- ▶ acquired brain trauma;
- ▶ an inability to speak English;
- ▶ mental illness; and
- ▶ drug and alcohol use.<sup>102</sup>

Each of these individual attributes will impact whether a prisoner identifies a legal issue, the ability of a prisoner to access legal information and advice, and the ability of a prisoner to understand advice that they do receive (e.g. from a prison library, visiting legal service or telephone advice service). Where a prisoner does not comprehend the process or advice, they may be reluctant to admit it due to feelings of shame and embarrassment.<sup>103</sup>

Prisoners with compromised comprehension may not be in a position to understand why they have been arrested, or in a civil context, remember that they have outstanding debts. They may sign documents without reading or understanding the effect of the documents, for instance parole conditions, tenancy agreements or agreements with Centrelink, which leaves them vulnerable to breaching those agreements.<sup>104</sup>

These prisoners may also be excluded from participating in programs while in prison due to their perceived intellectual disadvantage. This can have consequences for a prisoner's ability to obtain

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<sup>99</sup> Law and Justice Foundation of NSW, *Taking Justice into Custody: The Legal Needs of Prisoners*, (July 2008), pg 119

<sup>100</sup> Law and Justice Foundation of NSW, *Taking Justice into Custody: The Legal Needs of Prisoners*, (July 2008), pg 122

<sup>101</sup> Law and Justice Foundation of NSW, *Taking Justice into Custody: The Legal Needs of Prisoners*, (July 2008), pg 125

<sup>102</sup> Law and Justice Foundation of NSW, *Taking Justice into Custody: The Legal Needs of Prisoners*, (July 2008), pg 127

<sup>103</sup> Law and Justice Foundation of NSW, *Taking Justice into Custody: The Legal Needs of Prisoners*, (July 2008), pg 137

<sup>104</sup> Law and Justice Foundation of NSW, *Taking Justice into Custody: The Legal Needs of Prisoners*, (July 2008), pg 131

parole, and as a result, prisoners with intellectual disadvantages or similar issues may serve a longer sentence.<sup>105</sup>

A prisoner's ability to comprehend may also be limited by the effects of acquired brain injury, alcohol or drug intoxication or withdrawal, or mental health episodes. These episodes can coincide with crucial points in the legal process such as arrest, police interviews and initial court hearings, so that the prisoner is least able to draw on the skills they need to engage in the process.

#### 6.2.5. Life skills

The ability of prisoners to prevent and address legal issues is dependent on having appropriate and effective interpersonal skills and general living skills (such as the ability to use new technology, manage finances).<sup>106</sup>

In a place where they have little control over their lives and little capacity to effect change, prisoners can become passive and refuse to deal with legal issues. They may withdraw from services, particularly where they have difficulty comprehending those services or where the services do not address their particular needs or meet their expectations. Alternatively, prisoners may act out aggressively which, while it may be suited to a prison yard, is counter productive in non prison settings and may further isolate the prisoner from services and assistance.

### 6.3. Constraints on prisoner services

PILCH consultations with prisoner services also identified the following principal constraints on their ability to address prisoner legal.

#### 6.3.1. Access to prisoners

Lack of access is a significant barrier to the provision of prisoner services. In the first instance, lawyers must have a specific prisoner's name in order to arrange visitation. This constrains the provision of drop-in legal services. Most organisations that provide outreach prison services need individual prisoners to request an interview to gain access to them.<sup>107</sup> Legal representatives are only permitted to visit at times fixed by the *Corrections Regulations*.<sup>108</sup>

The distant location of prisons and prison visitation procedures also mean that visits are time-intensive and resource demanding on private practitioners and Community Legal Centres (CLC). VLA prison video conferencing facilities are only available to their lawyers.

#### Recommendation 2

**VLA should provide access to its prison video conferencing facilities for other legal practitioners.**

Lawyers are able to contact prisons to book a phone appointment with an identified prisoner, but if a prisoner wants to phone a lawyer, they must register the practitioner on their limited contact list (subject to the approval of the Prison Manager). As noted above, prisoners often have minimal information or documentation relating to their legal issues as a result of having limited or no access

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<sup>105</sup> Law and Justice Foundation of NSW, *Taking Justice into Custody: The Legal Needs of Prisoners*, (July 2008), pg 133

<sup>106</sup> Law and Justice Foundation of NSW, *Taking Justice into Custody: The Legal Needs of Prisoners*, (July 2008), pg 147

<sup>107</sup> As part of the PILCH Aboriginal Credit and Debt Clinic pilot project, ACDC Lawyers attended regional prisoners to assist Aboriginal prisoners about their legal issues. PILCH made contact with the prison to arrange a time for the lawyers to visit the prison and give 15-20 minute interviews to prisoners who had requested an interview. This model is similar to the Inside Access outreach service.

<sup>108</sup> Typically between 8.30am and 3.30pm. Visits outside these hours require permission of the Minister for Corrections, the Secretary of the Department of Justice or the Prison Manager.



to the internet, libraries and phone calls. A lot of information must be exchanged with prisoners by regular mail. Lawyers have no access to computers or internet in prison.

### **6.3.2.Resources and capacity**

Resource and capacity constraints were identified by a number of prisoner services as the primary limitation to their provision of assistance. Resource constraints prevent services from providing prisoner casework services, or conducting outreach at more than a few locations, if at all. Similarly, services may focus their resources on outreach and casework, preventing them undertaking effective policy and law reform.

It was also noted that CLC prisoner service delivery, like other CLC projects, is often dependant on the interest or focus of individual workers or management, and that changes in personnel can result in interrupted service delivery.

Additionally, prisoner services that rely on commercial firm lawyers, like Inside Access, may be constrained by legal conflicts of interest with corrections services, and they may have limited ability to reallocate prisoner files.

### **6.3.3.Barriers to funding**

As a marginalised group, prisoners are often misunderstood and stereotyped, impacting the ability of services to advocate for increased provision of funding for prisoner services. Organisations identified negative public opinion towards prisoners as a major barrier to obtaining funding. Lack of adequate funding puts more resource and capacity constraints on already limited prisoner services.

### **6.3.4.Procedural conflicts of interest**

Prisoner services indicate the importance of maintaining good relationships with correction authorities and institutions in order to facilitate their access to prisoners. This puts them in a procedural conflict of interest, which constrains their ability to challenge corrections authorities, particularly on internal prison disputes. This is especially the case for VLA.



## 7. Existing Prisoner Legal Services

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This Section surveys existing prisoner legal services in Victoria, and observes service gaps in responding to prisoner legal need. It also looks at a number of non-legal prisoner service providers.

### 7.1. Ways of meeting legal need

Prisoners may obtain legal assistance and advice from a number of sources, including lawyers and legal services, prison employees, medical professionals, support services, counsellors, family and friends and other prisoners.<sup>109</sup> This is not dissimilar to how the wider population seeks legal assistance, frequently from parties other than lawyers.<sup>110</sup> Assistance may come in non-traditional forms. For example, Monash University has run a Court Readiness Program which involves law students using drama to teach remand prisoners about what happens in court and prepare the prisoner for when they go to court for trial.<sup>111</sup>

This report considers the availability of *legal* services which assist prisoners. It also notes that prisoner support services are often well placed to address prisoner legal needs (see Section 7.3).

#### Recommendation 3

**Support should be given to non-legal services that engage with prisoners to enable those services to provide legal information and assistance to prisoners. This could include conducting training sessions and providing materials and contact numbers to those services, which they could utilise during prisoner contacts and visits.**

Prisoner access to justice may also be enhanced by greater access to legal information, particularly legal information that is clear and easy to understand. Prisoners currently have access to prison libraries and legal information phone lines (for example the VLA Legal Information Service). However, it is unclear if these are meeting prisoners' legal needs. While this report does not examine the ability of prisoners to access and understand legal information, it does recommend that these questions of access should be investigated further.

#### Recommendation 4

**A review should be undertaken of legal information currently available to prisoners, including; the contents of law libraries, information services and fact sheets. Following this, improvements should be made in the provision of legal information to prisoners. For example, this may include the preparation of fact sheets setting out the process for making a complaint in prison or accessing information (such as prisoner's records).**

### 7.2. Victorian legal casework services

The following services provide legal assistance to prisoners in Victoria:

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<sup>109</sup> For instance, Craig Minogue is a Victorian prisoner who has brought a number of legal challenges from within prison and assists other prisoners with their legal queries.

<sup>110</sup> Coumarelos, C, Wei, Z & Zhou, AH 2006, Justice made to measure: NSW legal needs survey in disadvantaged areas, Law and Justice Foundation of NSW, Sydney.

<sup>111</sup> Naylor, Bronwyn and Jacobson, Sharon, Putting the Boot on the Other Foot: Prisoners, Law Students and Theatrical Method in Clinical Community Development, Monash University (February 2009).

### 7.2.1. PILCH

PILCH addresses prisoner legal issues principally through pro bono casework referrals. Referrals for legal assistance are made to practitioners (PILCH member law firms, Law Institute of Victoria Legal Assistance Scheme (LIVLAS) members and members of the Victorian Bar Pro Bono Scheme (VBPBS)) on behalf of individual prisoners or prisoner services.<sup>112</sup> PILCH also refers clients to other prisoner services.

Details of the many recent applications for assistance received by PILCH are listed in Appendix 1.

During the Project, PILCH participated in prisoner roundtable discussions and fora held by the HRLC<sup>113</sup> and VLA<sup>114</sup> and a workshop jointly hosted by the Prisoners' Legal Service, the Federation of CLCs and the HRLC.<sup>115</sup>

PILCH also conducted an Aboriginal Credit and Debt Clinic pilot project in regional Victoria in 2010 (ACDC Clinics) which included lawyers attending regional prisons and providing advice and casework to 23 Aboriginal prisoners. Findings indicate significant unmet legal need in the Aboriginal prison population, particularly with credit and debt issues.<sup>116</sup>

The Homeless Persons' Legal Clinic (HPLC) conducts a legal services clinic at the Victorian Association for the Care and Resettlement of Offenders (VACRO)<sup>117</sup> for offenders, prisoners and their families. The clinic operates for 2 hours per week and provides advice and casework assistance for civil law problems.

PILCH has, however, experienced limits in its ability to make pro bono referrals for prisoners. Some reasons may be a lack of legal merit, difficulties in accessing prisoners, taking instructions and exchanging documents, insufficient capacity legal conflict of interest among pro bono lawyers, negative attitudes towards prisoners, and the extent to which firms consider prisoner matters as appropriate for pro bono.

In order to determine the appetite and capacity of firms to accept pro bono referrals for prisoners, it is recommended PILCH meet with the VBPBS (through its Pro Bono Committee), the LIVLAS (through its Access to Justice Committee) and PILCH member firms.

#### Recommendation 5

**PILCH should discuss prisoner legal need with the VBPBS, the LIVLAS and PILCH member law firms to identify practitioners and firms that have interest, capacity or expertise to provide civil legal services to prisoners. Once interest has been gauged, PILCH should**

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<sup>112</sup> PILCH assesses prisoner inquiries for assistance against its general eligibility criteria, as follows:

you cannot afford to pay for legal assistance from a solicitor;  
you cannot obtain legal assistance from any other source (including Victoria Legal Aid and community legal centres);  
you have a legal issue which requires the assistance of a solicitor;  
your case has legal merit (a reasonable prospect of success); and  
the matter is appropriate for pro bono assistance or you must also demonstrate that your matter is in the public interest.

<sup>113</sup> HRLRC held a roundtable to discuss strategies for addressing some of the major legal issues facing prisoners within the corrections system in Victoria. The roundtable brought together a small group of key organisations and individuals working in the corrections area to discuss ways to collaborate and strategically address some of the systematic issues. This has resulted in a compilation of: strengths of the sector; key issues; focus areas, and strategies. Document located at <Z:\SHARED\Human Rights Law Resource Centre\HRLRC\Seminars and Events\2010\Corrections Roundtable>

<sup>114</sup> Victoria Legal Aid has hosted a series of forums on prisoner issues attended by PILCH. Attendees have developed contacts and identified need and gaps in service provision. VLA has developed a contacts list of all legal services that provide assistance to prisoners. It will additionally map the landscape of the services available to prisoners and develop a manual for providers of prisoner services.

<sup>115</sup> The workshop addressed the practical process of using the *Charter* in direct advocacy for individual prisoners and in policy and law reform activities.

<sup>116</sup> ACDC Project Report and Evaluation, see: <http://www.pilch.org.au/Page.aspx?ID=436>

**organise training on prisoner issues and corrections law and build capacity for firms and barristers to accept prisoner referrals and/or establish specific prisoner clinics.**

### **7.2.2. Prisoners' Legal Service Victoria**

The PLSV was a pilot program of the Brimbank Melton Community Legal Centre, which is operated by Community West Inc (a multi-program agency servicing Melbourne's western suburbs). The project commenced in early 2009, and was funded by grants from the Legal Services Board Victoria. It ceased operating at the end of March 2011.

During its operation, PLSV became the primary prisoner focused legal service in Victoria. It provided legal services, education and information on prison-related issues to prisoners and their families. PLSV also supported CLC workers and other prisoner advocates by providing prison law information and expertise, and worked to reform laws and policies that affect prisoners and their families.

PLSV provided free legal services and advice to prisoners through a limited telephone service, and outreach at four Victorian prisons.<sup>118</sup> PLSV focused on prisoner issues relating to Corrections Victoria and the Corrections Act, rather than generalist legal services, and it did not provide criminal law advice. In many instances it provided a service and undertook policy work that would not ordinarily be undertaken by VLA.

Despite efforts to secure an on-going commitment to establish a Prisoner's Legal Service for Victoria, the PLSV no longer receives funding. Absent of such funding, Community West created a modified PLSV that includes a limited telephone advice line, referral to private firms and a web based resource bank. Whilst the current model cannot meet the needs of Victorian prisoners, it represents a foundation for stakeholders to collaborate to develop an effective and sustainable model.

Prisoner inquiries to PILCH appear to have declined since PLSV closed, supporting a conclusion that unmet prisoner legal need is effectively masked in the absence of sufficient reach and penetration to the prison population.

### **Recommendation 6**

**Prisoners Legal Service Victoria should be re-established or a similar service established to provide specialised and targeted legal support for prisoners. This could take the form of a joint program with community legal centres or with VLA.**

### **7.2.3. Victoria Legal Aid**

VLA's Prison Advice Service provides regular outreach legal services to prisoners at all Victorian corrections facilities.<sup>119</sup> It provides the most comprehensive legal services to prisoners in Victoria.

The primary focus of VLA's prison program is the provision of legal advice in relation to criminal matters. VLA will also provide legal advice for non-criminal matters, and may assist with non-legal work including contacting relatives, other prisoners, other legal practitioners, court services, correctional authorities, police, medical personnel, social workers and other community workers. If a prisoner wishes to speak to a VLA lawyer, they can request to be put on the VLA prison visit list by calling the relevant VLA office or they can call the VLA legal information service.

<sup>117</sup> See below at 7.3.2 description of non-legal services provided by VACRO.

<sup>118</sup> Port Phillip Prison, Dame Phyllis Frost Centre, Metropolitan Assessment Prison and Melbourne Remand Centre.

<sup>119</sup> See Appendix 3 for a list of prisons visited by VLA and the days they attend.

Like other VLA clients, prisoners must apply to VLA for a grant of assistance for ongoing legal assistance. This is subject to a means test and the VLA Grant of Aid Guidelines, which are relatively restrictive for family and civil law issues. VLA has a limited public interest eligibility guideline, some work may be conducted as discretionary 'minor work' files, and guidelines are broadened for defined 'special circumstances' clients. VLA is currently re-evaluating the scope of its civil law services to prisoners

PILCH considers VLA would be well placed to provide civil services that address the unmet legal need identified in Sections 4 and 5 due to its expertise and its broad coverage of Victorian prisons. PILCH recognises, however, that providing civil services to prisoners has budgetary consequences and the potential to bring VLA into a procedural conflict of interest with prison authorities, as described in Section 6.3.4.

#### **Recommendation 7**

**VLA should consider the provision of a comprehensive statewide prisoner legal service with extended VLA civil law eligibility guidelines. This should include, at a minimum, providing prisoners with information about ways to access civil legal assistance, including from CLCs and PILCH.**

In 2010/11 VLA collated materials for a proposed Prison Advice Manual. The manual was intended to be a quick reference guide to assist practitioners when giving advice to prisoners. The manual is subject to review, to determine its likely practicality, how to ensure it would have currency, and whether there would be better ways of providing this information, for example fact sheets prepared by the Fitzroy Legal Service alongside its online Law Handbook.<sup>120</sup>

#### **Recommendation 8**

**VLA should prepare reference materials to assist legal practitioners providing assistance to prisoners that is both practical and up to date, and which includes information about ways to access the legal assistance sector for civil advice, including CLCs and PILCH**

### **7.2.4. The Human Rights Law Centre**

The HRLC is a leading national human rights body that promotes and protects human rights in Australia by undertaking policy advocacy, litigation, education and capacity building. The HRLC receives frequent inquiries from prisoners seeking assistance to protect their human rights, in relation to prison conditions, access to health care (particularly mental health), and access to education, rehabilitation and visitation rights. In 2009/2010, 38% of the HRLC's casework was within the area of rights of people in detention.<sup>121</sup>

The HRLC has done significant work advocating for the right to health for prisoners, including instructing in the *Castles* case, negotiating with prison management to revise their policy pertaining to oral cavity searches, and engaging with the UN Special Rapporteur on the Right to Health. The HRLC has also completed a number of policy and law reform submissions relevant to prisoner rights.<sup>122</sup>

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<sup>120</sup> See: <http://www.lawhandbook.org.au/>

<sup>121</sup> Human Rights Law Resource Centre, Annual Report 2009/10

<sup>122</sup> See: <http://www.hrlc.org.au/our-work/topics/prisoners/>

The HRLC may be able to assist with representation or advice in certain cases that relate to the rights of people in detention and which raise specific human rights issue.

#### 7.2.5. Inside Access – Mental Health Legal Centre

Inside Access is a legal service and education project that has been operating since 2008. Inside Access is auspiced by the Mental Health Legal Centre Inc. and provides legal assistance to people experiencing mental illness in Victorian prisons and secure hospitals.

Inside Access conducts legal clinics staffed by lawyers from two law firms, DLA Piper Australia and Blake Dawson, at the Dame Phyllis Frost Centre and the Melbourne Assessment Prison. In addition, Inside Access accepts referrals from the Thomas Embling Hospital and Port Phillip Prison on a case by case basis.

Inside Access lawyers will assist any prisoners who are currently in the mental health unit of a prison, or any prisoner who identifies with mental illness. Lawyers will provide civil law advice other than family law and criminal law which are referred on to the appropriate service. Inside Access lawyers will not provide legal representation in litigation.

Inside Access also conducts legal education amongst prisoners, prisoner advocates and in the broader community, including the development of financial counselling kits and services specifically tailored to the needs of prisoners with mental illness.

Their ability to assist prisoners is principally limited by capacity, but also by legal conflicts of interest.

#### 7.2.6. Victoria Aboriginal Legal Service

The Victorian Aboriginal Legal Service (**VALS**) provides legal assistance to Aboriginal and Torres Strait Islander people. VALS solicitors, Client Service Officers and Prisoner Support Workers undertake prisoner casework and conduct outreach to prisons. These services are constrained by funding and capacity, and may be prioritised for prisoners who were clients pre-incarceration. VALS provides criminal and family law assistance (excluding divorce and property disputes) and limited civil services including victims of crime, complaints and discrimination.

VALS previously secured funding for a dedicated prisoner support officer (non-legal) to have a permanent presence in Victorian prisons. Unfortunately, funding for that position was recently discontinued and VALS is seeking alternative funding. VALS also conducts policy and law reform work relevant to prisoners, including:

- ▶ implementation of OPCAT;
- ▶ implementation of Royal Commission into Aboriginal Deaths in Custody;
- ▶ mental health of prisoners;
- ▶ deemed served program; and
- ▶ the parole system.

#### 7.2.7. Youthlaw

Youthlaw is a state- wide specialist CLC that provides free and confidential legal services to persons under the age of 25. It provides limited services to prisoners and has no outreach services to youths in prisons. They conduct casework for clients under the age of 25 with criminal legal issues and assistance with civil law matters. They do not assist with family law matters or children protection matters. Youthlaw also provides post-incarceration services. The majority of their clients do not face serious criminal charges, and receive suspended sentences or community based orders, rather than jail sentences.

### 7.2.8. Other Community Legal Centres

Prisoners have potential access to various CLC services, which are available to the broader public. Some CLCs have specific outreach programs with local prisons and have developed expertise in areas relevant to prisoners.

For example, Central Highlands CLC (**CHCLC**) provides free legal advice, information and community legal education to prisoners in the Central Highlands Region. CHCLC lawyers provide family, consumer and civil law casework and legal advice and will contact other agencies and liaise with family members on behalf of prisoners. CHCLC provides outreach services to prisoners once a month to Langi Kal Kal prison and Ararat prison. Prisoners must request a visit from CHCLC to obtain assistance.

### 7.3. Non-legal services assisting prisoners

As mentioned, non-legal services can also address prisoner legal issues. They do this directly and indirectly, by advocating decarceration, assisting in the resettlement and rehabilitation of prisoners, providing services that reduce recidivism, advocating for prisoner rights and conditions, and by increasing awareness of prisoner issues. Whilst not a focus of this report, we note the following examples of non-legal service providers that support prisoners in Victoria:

#### Flat Out

Flat Out is a state wide advocacy and support service for women who have had contact with the criminal justice or prison system in Victoria. Flat Out leads and engages in research, advocacy, education and community involvement to inform the community and other service providers about the issues that occur for women in the prison system. It works towards:

- ▶ improving the rights and conditions of women in prison;
- ▶ preventing women from going to prison;
- ▶ supporting and keeping women out of prison once they are released; and
- ▶ having a strong voice in the prison abolition movement in Australia.

Flat Out's primary tasks are:

- ▶ To support women who are exiting prison or who are at risk of being imprisoned, by providing access and referrals to appropriate and affordable transitional, supported, private, public or community housing.
- ▶ To provide and link women to appropriate supports, education and information to re-establish them in the community post-release.
- ▶ To work with women to prevent their re-incarceration.

Flat Out regularly supports women through the court process by writing court reports, and attendance at court. This support will often result in women getting a non-custodial sentence. Flat Out also assists single women (with or without children) whose lives have been disrupted by drug and alcohol misuse.

### 7.3.1. Centre for the Human Rights of Imprisoned Persons

The Centre for the Human Rights of Imprisoned People (**CHRIP**) is a project of Flat Out promoting human rights for people in Victorian prisons through education, community capacity building, legal education, and systemic advocacy, that is fundamentally informed by a social justice and decarceration framework. CHRIP does not provide any direct legal assistance to prisoners, however they are closely partnered with Inside Access and they refer clients to Inside Access, VLA and CLCs generally for legal assistance. CHRIP was also closely involved with PLSV during its inception and operation.

CHRIP conducts advocacy, education and campaign services on prisoner rights including:

- ▶ providing education and training for lawyers, CLCs and the broader community;
- ▶ holding public forums on systemic issues;
- ▶ conducting research and publishing reports and other resources on systemic issues; and
- ▶ acting as a point for cross-sector collaboration and networking.

CHRIP indicated there is a fundamental lack of understanding and persistent misconceptions about prisoners that significantly impacts the ability to get funding, and that this is a major limitation for the service delivery. CHRIP also noted that because of limited funding, prisoner services often have a limited and short lifespan, which impacts the cultivation of trust with prisoners and therefore impacts effective service delivery.

### 7.3.2. Victorian Association for the Care and Resettlement of Offenders

The Victorian Association for the Care and Resettlement of Offenders (**VACRO**) provides support and information for individuals charged with a criminal offence, offenders, prisoners and their families, as well as a leadership, education, training and research on the justice system for the community. It conducts policy and advocacy work including submissions to parliamentary inquiries on prisoner issues.

Whilst VACRO will assist as soon as a person has come into contact with prison, most of their services are focused at post incarceration assistance. VACRO provides Justice System Services, which are transitional support services for clients and their families during the pre and post release stages, for example, accommodation, health, drug and alcohol, and banking services. VACRO also hosts the HPLC weekly legal advice clinic.

VACRO identified high demand and resource constraints as the primary limitation on capacity to assist all clients. VACRO also noted that public opinion presented significant barriers to obtaining funding and providing effective advocacy.

### 7.3.3. The Bridge of Hope Foundation

The Bridge of Hope Foundation's (**BoH**) principal purpose is to provide money, property and support to agencies that conduct rehabilitation and reintegration programs for inmates, former inmates and their families especially their children, youth in detention centres and young single mothers. In the event of a service or agency gap then BoH will deal with the 'gap' issue in its own right. BoH seeks to address those areas that will make for a safer community such as rehabilitation, recidivism, homelessness, education, employment and community acceptance of former prisoners. BoH engages with inmates and former inmates when advocating on their behalf.



#### 7.4. Service gaps

While there are a number of services that prisoners may access to obtain legal assistance, resources are limited, and with the closure of PLSV there is no service focused solely on providing legal services to prisoners. Legal services which are not used to dealing with prisoners may be frustrated by the environmental barriers presented by dealing with the prison system and may also struggle to communicate advice to prisoners.

Outreach services only operate at certain prisons and, apart from Inside Access, there are no specialised services dealing with prisoners with limited cognitive abilities. As a result, there may be difficulties in communicating legal advice in a form that prisoners understand and are willing to act on.

Prisoners are particularly vulnerable on release from prison. They face the challenges of re-establishing themselves in the community, including locating housing and work, must ensure they do not breach any conditions of their parole and may attract extra police attention. Research has shown that the following people are more likely to return to prison:

- ▶ youth;
- ▶ Indigenous (particularly Indigenous females);
- ▶ those who have been previously imprisoned;
- ▶ those who have housing or debt issues; and
- ▶ drug users.<sup>123</sup>

To a lesser extent, reimprisonment was also associated with being male.<sup>124</sup> While VACRO and Flat Out assist in the re-establishment of ex-prisoners, they do not provide legal advice (other than through the HPLC VACRO legal clinic). As prisoners often fail to deal with civil and family law issues while in prison, they are likely to face these issues on release and may not have the capacity (mentally or financially) to deal with them. Targeting legal services to these groups around the time of release may reduce the reimprisonment rate.

#### Recommendation 9

**Further consideration should be given to the idea of targeted legal services for prisoners about to be released, or recently released from prison, to address housing, debt, family and other civil law issues that these prisoners may have.**

It might also be appropriate to target legal assistance to prisoners at the time of incarceration (or to those at risk of incarceration), when legal problems might be more amenable to resolution, and before those problems escalate. Support services available to newly incarcerated persons do not typically include the provision of legal assistance.

Further, there are no specialised legal services for women prisoners. Women prisoners are more likely than male prisoners to be in a relationship, have separated from a relationship or to have children, with the result that they may experience particular legal needs arising from those circumstances.

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<sup>123</sup> Zhang, Jessica and Webster, Andrew, An Analysis of Repeat Imprisonment Trends in Australia using Prisoner Census Data from 1994 to 2007, ABS (Aug 2010) and Law and Justice Foundation of NSW, *Taking Justice into Custody: The Legal Needs of Prisoners*, (July 2008), pg 122

<sup>124</sup> Zhang, Jessica and Webster, Andrew, An Analysis of Repeat Imprisonment Trends in Australia using Prisoner Census Data from 1994 to 2007, ABS (Aug 2010).



There is also an imperative for increased funding for VALS to support Aboriginal and Torres Strait Islander prisoners who are disproportionately represented in the prison system. In conclusion, services that provide legal support for prisoners are limited and are under resourced.

**Recommendation 10**

**PILCH should enhance existing, and develop new, relationships with prisoner legal services to facilitate mutual referrals.**

**Recommendation 11**

**PILCH should provide referrals for pro bono legal assistance for organisations assisting prisoners or providing support for newly released prisoners that seek:**

- iii) general advice about prisoner legal rights that the organisation can use in assisting its clients; and**
- iv) specific legal assistance on behalf of clients that falls outside the scope of the organisations' legal expertise (eg. FOI applications).**

## 8. PILCH Response

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The Project has found that prisoners experience particular and exacerbated legal needs when compared to the general population. Prisoners also experience particular disadvantage and oppression (by the State) and barriers to the justice system. Their legal complaints raise issues of human rights, social justice and systemic injustice. There are limited services available to address prisoner legal needs, and those that are available have resource constraints and experience conflicts in service provision.

In addition to the recommendations made previously in this report, PILCH should consider taking a leadership position: in the provision of legal services to prisoners (either through casework or clinics); in the support of other prisoner assistance services; and in relation to research and policy development in this area. PILCH should consider whether it is able to target legal services, through member firms or supporting other providers of services to prisoners, to address particular forms of disadvantage (such as support for those with intellectual disabilities, prisoners about to be or just released from prison, Indigenous people, women or young people) and particular areas of legal need (such as debt, housing, family law or prisoner specific issues).

### 8.1. PILCH referrals and clinics

Discussions with prisoner services reveal that prisoners principally want direct casework and outreach services, provided by legal practitioners with expertise in corrections law. Prisoners also require direct advocacy assistance to negotiate and correspond with prison authorities. PILCH is in a position to facilitate those services.

#### **Recommendation 12**

**PILCH should continue to assist individual prisoners when other legal services are not available. These referrals should be prioritised in instances of:**

- i) need as identified by prisoner services and relevant research (see Section 4); and**
- ii) where there is an opportunity to advance the public interest on systemic prisoner issues or cases which raise human rights concerns (see Section 5).**

PILCH's resources and services are also appropriately placed to provide assistance to prisoner services, including advice on legal issues outside prisoner service expertise. As recommended at Section 7, PILCH should encourage relationships with existing prisoner services to support those services and to facilitate direct legal services to prisoners.

Further, PILCH already has a wealth of resources and knowledge through the Homeless Persons Legal Clinic (**HPLC**). As homelessness is a key factor in individuals re-offending, PILCH should leverage its HPLC experience to consider whether legal services could be targeted at ex-prisoners (see Recommendation 9).

Given the various barriers identified in Section 6, PILCH must recognise that increasing referral capacity would require appropriate focus and engagement (see Recommendation 5).

### 8.2. Policy and law reform

PILCH has not previously focused on prisoner issues as an area of policy priority. The HPLC has undertaken some advocacy work in relation to prisoners and ex-prisoners, including discrimination on the basis of irrelevant criminal record and drug related offending in women prisoners.

Prisoner issues are not a current campaign priority for PILCH, but they can be located within PILCH's existing priorities of: Access to the Justice System and Human Rights. Whilst it is not recommended that prisoners become a campaign focus area for either of the Access to the Justice System or Human Rights campaign priorities, they could provide the basis for PILCH undertaking policy and campaign work in the future.

PILCH acknowledges that direct prisoner services have more expertise to undertake policy and law reform work and therefore PILCH should work with, support and endorse other organisations conducting policy work for prisoners, including providing resources for publications and submission drafting. In order to achieve this level of support, PILCH should contact organisations and provide information to them about how PILCH can support them with training and securing pro bono resources to prepare submissions or fact sheets.

PILCH makes the following recommendations in relation to campaign and policy work:

#### **Recommendation 13**

**PILCH should prepare or facilitate the preparation of position papers on prisoners' issues for future use and reference. These papers may be provided to prisoner assistance services and may cover areas such as:**

- i) the obligations of prison authorities in relation to prisoner assault and avenues of redress for prisoners; and**
- ii) the operation of the Parole Board, particularly in relation to types of disadvantage prevalent in the prisoner population.**

#### **Recommendation 14**

**PILCH should continue to support prisoner services with their policy work. This may include endorsing submissions, providing training, making pro bono referrals, facilitating assistance in drafting submissions and/or creating fact sheets.**

## Appendix 1

### De-identified list of client inquiries and referrals from PILCH's casework.

| Type of issue                | Database no. | Matter Description   |
|------------------------------|--------------|--|
| Medical/Psych treatment      | PIL/09/0324  | Applicant sought advice in relation to the medical treatment he is receiving in prison.  |
| Medical/Psych treatment      | PIL/10/0283  | Prisoner's Legal Service seeking advice on the obligations of prison authorities to provide medical treatment  |
| Medical/Psych Treatment      | PIL/10/0021  | Applicant sought a list of specialist legal practitioners  |
| Medical/Psych Treatment      | PIL/09/352   | Applicant claimed that he ought to serve his sentence at Thomas Embling Hospital and not Port Phillip Prison ( <b>PPP</b> )  |
| Medical/Psych Treatment      | PIL/09/0350  | Applicant sought assistance in ensuring adequate medical treatment for a number of conditions  |
| Medical/Psych Treatment      | PIL/08/0231  | Applicant claimed medical negligence against the Dame Phyllis Frost Centre ( <b>Phyllis Frost</b> ) for treatment resulting in a limb amputation.  |
| Medical/Psych Treatment      | PIL/08/0314  | Applicant sought advice regarding potential claim against Phyllis Frost for medical negligence resulting in an unnecessary partial hysterectomy  |
| Medical/Psych Treatment      | PIL/10/0137  | Applicant sought advice regarding the possibility of compelling his doctor to re-prescribe Deca Durabolin for muscle wastage associated with his HIV   |
| Discrimination               | PIL/09/0275  | Applicant claimed discrimination and segregation due to HIV status   |
| Access to personal files     | PIL/09/0266  | Applicant sought assistance with accessing personal files from Corrections Victoria relating to a murder conviction.   |
| Defamation and Privacy       | PIL/10/0017  | Applicant sought advice on how much compensation was appropriate for an admitted breach by the Department of Justice in publishing prison photos of her.   |
| Kosher Food                  | PIL/09/0335  | Applicant's religious beliefs were not respected while imprisoned. Specifically, he was given non-Kosher food and forced to sign on the Sabbath.   |
| Removal of Possessions       | PIL/09/0323  | Applicant sought assistance regaining his possessions and quarters at Fulham prison back which were allegedly taken from him.  |
| Prison visitation conditions | PIL/10/090   | Applicant sought advice regarding lack of contact with daughter due to sexual assault conviction. The mother expresses concern regarding daughter only being able to visit her father behind a screen. |
| Facilities for disability    | PIL/08/0314  | Applicant sought advice regarding transfer from Juvenile Holding Centre to prison upon turning 18. Concern was expressed as applicant has severe intellectual disability.                              |

| Type of issue                           | Database no. | Matter Description   |
|---|--------------|--|
| Wrongful Death                          | PIL/08/0560  | Applicant sought advice regarding husband's death at PPP as a result of an asthma attack that could not be appropriately treated due to broken intercom system.                                  |
| Wrongful Death                          | PIL/10/0027  | Applicant sought advice regarding son's death in custody and the interaction between the civil proceedings and the coronial inquest.   |
| Request for 'emergency management days' | PIL/09/0272  | Applicant sought assistance regarding decision of Corrections Victoria to refuse application for "Emergency Management Days" remission.  |
| Civil claim against Lawyers             | PIL/10/0507  | Applicant sought assistance with application for retrial in relation to armed robbery firearm related convictions.   |
| False Imprisonment                      | PIL/09/0351  | Applicant sought advice regarding a two-week detention in addition to her sentence because of a misunderstanding in the court orders   |
| Child visitation                        | PIL/10/0407  | Applicant sought assistance arranging visitation for daughter to see father who is undergoing sentence for sexual assault.   |
| Sex Offenders Registrar                 | PIL/10/0358  | Applicant was concerned about being listed on the Sex Offenders Register.  |
| Adult Parole Board                      | PIL/10/0418  | Applicant sought FOI of parole rejection and seeking advice on the lack of rehabilitative services.  |
| Prison Transfer and Parole Board        | PIL/10/0443  | Applicant sought review of prison transfer and rejection of parole.  |
| Personal Injury claim                   | LIV/10/0359  | Applicant is an ex-prisoner seeking compensation against the Melbourne Assessment Prison ( <b>MAP</b> ) for personal injuries  |
| Civil claim and victim's compensation   | LIV/10/0743  | Applicant sought advice on whether the prison was negligent in the provision of medical treatment, victim's compensation and also a review of sentence. Applicant was stabbed in jail.           |
| Parole Issue                            | LIV/10/0731  | Applicant sought to fix non parole period before the Supreme Court of Victoria   |
| Property/Settlement                     | LIV/10/0695  | Applicant contacted PILCH regarding a Family/Property Settlement issue.  |
| False Imprisonment                      | LIV/10/0680  | Applicant sought advice regarding failing a urine sample. Applicant subsequently obtained a clean sample and was advised his sentence would be reduced by 3 months but this did not occur.       |
| Return of person belongings             | LIV/10/0644  | Applicant sought assistance with return of computer after having it confiscated because of contraband content (music and porn). Applicant alleges the computer is required for his studies (BA). |
| Access to personals                     | LIV/10/0650  | Applicant sought assistance to obtain access to non-allergenic toiletries – Medical certificate issued by prisoner doctor.   |

| Type of issue                               | Database no. | Matter Description   |
|---|--------------|--|
| Medical Access                              | LIV/10/0605  | Applicant has been denied medical treatment from the specialist doctors he was seeing when housed in PPP.  |
| Civil claim against former partner's estate | LIV/10/0461  | Applicant issued proceedings in which there were allegations of fraudulent property transfers by deceased de facto.  |
| Bankruptcy                                  | LIV/10/0451  | Applicant is currently in prison for fraud. Client is an undischarged bankrupt whose trustees (former employers) are seeking a declaration that the client has an equitable property transferred to her ex-partner whilst declared bankrupt. |
| Criminal Appeal                             | LIV/10/0382  | Applicant sought assistance with bail application and criminal appeal – sexual offence matter.   |
| Civil claim                                 | LIV/10/0359  | Applicant is an ex-prisoner seeking to make a personal injuries claim against MAP.   |
| Application for fixing non-parole period    | BAR/10/0372  | Applicant is a prisoner that transferred from WA to VIC. WA has no fixed non-parole period, and he is seeking to have one set in VIC.  |
| Appeal (Criminal)                           | BAR/09/0176  | Applicant sought assistance appealing conviction and possible claim against former lawyers.  |
| Appeal (Criminal)                           | BAR/09/0456  | Applicant sought assistance with his appeal against a conviction and sentence on two counts of robbery or an application for bail.   |
| Appeal (Criminal)                           | BAR/09/0513  | Applicant sought assistance with the preparation of court books and someone to represent him in a High Court leave to appeal application in relation to a conviction on conspiracy to steal.   |
| Appeal (Criminal)                           | BAR/09/0551  | Applicant originally sought help in relation to a civil action arising out of the circumstances surrounding his conviction for conspiracy to murder his wife. Application subsequently sought help in applying for a retrial.                |
| Appeal (Criminal)                           | BAR/10/0068  | Applicant sentenced to one year imprisonment in Sudan for being involved in a fight, had been diagnosed with a mental illness.   |
| Appeal (Criminal)                           | BAR/10/0079  | Applicant sought assistance in appealing to indefinite sentence - pursuant to s 98 of the <i>Sentencing Act 1995</i> (WA) - for burglary and attempted child stealing.   |
| Cancellation of visa on character grounds   | BAR/09/0141  | Migration matter for an inmate at Margoneet Corrections Centre: Department has cancelled on 501 grounds and client was unrepresented up until the review process.  |
| Cancellation of visa on character grounds   | BAR/09/0275  | Applicant's notice of visa cancelled on the basis that he was convicted for a violent crime.   |
| Cancellation of visa on character grounds   | BAR/09/0280  | -  |

| Type of issue                             | Database no. | Matter Description   |
|---|--------------|--|
| Cancellation of visa on character grounds | BAR/09/0353  | Applicant sought advice in relation to whether he could/would be deported when parole was granted after his visa was cancelled and also advice on how he might remain in the country for his parole period.  |
| Civil Action                              | BAR/09/0067  | Applicant claims that his property (including valuable jewellery) was stolen from a safe at PPP in 2000. The Ombudsman investigated the theft and the Prison eventually indicated that the prisoner would be compensated for the loss. Between that date and now, the prisoner has suffered injury (attempted suicide) and mental health issues. |
| Civil Action                              | BAR/10/0005  | Applicant claimed breach of privacy due to prison supplying photo to media.  |
| Civil Action                              | BAR/10/0050  | Applicant sought assistance defending a civil allegation from former employer.   |
| Adult Parole Board                        | BAR/09/0056  | Applicant sought advice regarding a requirement to do course he didn't know about.   |
| Adult Parole Board                        | BAR/09/0267  | Applicant sought advice regarding the requirement to undertake a sex offender's course.  |
| Criminal matter (ie prisoner on remand)   | BAR/09/0239  | -  |
| Criminal matter (ie prisoner on remand)   | BAR/09/0348  | -  |
| Other                                     | BAR/09/0119  | Applicant sought assistance to appeal the decision by prison to veto in-cell pc and Supreme Court vexatious litigant tag.  |
| Other                                     | BAR/09/0433  | Applicant sought advice regarding possibility of changing prisoner's right to vote.  |



## Appendix 2

### Prisons attended by VLA lawyers and their attendance days

| Prison                                      | VLA office                      | Days in attendance  |
|---|---------------------------------|---|
| Metropolitan Assessment Prison              | Criminal Law Melbourne          | Monday, Wednesday, Friday   |
| Melbourne Remand Centre                     | Criminal Law Melbourne          | Tuesday, Thursday   |
| Port Phillip Prison                         | Criminal Law Melbourne          | Tuesday, Thursday   |
| Dame Phyllis Frost                          | Criminal Law Melbourne          | Wednesday   |
| Thomas Embling                              | Civil Law Melbourne             | Tuesday fortnightly   |
| Ararat Prison                               | Wimmera Regional Office         | fortnightly on Friday   |
| Fulham Prison                               | Morwell Office                  | Tuesday weekly  |
| Loddon Prison                               | Loddon Campaspe Regional Office | fortnightly (currently on a Friday)                               |
| Tarrengower                                 | Loddon Campaspe Regional Office | fortnightly on request<br>can provide telephone advice            |
| Malmsbury                                   | Loddon Campaspe Regional Office | monthly on a Monday or on request<br>can provide telephone advice |
| Barwon Prison                               | Geelong Office                  | Wednesday weekly  |
| Marngoneet                                  | Geelong Office                  | Tuesday weekly  |
| Langi Kal Kal                               | Ballarat Office                 | On request  |
| Dhurringile                                 | Shepparton Office               | Wednesdays fortnightly  |
| Beechworth                                  | Shepparton Office               | Fridays fortnightly   |
| Melbourne Youth Justice Centre at Parkville | Youth Legal Service             | Tuesday and Thursday weekly                                       |

# Appendix 3

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## Corrections Act 1986 - SECT 47

### 47. Prisoners rights

- 1) Every prisoner has the following rights-
  - a) if not ordinarily engaged in outdoor work, the right to be in the open air for at least an hour each day, if the weather permits;
  - b) the right to be provided with food that is adequate to maintain the health and well-being of the prisoner;
  - c) the right to be provided with special dietary food where the Governor is satisfied that such food is necessary for medical reasons or on account of the prisoner's religious beliefs or because the prisoner is a vegetarian;
  - d) the right to be provided with clothing that is suitable for the climate and for any work which the prisoner is required to do and adequate to maintain the health of the prisoner;
  - e) if not serving a sentence of imprisonment, the right to wear suitable clothing owned by the prisoner;
  - f) the right to have access to reasonable medical care and treatment necessary for the preservation of health including, with the approval of the principal medical officer but at the prisoner's own expense, a private registered medical practitioner physiotherapist or chiropractor chosen by the prisoner;
  - g) if intellectually disabled or mentally ill, the right to have reasonable access within the prison or, with the Governor's approval outside a prison to such special care and treatment as the medical officer considers necessary or desirable in the circumstances;
  - h) the right to have access to reasonable dental treatment necessary for the preservation of dental health;
  - i) the right to practise a religion of the prisoner's choice and, if consistent with prison security and good prison management to join with other prisoners in practising that religion and to possess such articles as are necessary for the practice of that religion;
  - j) the right to make complaints concerning prison management to the Minister, the Secretary, the Commissioner, the Governor, an official visitor, the Ombudsman, the Health Services Commissioner and the Human Rights Commissioner;
  - k) the right to receive at least one visit which is to last at least half an hour in each week under section 37;
  - l) the right to be classified under a classification system established in accordance with the regulations as soon as possible after being sentenced and to have that classification reviewed annually;
  - m) subject to sections 47A and 47B, the right to send letters to, and receive letters from, the following people without those letters being opened by prison staff-
    - i) the Minister, the Secretary, the Commissioner or an official visitor;
    - ii) a member of Parliament;
    - iii) a lawyer representing the prisoner, or from whom the prisoner is seeking legal advice;
    - iv) the Ombudsman;
    - v) the Health Services Commissioner;
    - vi) the Human Rights Commissioner;
    - vii) any person authorised to act on behalf of a person listed in subparagraph (iv), (v) or (vi);
  - n) subject to section 47D, the right to send and receive other letters uncensored by prison staff;
  - o) the right to take part in educational programmes in the prison.
- 2) A prisoner's rights under this section are additional to, and do not affect any other rights which a prisoner has under an Act other than this Act or at common law.
- 3) Subsection (1)(m) does not prevent the opening of letters in accordance with [section 28\(3\)](#) of the [Ombudsman Act 1973](#) or [section 86L\(7\)](#) of the [Police Regulation Act 1958](#).

## Appendix 4

### VLA Prisoner Advice Manual

PILCH's entry in the proposed VLA Prison Advice Manual, which is currently subject to review (see Section 7.2.3):

#### **The Public Interest Law Clearing House (Vic) Inc (PILCH)**

PILCH is a Victorian not-for-profit organisation which is committed to furthering the public interest, improving access to justice and protecting human rights. PILCH facilitates the provision of pro bono legal services to individuals and organisations and also undertakes law reform, policy work and legal education aimed at improving access to justice.

#### **PRO BONO LEGAL SERVICES**

PILCH facilitates pro bono (free) legal assistance for individuals who are ineligible for legal aid and cannot afford a lawyer, and community groups with public interest objectives. PILCH does this by assessing applications for legal assistance from the public and referring them to pro bono solicitors and barristers.

Due to limited pro bono resources, PILCH considers issues like human rights, disadvantage, marginalisation, oppression, systemic wrong and social change in making an assessment of referral applications. PILCH is not able to refer all applications for assistance. PILCH does not provide direct legal advice to individuals.

PILCH is assisted by lawyers and barristers from its own member firms, and through the Law Institute of Victoria Legal Assistance Scheme and the Victorian Bar Pro Bono Scheme.

#### **Individual requests for legal assistance**

Individual prisoners can apply directly to PILCH for pro bono legal assistance. Each inquiry will be assessed and determined on an individual basis depending on the legal issue and factual circumstances. As PILCH is an organisation of last resort, individuals must be unable to obtain legal assistance through other services before PILCH is able to refer them.

Family, friends, legal or non-legal services with access to a prisoner can make an inquiry to PILCH on a prisoner's behalf. If a prisoner advocate seeks to refer a prisoner, PILCH will typically require an authority to act from the prisoner.

When making an initial application for assistance, it is important to provide as much detailed information and documents as possible about:

- 1) the legal issue;
- 2) all relevant background information to the legal issue;
- 3) what outcomes the prisoner wants; and,
- 4) details of any legal assistance sought and provided to the prisoner in the past.

If PILCH considers it might be able to assist with a referral, it will send out a formal Application Form. The Application Form includes a release which authorises PILCH to act on the prisoner's behalf.

#### **Pro bono legal assistance for organisations**

PILCH can also make referrals on behalf of organisations seeking legal assistance in relation to prisoner issues.

Referrals for organisations may include:

- 1) broad legal advice about a prisoner issue that can be then used by the organisation to provide direct legal advice to prisoners;
- 2) specific legal assistance for a current client outside the expertise of the organisation (eg. FOI applications, administrative law reviews, defamation etc.); or,
- 3) assistance with drafting policy or law reform submissions.

If PILCH considers it might be able to assist with a referral, it will send out a formal Application Form. The Application Form includes a release which authorises PILCH to act on the prisoner's behalf.

#### **Pro bono legal assistance for organisations**

PILCH can also make referrals on behalf of organisations seeking legal assistance in relation to prisoner issues.

Referrals for organisations may include:

- 4) broad legal advice about a prisoner issue that can be then used by the organisation to provide direct legal advice to prisoners;
- 5) specific legal assistance for a current client outside the expertise of the organisation (eg. FOI applications, administrative law reviews, defamation etc.); or,
- 6) assistance with drafting policy or law reform submissions.

To request legal assistance please contact PILCH on:

Ph: (03) 8636 4444  
Fax: (03) 8636 4455  
PO Box 16013  
Collins St West  
VIC 8007  
[pils@pilch.org.au](mailto:pils@pilch.org.au)



17/461 Bourke St Melbourne VIC 3000  
Tel: (03) 8636 4400 | Fax: (03) 8636 4455  
[www.pilch.org.au](http://www.pilch.org.au)