

The Allen Consulting Group

**Proposed Charter of Human Rights and
Responsibilities (Public Authorities)
Regulations 2009**

Regulatory Impact Statement

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Report to the Department of Justice

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Key findings

This Regulatory Impact Statement (RIS) assesses regulatory options for the operation of the Adult Parole Board, Youth Residential Board, and the Youth Parole Boards (the Boards) in the context of requirements in the Charter of Human Rights and Responsibilities Act 2006 (the Charter).

The Boards are currently exempted from compliance with the Charter by Interim Regulations that declare them not to be ‘public authorities’ for the purposes of the Charter. The Interim Regulations are due to expire on 29 December 2009.

The problem assessed in this RIS is the extent to which compliance with the Charter would require changes to the Boards’ current practices, and the potential negative impacts of these changes. These impacts occur because of the unique role that the Boards have in the criminal justice system.

The Boards make decisions that potentially have an impact on the human rights of offenders as part of the discharge of their functions and duties. In particular, decisions regarding:

- cancellation of parole; and
- the imposition and variation of conditions on parolees

are likely to have some impact on the human rights of offenders.

Specific rights likely to be engaged by these decisions include liberty rights, the right to privacy, the right to freedom of movement, and the right not to be subject to compulsory medical treatment. To comply with the Charter it is likely that the Boards would have to, at a minimum, institute a more formal and structured decision-making process. This would require:

- that the Boards properly consider *all* relevant human rights when making decisions, particularly when making decisions regarding the cancellation of parole or the imposition or variation of conditions on parolees;
- that this consideration include an assessment of the potential impact of any interference with any relevant human right or rights, taking into account any countervailing considerations, such that any limitation can be seen to be demonstrably justifiable under the Charter; and
- some measure of recording of decisions to demonstrate that the above processes have been applied, and that an appropriate balance has been struck in individual cases.

Certain elements of procedural fairness may also be necessary or advisable. Likely changes include:

- written reasons for Board decisions to be given in certain instances, most likely with respect to decisions to cancel parole and any decisions that significantly affect the right to privacy;

- increased opportunity for prisoners or parolees to respond to information (for example, information from victims or family members of victims) that may have an adverse effect on a prisoner or parolee's status or conditions. This is generally done in practice, but more formal measures, such as a gist statement (setting out the principal ground or gist of the adverse information relied upon), may be required; and
- prior warnings to be given, particularly in the event that a Board is considering cancelling parole. This generally occurs in practice, but not in every instance.

It is also likely that the establishment of accessible and predictable criteria for decisions would be required in order to establish that any limitations on human rights are made 'under law'.

Analysis of the practices and procedures necessary to achieve compliance with the Charter suggests that, while assisting in meeting Charter obligations, they will likely inhibit the flexibility of Boards' decision-making, and consequently could potentially undermine the effectiveness of the Boards in meeting their objectives. Chapter 5 will examine in more detail the costs and benefits associated with the changes, focusing on the following areas:

- The case management approach is central to the effectiveness of the Boards, and it is apparent that it fosters a high degree of trust between offenders and the Boards. The case management approach is partly dependent on the ability of the Boards to operate flexibly and to customise their decisions to individual cases. Specific criteria that mandate the balance of considerations in all cases will substantially erode this flexibility.
- Introducing requirements for more stringent decision-making processes is likely to change the nature of Board hearings from relatively open and informal to adversarial and restrictive.
- The tendency of the Boards to grant parole is largely dependent on the Boards' unfettered power to cancel parole, as the Boards have confidence that if parole orders are breached, they will be able to order the necessary cancellation. Fettering the power to cancel parole is therefore likely to inhibit the granting of parole.
- Setting out criteria for imposing conditions, or requiring the Boards to go through a process of considering every relevant human right when making decisions with respect to conditions, would likely restrict the Boards from imposing conditions that they currently impose, particularly those that may not be required to protect the public but are beneficial to the parolee (for example, conditions regarding residence, rehabilitation programs, avoidance of certain areas). This would act to the detriment of parolees and hinder their successful reintegration into the community.

It is probable that these effects would result in fewer paroles being granted in any given period, with potential flow-on costs for the corrections and criminal justice systems.

Given the potential significant impact on the Boards' operations arising from compliance with the Charter, this RIS assesses regulatory options which the Government may implement to address the problem.

Options to address the identified problem

Base case — no regulation

The base case option is a ‘no regulation’ case — effectively that the current exemption under the Interim Regulations is allowed to lapse with no further government intervention or new regulations. In other words, under the base case the current exemption would expire, the Charter of Human Rights would apply to the Parole Boards, but the Boards would not change current practice and so could potentially be found non-compliant with the charter.

Option 1 — Immediate compliance with the Charter via legislative and procedural change

Under this option, a range of procedural and legislative changes would be instituted to try to ensure the Boards’ compliance with the Charter following the lapsing of the Interim Regulations. Changes under this option (set out in more detail in Chapter 4 of this RIS) effectively involve changes to the practices and processes of the Boards (including creating criteria for cancellation and the imposition of conditions, and providing prior warning of cancellation) and implementing a more stringent decision-making process in which all relevant human rights are considered in each individual case, and recording reasons for certain decisions to show compliance with human rights considerations.

Option 2 — Creation of a further four-year exemption, with further consideration of options to better comply with the Charter

Under this option, a further four-year exemption would be provided to the Boards, allowing them to continue to apply their current practices and procedures, while continuing to review their operations and processes in relation to the Charter.

During this four-year period the Boards would take on some additional staff to review current processes and develop processes that better align with the Charter. This period of exemption will also allow the Boards to consider any possible changes in light of the broader review of the Charter that is planned for completion by the end of 2011.

Assessment of options

The impact of each option, compared with the base case, is assessed in this RIS using a multi-criteria analysis. Five criteria are used for this assessment:

1. *Acting compatibly with human rights* — This criterion measures the extent to which, under each option, the Boards will act compatibly with human rights objectives.
2. *Reducing the risk of re-offending through rehabilitation and reintegration* — this criteria reflects the importance of parole in supporting prisoner rehabilitation. Where an option leads to a reduction in the granting of parole, or less effective use of parole, it is assessed negatively against this criterion.
3. *Minimising the risk of litigation* — This criterion reflects the risk to the Boards of litigation on the basis of the Charter. If decisions of the Boards were subject to repeated litigation as a result of the application of the Charter, it would undermine administrative integrity and decrease the confidence of stakeholders in the capacity of the Boards to fulfil their functions. This criterion will assess

the degree to which the options are likely to result in a higher or lower risk of litigation for the Boards, compared with the base case.

4. *Cost* — This criterion reflects the costs of each option, which includes direct costs to the Boards of each option — such as costs of transition or adjustment to a new structure, or new management approach — and indirect costs to the criminal justice system more broadly.
5. *Minimising unintended consequences* – This criterion reflects the extent to which options have any unintended consequences, emerging particularly as a result of attempting to achieve compliance with the Charter in the short term.

The assessment of Option 1 and Option 2 against the criteria is set out in Table ES.1. These scores reflect the performance of each option compared with the base case (no government action). The scores are set on a scale from –5 to +5, with a negative score indicating a poor performance compared with the base case, and a positive score indicating a strong performance compared with the base case.

This assessment shows that Option 1 has an *unweighted* cumulative score of 0. Option 2 compares substantially better than the base case, with a cumulative score of +4. When weighted according to relative importance of the criteria (cost and minimising unintended consequences being weighted lower than the other criteria), Option 1 scores +0.75 and Option 2 scores +1.1.

Table ES.1

ASSESSMENT OF REGULATORY OPTIONS AGAINST CRITERIA (COMPARED WITH THE BASE CASE)

	Weightings	Option 1 Immediate compliance	Option 2 Exemption
Acting compatibly with human rights	0.25	+5	+1 (due to intention to continue to review practice)
Reducing the risk of re-offending through rehabilitation	0.25	–2	0 (no better or worse than the base case)
Minimising the risk of litigation	0.25	+3	+4
Cost	0.15	–3	–1
Minimising unintended consequences	0.1	–3	0 (no better or worse than the base case)
Overall score (not weighted)		0	+4
Overall score (weighted)		+0.75	+1.1

Note: these scores reflect the impact of the regulatory options compared with the base case. The base case is the state in which the current exemption lapses and government does not act in any way to address the problems associated with the lapsing of the exemption (do nothing approach).

Based on the analysis in Chapter 5 of this RIS, the preferred option is Option 2 — a four year exemption for the Boards from compliance with the Charter. This conclusion is made on the basis that Option 2 provides a stronger net benefit compared with both the base case and Option 1, measured against the criteria.

Option 2 provides a degree of improved compatibility with human rights objectives (through the intention to review and develop practices that better align with these objectives), while at the same time preserving the benefits of the current approach of the Boards, which is built on the case management model and is highly flexible and responsive, and which ultimately supports rehabilitation objectives.

Option 1, while providing the strongest compatibility with human rights objectives, would have:

- a negative impact on the rehabilitation objectives for the Boards compared with the base case and Option 1, due to the changes in current Board practices required to comply with the Charter; and
- higher costs in terms of both Board resources and the efficiency of the criminal justice system. These costs are incurred through increased resource needs for each Board to meet the process requirements of the Charter (such as providing written reasons for decisions and applying criteria). Indirect costs result from an expected reduction in the frequency of parole granted, which increases prison costs (and reduces the timeliness of decision-making in the system).

It is therefore recommended, based on options assessed in this RIS, that regulations be made to exempt the Boards from compliance with the Charter until 2013.

Chapter 1

Background and context

1.1 Parole in Victoria

The system of parole in Victoria is administered by three separate boards (the Boards):

- The Adult Parole Board (APB), which has jurisdiction over offenders for whom a court has ordered a prison sentence where a non-parole period applies, as well as young persons transferred to prison from a youth justice centre, and transferred from prison to a youth justice centre.
- The Youth Residential Board (YRB), which has jurisdiction over young people sentenced by a court to a period of detention in a youth residential centre (10-14 years of age).
- The Youth Parole Board (YPB), which has jurisdiction over young people sentenced by a court to a period of detention in a youth justice centre (15-21 years of age), and those transferred by the Adult Parole Board from imprisonment to a youth justice centre.

The principal role of the Boards is to manage the appropriate release of offenders on parole and home detention orders.

The Boards seek to take an active role in preparing offenders for reintegration into the community. In particular, each of the Boards assumes some responsibility for case-managing offenders throughout their entire sentence, conducting regular reviews and ensuring the availability of rehabilitation programs. This approach is partly designed to promote the likelihood of the grant of parole when the offender is eligible.

This approach contrasts with that of other jurisdictions, for example, New Zealand, where the Parole Board plays no role in the preparation of an offender for parole and does not hold a hearing until the offender is eligible for parole.

1.2 Adult Parole Board

The Adult Parole Board (APB) is an independent statutory body established under the Corrections Act 1986 (Vic) (the Corrections Act). As noted above, the key role of the APB is to manage the appropriate release of offenders on parole and home detention orders.

The APB has jurisdiction over the following offender groups:

- offenders for whom a court has ordered a prison sentence where a non-parole period applies; and
- young persons transferred to prison from a youth justice centre, and transferred from prison to a youth justice centre.

The Corrections Act specifies that the APB is to consist of one or more judges of the Supreme Court, one or more judges of the County Court, one or more Magistrates, a full-time member and the Secretary of the Department of Justice. There are also to be part-time community members. Members of the APB are appointed by the Governor-in-Council; there are presently 22 members, and the current chair is the Hon. Justice Simon Paul Whelan, Judge of the Supreme Court.

Key sections of the Corrections Act that pertain to functions and powers of the APB include:

- Section 66(6) enables the APB to regulate its own procedure, subject to regulations.
- Section 69(2) expressly provides that the APB is not bound by the rules of natural justice in exercising its functions.
- Section 71 confers on the APB the power to take evidence.

Functions and duties of the Adult Parole Board

The APB has the following functions and duties under the Corrections Act.

- To grant parole at the expiry of the non-parole period (section 74(1)). Such an order may be made in advance and has the effect (unless revoked) of requiring release of the prisoner at the time stated in the order (section 74(1)).
- To revoke a parole order before the prisoner is released under the parole order (section 74(2)).
- To vary a parole order prior to release (section 74(3)).
- To cancel a parole order (section 77(7)), and for the purpose of deciding as to cancellation if appropriate to arrange for examination by a medical practitioner and require such practitioner to give a report in writing to the APB (section 77(8)).
- To impose terms and conditions upon a parole order, either before or after release on parole, which conditions can include conditions set out in the regulations (section 74(54) and (5));
- To give reasons for revocation or cancellation of a parole order (section 74(8)).
- To make a parole order in respect of a person who is detained in an approved mental health service under a hospital security order but such order does not take effect until that person is discharged as a security patient under the Mental Health Act 1986 (section 74(8A)).
- To consider and give appropriate weight to victim submissions made under section 74A but the APB must not release the submission to the prisoner unless it is essential in the interests of fairness and justice and the victim consents to disclosure in that form (section 74B). In the event that the submission is neither disclosed nor withdrawn upon request under section 74B(2), the APB may reduce the weight which it would otherwise have given to the submission.

- To make directions under section 77(7A) as to whether or not some or all of the period during which a parole order that has been cancelled or deemed to be cancelled was in force is to be regarded as time served in respect of the prison sentence (in this way the Board has power to influence the length of time served under a sentence).
- In relation to a person detained in a prison in Victoria under or pursuant to a law of the Commonwealth, to exercise a power or perform a function which is a power or function which the Attorney-General for the Commonwealth might exercise or perform in relation to that person, if requested to do so by the Attorney-General for the Commonwealth and authorised by the Minister (section 72(7)(b)).
- To give reports as follows:
 - Annually, to the Minister, as regards persons released on parole, placed on home detention curfew, in respect of whom extended supervision orders (or interim orders) are made, persons returned to prison, and other such generic matters (section 72(1)).
 - On request by the Minister, to give a report and recommendation concerning a person who at the time of the report is serving a prison sentence or is the subject of an extended supervision order or interim order, or of an application for such an order (section 72(4));
 - On request by the Attorney-General for the Commonwealth and if authorised by the Minister, to make a report or recommendation concerning a person detained in a prison in Victoria under or pursuant to a law of the Commonwealth (section 72(7)(a)).

(see also as regards the YRB section 441 and as regards the YPB section 452 which impose similar functions and duties).

Under Division 4 of the Corrections Act, the Board has the following powers and functions:

- To make a home detention order if satisfied of the relevant statutory criteria (sections 59, 60, 60B) in which case the prisoner is taken for all purposes to be serving a sentence of imprisonment for the whole term stated in the order except if subject to any specific statutory exception (section 59(3)). In making such an order the APB must have regard to the contents of a home detention assessment report by the Secretary on the prisoner (including investigation which may in some cases be directed by the APB), and can only make such order if that assessment assesses the prisoner as suitable (section 60B(2) and (4) and 60D(1)).
- To attach, vary or revoke special conditions to a home detention order (section 60K).
- To revoke a home detention order, which may in urgent cases be without notice to the prisoner (section 60M). The APB may then issue a warrant authorising the arrest of the offender (section 60M(10)).
- To revoke a home detention order or issue a formal warning, add special conditions or vary any special conditions under section 60R if:

- The Secretary has been satisfied that there has been a serious breach (as defined in section 60P(6)) of a home detention order which is not of a minor nature (section 60P(7)), in which case the Secretary must apply for the revocation or variation of the order (section 60P – notice must be given to the offender unless the breach is of a core condition of the order in section 60J(d) – remaining at an approved residence, or (e) – adhering to a specified activity plan when absent from an approved residence (section 60P(2) and (3));
- The APB has required the offender to appear if it determined to do so under section 60Q;
- In respect of revocation, the APB has been satisfied that “it is proper in the circumstances of the case to do so” (section 60R(2)).
- In cases where revocation took place without notice to the offender, following application of the offender to rehear the revocation, to rescind the revocation (section 60T);
- To rescind the revocation if satisfied as regards an approved residence under section 60U;
- To give leave for disclosure of the home detention assessment report (section 60F(2)), for which purpose the APB must consider the likelihood and the nature or extent of harm that could be caused to any person if the information is disclosed (section 60F(4)).
- To direct examination by a medical practitioner and the provision of a report in writing to the APB (section 60G).

The APB also has the following functions and powers under Division 5 of the Children, Youth and Families Act 2005:

- If it considers it appropriate in the interests of the person and if satisfied that the person is suitable for such detention, to direct that a person under the age of 21 be transferred to a youth justice centre (section 471), in which case the Secretary of the Department of Justice must cause this physically to take place.
- If it considers it appropriate in the interests of the person and if satisfied that the person is suitable for such detention, to direct that a person under the age of 18 be transferred to a youth residential centre (section 472), in which case the Secretary of the Department of Justice must cause this physically to take place.

APB functions under the Serious Sex Offenders Monitoring Act 2005 (SSOMA)

The APB currently administers a number of functions under the Serious Sex Offenders Monitoring Act 2005 (the SSOMA).

The SSOMA enables a court to impose an extended supervision order (ESO) on an offender on completion of his or her custodial sentence for a period of up to 15 years, with court reviews at three year intervals or earlier with the leave of the court or if the court so orders.

While the court imposes ESOs, under section 16 of the SSOMA the APB determines ‘instructions or directions’ applicable to offenders that are subject to an ESO. The provisions of the SSOMA only permit the APB to make directions that the APB considers necessary to achieve the purpose either of ensuring the community is adequately protected by monitoring the offender or to promote the rehabilitation, care and treatment of the offender.

Instructions or directions the APB may issue include matters such as where the offender may reside, times at which the offender must be home, and places or areas that the offender must not visit or may only visit at specified times. The APB is not permitted to make directions that are not necessary to achieve one of the two stated purposes. .

As highlighted in the Statement of Government Intentions 2009, the Government will shortly introduce a new legislative scheme for post-sentence supervision and detention of serious sex offenders. Consequently, this issue will not be considered further in the RIS.

Practical operation and objectives of the APB

In general, the APB considers each case on its merits and takes account of the interests of the community, the rights of the victim, the intentions of the sentencing authority, and the needs of the offender in deciding whether to release an offender on parole or home detention. The principal factor to which the APB has regard is the risk to the community.

There are a number of notable features of the conduct of the APB, particularly as these differ from practices employed in other jurisdictions.

The APB regards part of its function as being the preparation of offenders for reintegration into the community, and to that end meets with offenders at a relatively early stage during their sentence, with regular reviews of the offender’s progress. Long-term offenders and those serving life sentences will be interviewed by the Board at the start of the sentence and at regular intervals (annually). Such interviews will establish a plan for parole including identifying the rehabilitation programs and types of behaviour that are expected if the offender is to be granted parole. This may also include counselling the prisoner in relation to negative behaviours that may be occurring, such as prison disciplinary offences, drug use etc. This may be contrasted with the New Zealand parole system, for example, where the Parole Board plays no role in the preparation of offenders for parole and does not hold a hearing until the offender is eligible for parole.

Associated with its role of preparing prisoners for parole, the Board takes an active role in ensuring that appropriate rehabilitation programs are made available to the prisoner by Corrections, including transfer to a prison that provides such programs. This is achieved through communications between the Board and Corrections and/or other agencies.

The Board also plays a significant role in the management of the offender while on parole. Rather than await a report from Community Correctional Services, the Board undertakes regular reviews of its own initiative. For long-term parolees (murder and sex offenders), such reviews occur on at least a three-monthly basis. This enables the Board to provide encouragement for positive behaviour; to counsel a parolee in relation to behaviour that has the potential to raise the risk of the parolee re-offending; and to provide support in addressing those behaviours (for example communicating with Community Correctional Services regarding treatment programs, etc). The Board requests regular parole progress reports from Community Correctional Services. While these may contain recommendations including to warn, or to cancel parole, the Board will act of its own volition and does not rely upon any formal application by Corrections to cancel parole.

The Victorian approach can be contrasted with other jurisdictions. For example, the New Zealand Parole Board has the power to monitor compliance with conditions of parole, but only if ‘because of the special circumstances of an offender, it is desirable for the Board to do so’ and the form and frequency of such monitoring is limited. Further, the Board cannot recall a prisoner (cancel parole) of its own volition. Rather, the Board must rely upon an application by the Chief Executive of Corrections to make a formal application for recall.

One of the highly valued features of the APB is its capacity and willingness to engage in an ongoing process of assessment of individuals with a view to promoting the likelihood of the grant of parole at some point in the future, and the management of the offender’s progress while on parole.

Decision-making process of the APB

The approach of the Boards could be described as inquisitorial, as the Boards themselves take the primary role in determining issues of fact before them, rather than acting as a referee between opposing sides (an adversarial system). This provides substantial flexibility and allows the Boards to manage significant caseloads in a small amount of time. The benefits of this flexibility (in fostering trust and giving confidence in the ability of Boards to manage parolees) are discussed further in the impact analysis. However, it is worth noting here that many emerging alternative dispute resolution techniques (eg mediation) incorporate inquisitorial elements – the recent expansion of alternative dispute resolution measures in common law jurisdictions, including Victoria, reflects an acknowledgement of the benefits of this approach in suitable circumstances

The APB meets regularly and conducts two types of meetings:

- Paper meetings, where the APB reviews the progress of offenders and parolees based solely on the papers.
- Interviews, where the APB reviews the matter and interviews the prisoner (via video-link with the Prison) or parolee (who attends personally).

The possible outcomes of a meeting in respect of a person on parole include:

- Warning given.
- Cancellation of parole.

- Variation of conditions.
- Report noted (for example, where a breach/cancellation/warning recommendation of the Corrections officer is disagreed with).

The possible outcomes of a meeting with a person currently in prison include:

- Recommendations with respect to programs to be completed before parole is granted, and facilitating those where required.
- Discussion with prisoner regarding their conduct in prison and the need to address such conduct if parole is to be granted.
- Request for further information (e.g. accommodation plan etc) and scheduling of further meeting to consider parole.
- Granting parole.
- Deferring or refusing parole.

Paper meetings involve a review of the paper file, together with any relevant progress reports. The relevant prisoner or parolee is not given any opportunity to participate in the decision-making process. 'Decisions' are made with respect to non-contentious matters such as: calling for a further progress report; scheduling a further review; or scheduling an interview. Contentious decisions are generally not made without meeting with the individual concerned.

Interview meetings generally involve:

- A review of the paper file and any relevant reports, and a discussion between APB members regarding the offender, in the offender's absence.
- Sometimes the APB will meet with the relevant Community Correctional Services officer to obtain further information or clarification of matters in the report. This generally occurs in the absence of, and prior to interviewing, the offender.
- The Board then interviews the offender. Any concerns the Board has are discussed with the offender. A decision is then made, and the offender is orally informed of that decision and the reasons for it.

In addition to the procedures set out above, the following are relevant considerations:

- An offender, or a person acting on the offender's behalf, may request a review of an APB decision.
- Special conditions of parole may include residence, drug or alcohol testing, rehabilitative programs, non-contact orders, avoidance of certain geographical areas, and treatment and assessment.
- The power to cancel parole is not circumscribed under the Corrections Act 1986.
- There are many cases of notified breaches of the conditions of parole that do not result in cancellation.

- In determining whether or not time spent on parole prior to cancellation counts towards serving the sentence the APB takes into account the nature of the breach of parole conditions and the offender's performance during the period of supervision.

Information used by the APB

Information used by the APB in making its decisions includes:

- The offender's criminal history.
- The Judge's sentencing notes in respect of the offence for which the offender is serving the prison sentence.
- Notes of interviews with the offender. In the case of a formal warning given by the Board there will ordinarily be a transcript of the interview, at least that part of the interview relating to the warning.
- Reports from Corrections or Community Correctional Services, including:
 - Parole assessment reports (for persons eligible for parole).
 - Parole progress reports (for persons on parole).
 - Breach reports (in respect of persons on parole).

The reports prepared by Corrections are ordinarily produced at the request of the APB and cover matters including:

- The offender's background and social history.
- Information relating to the offending.
- In the case of parole assessment reports, information relating to the offender's progress in prison including:
 - Rehabilitation, treatment and education programs undertaken.
 - Conduct of the offender in prison, including disciplinary offences (particularly those relating to violent behaviour or drug use).
 - A parole plan, addressing issues such as accommodation arrangements, employment, treatment programs (e.g. drug and alcohol, sex offender treatment programs etc).
 - A recommendation with respect to release on parole.
- In the case of persons already on parole, information relating to the offender's progress including:
 - Compliance with parole conditions.
 - General progress, such as gaining employment and development of family and social networks.
 - Any concerns relating to the offender's progress and risk of re-offending, such as association with other known criminals, suspected drug or alcohol use, or any breakdown or difficulties in family or social support networks.

- Any recommendations as to change of conditions.
- In the case of poor progress or non-compliance with conditions, a recommendation with respect to warning (whether by Community Correctional Services Centre Manager or the Board) or cancellation of parole.
- The reports are not disclosed to the offender.
- In addition to the above, the APB’s file may contain a range of other material, including:
 - Victim submissions which, if requested by the victim, are not disclosed to the offender.
 - Correspondence from other affected persons.

1.3 Youth Residential Board and Youth Parole Board

The Youth Residential Board (YRB) was established in 1991 with the enactment of the Children and Young Persons Act 1989 and is continued under section 431 of the Children, Youth and Families Act 2005 (Vic) (the Children, Youth and Families Act). The Youth Parole Board (YPB) was originally established in 1961 under the Social Welfare Act of 1960 and is continued by the section 442 Children, Youth and Families Act.

The Boards carry out the following general functions:

- Exercising jurisdiction over all young people sentenced by a court to a period of detention in a youth residential centre (10-14 years of age) or in a youth justice centre (15-21 years of age) and those transferred by the Adult Parole Board from imprisonment to a youth justice centre.
- Making decisions concerning eligibility for and release on parole of young people sentenced to detention.
- Making decisions concerning the transfer of young people between a youth residential centre and a youth justice centre and between a youth justice centre and prison.

The roles of the YRB and YPB must be seen in the context of the Victorian Youth Justice system as a whole. That system is:

underpinned by a commitment to the diversion of young offenders from intensive penalties whenever appropriate. Incarceration is the most serious of criminal sanctions and is used as a last resort for young people considered unsuitable for supervision in the community.¹

When a young person is sentenced to custody, legislation and policy guide the Youth Justice program to provide an environment that encourages positive development with a focus on successful community reintegration. Successful reintegration into the community involves assisting each young person to engage in constructive activities and to develop positive social networks and relationships.

¹ Youth Parole Board, Context and role within the Youth Justice system, June 2008 at p 1.

The Youth Justice program provides case management services for statutory clients on Youth Justice community-based and custodial court orders, as well as supervision of young people on remand.

The YRB and YPB operate within a system that includes, as its principal objectives:

- To maximise appropriate diversion of young people from court.
- To minimise progression of young people into youth justice and adult correctional systems.
- To minimise the likelihood of re-offending and maximise rehabilitation.

In the Youth Justice system a balanced approach is taken when considering the rehabilitation and personal development of the young offender, along with punishment, restorative justice principles and the protection of the community. There is also a strong commitment to the diversion of young offenders from intensive penalties whenever appropriate.

These principles and objectives flow through to the parole system, and consequently the approach of the YRB/YPB is primarily welfare and rehabilitation focused.

Functions and duties of the Youth Residential Board and Youth Parole Board

The powers of the YRB and the YPB (under sections 454, 456, 458 and 460 of the Children Youth and Families Act) are in many respects similar to those of the APB, in that they include to:

- direct that a person is released on parole on prescribed conditions, subject to any determination of the YRB or YPB;
- revoke such an order;
- amend or vary the conditions to which a parole order is subject;
- cancel a parole order; and
- revoke the cancellation of a parole order.

However these powers may be limited by any non-parole period ordered by a court, or, if a sentence of imprisonment in excess of 12 months was imposed and no non-parole period was ordered (section 470).

The YRB may direct the transfer of a person from a youth residential centre:

- to a youth justice centre if it considers it appropriate to do so having regard to the antecedents and behaviour, or age and maturity, of the person (section 464), but only in exceptional circumstances in respect of a child under the age of 14 (section 465); or
- to a youth justice centre or a prison if the person is, before the end of their sentence, sentenced to a period of detention in either place (section 474).

The YRB also has a power to direct that an unexpired period of detention in a youth residential centre be served in a youth justice centre where that person was sentenced to a period of detention in a youth residential centre whilst already serving a sentence in a youth justice centre under section 476.

The YPB may direct the transfer of a person aged 16 years or more from a youth justice centre to a prison but only if:

- it has had regard to the antecedents, behaviour, age and maturity of the person, it has taken into account a report from the Secretary, and it is satisfied that the person has engaged in conduct that threatens the good order and safe operation of the youth justice centre and cannot be properly controlled in a youth justice centre (section 467(1) – (3)); or
- the person applies for a transfer and, having considered a report of the Secretary and having regard to the antecedents and behaviour of the person the YPB considers it appropriate (section 468); or
- the person was previously transferred from prison, and the YPB considers it appropriate having regard to the antecedents, behaviour, age and maturity of the person and the unexpired portion of the person’s sentence (section 473); or
- the person is, before the end of their sentence, sentenced to a term of imprisonment in a prison (section 475).

The YPB may direct the transfer of a person under the age of 18 from a youth justice centre to a youth residential centre if it considers it appropriate in the interests of the person (section 470). The YPB may direct that a person aged 18 or more be transferred from a youth justice centre to a prison if it considers this appropriate having regard to the antecedents and behaviour of the person (section 467(4)).

The YPB also has a power to direct that an unexpired period of detention in a youth justice centre be served in a prison where that person was sentenced to a period of detention in a youth justice centre whilst already serving a sentence in a prison under section 477.

Like the APB, The YRB/YRB are not bound by rules of natural justice in exercising its functions (sections 438 and 449), and may take evidence (section 439).

Practical operation and objectives of the YRB/YPB

Within the Youth Justice system, minimum periods of detention are not imposed at sentencing; there is no parole eligibility date. The YRB/YPB have discretion to parole any young person irrespective of the length of sentence, and at any time during the sentence. However, the Boards have a general policy to consider granting parole only to those sentenced to 6 months or longer. Young persons with sentences of less than 6 months are usually deemed to be ‘not appropriate for parole’ and are therefore eligible to be granted remissions of up to one-third of their sentence. The YRB/YPB may also decide that a young person with a sentence of more than 6 months is also ‘not appropriate for parole’, in which case he or she will be eligible for remission.

The Parole process is as follows:

- *Preview stage:* Young people who are sentenced to a custodial order are generally reviewed within the first 2 weeks of receiving their sentence. This occurs on the papers, without the young person being present or being given an opportunity to be heard. At this stage, the Board will determine if the young person will be deemed eligible for parole. If the young person is deemed eligible for parole, a review date will be set which will guide the parole eligibility date. If the person is deemed ‘not appropriate for parole’, they will then be considered for remission of up to one-third of their sentence; this is almost always granted.
- *Review date:* The Board will consider the progress and plans of a young person and determine whether it is appropriate to move to the next step of requesting a parole plan. These decisions are also made on the papers, without the young person being present or being given an opportunity to be heard. Where the young person’s behaviour pending parole is placing his/her parole in jeopardy, the Board will usually meet with the young person and emphasise the requirements for parole to be granted.
- *Parole Plan:* The parole plan is prepared by the Department’s regional parole officers in consultation with the Youth Justice Centre or Youth Residential Centre staff and others. It outlines the arrangements to be implemented for the parolee, and can recommend special conditions.
- *Decision to parole:* The YRB/YPB meets to consider the parole plan and consider whether to grant or defer parole. They will generally meet with the young person’s case officer(s)/parole officer(s), the young person and their family, where appropriate. Reasons are generally given for a decision to defer parole, unless it would be in the best interests of the young person not to do so. An example of when a young person is not provided with proper reasons is when a family member has told the young person they are willing to have them back, but have told the Board they are not. In this case, the case officer or parole officer will work to find other suitable accommodation – the failure to provide full reasons would not disadvantage the young person.
- *Progress reviews:* The Board receives regular reports from the Parole Officer as to progress on parole. The Board meets to discuss the progress reports and may determine to:
 - Cancel parole (generally following a warning, but not necessarily so).
 - Set a further review date.
 - Meet with the young person (and their Parole officer) to discuss the review.
 - Send a letter to the parolee to remind him/her of his/her obligations.
 - Warn of the potential to cancel parole (normally done in person).
 - Request further reports or enquiries as to possible additional services to be provided to the parolee.

In addition to the warning processes of the Board, the regional offices of the Department have a system of warnings.

Where parole is cancelled, if there is perceived to be a need to do so, or if the young person so requests, the YRB/YPB will meet with the young person. If not, the YRB/YPB will call for a new progress report. Cancellation of parole does not necessarily mean the young person will serve the rest of their sentence in custody. The YRB/YPB and the case officers/parole officers will continue to work towards another period of parole. The YPB/YRB also always considers crediting the parolee with time served for any successful period of parole.

The guidelines state that, in making decisions with respect to parole, the YRB/YPB consider a range of factors including:

- Interests of/risk to the community.
- Interests of the young person.
- Age of the young person.
- Capacity for parole to assist the young person's rehabilitation.
- Intentions and comments of the sentencing authority.
- The nature and circumstances of the offences.
- Young person's criminal history.
- Previous community based dispositions and compliance.
- Family and community support networks.
- Release plans.
- Reports, assessments and recommendations made by a variety of professionals including medical practitioners, psychologists, psychiatrists, custodial staff, parole officers and support agencies.
- Submissions made by the young person, the young person's family, friends and potential employers.

However:

- As a general rule, parole is granted to a young person when considered for his/her first parole unless the young person:
 - has refused to participate in certain rehabilitation programs;
 - has no suitable accommodation available; and
 - has outstanding matters for serious offences and bail has not been granted.

It should be noted that the APB also has the capacity to send an offender aged under 21 from an adult prison to a Youth Justice Centre. Whenever a transfer takes place between the various types of institutions, responsibility for parole switches to the appropriate board.

1.4 The Victorian Human Rights Charter

The Charter of Human Rights and Responsibilities Act 2006 (the Charter) was passed in July 2006 and came into full effect on 1 January 2008.

The Charter sets out twenty human rights that the Victorian Parliament seeks to protect and promote, reflecting the four basic principles of:

- freedom;
- respect;
- equality; and
- dignity.

Per section 38 of the Charter, all Victorian public authorities are obliged to act in a way that is compatible with human rights. A public authority that acts incompatibly with a human right, or fails to take a relevant human right into proper consideration, will be acting unlawfully unless, as a result of a statutory provision, it could not reasonably have acted differently.

Box 1.1

HUMAN RIGHTS IN THE VICTORIAN CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES

The human rights in the Charter are based on the four principles of the rule of law, human dignity, equality and freedom. The following rights are recognised in the Charter:

- 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 from forced work (s.11)
- Freedom of movement (s.12)
- Privacy and reputation (s.13)
- Freedom of thought, conscience, religion and belief (s.14)
- Freedom of expression (s.15)
- 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)
- Right to liberty and security of person (s.21)
- Humane treatment when deprived of liberty (s.22)
- Children in the criminal process (s.23)
- Fair hearing (s.24)
- Rights in criminal proceedings (s.25)
- Right not to be tried or punished more than once (s.26)
- Retrospective criminal laws (s.27)

Source: Charter of Human Rights and Responsibilities Act 2006 (Vic)

1.5 The role of the RIS

The proposed Regulations are subordinate legislation for the purposes of the *Subordinate Legislation Act 1994*, and as such, before they can be made a Regulatory Impact Statement (RIS) must be prepared.

The *Subordinate Legislation Act 1994* requires a RIS to consider the fundamental rationale for a regulatory proposal relative to the base case or absence of any regulatory framework. At the same time — and to provide readers with an easy to understand comparison — the RIS will also consider the impact of the proposed Regulations, relative to those currently in place.

The RIS is required to consider the problem to be addressed, the feasible options to address the problem, and to assess the economic and social costs and benefits associated with each feasible option. This ensures that due consideration is given to the regulatory proposal, regulation is only implemented where there is a justified need, only the most efficient forms of regulation are adopted, and there is an adequate level of public consultation in the development of regulatory measures.

Chapter 2

Nature and extent of the problem

In general, the problem that the proposed regulations are designed to address is that achieving immediate compliance with the requirements of the Charter will undermine the effective operation of the Boards.

Before the Charter came into full effect at the start of 2008, the Boards were granted an exemption from the operation of the Charter. This initial exemption expired on 31 December 2008, and was then extended to 29 December 2009.

The exemption was granted in order to allow a review of the application of the Charter to the Boards. The complexity of the issues meant that the review could not be completed before the end of the first exemption. This RIS is considering options for government when the current exemption expires at the end of 2009.

2.6 Requirements of section 38 and section 7 of the Charter

Section 38 of the Charter imposes an obligation on all ‘public authorities’ to conduct themselves with respect for human rights. Specifically, s 38 states:

Section 38(1): [I]t is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

Section 38(2): Subsection (1) does not apply if, as a result of a Victorian statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision.

Section 7 of the Charter describes what human rights are and how they may be limited. Section 7(2) of the Charter provides that:

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

At present, the existing Interim Regulations exclude the application of these sections to the Boards, as they are declared not to be ‘public authorities’ for the purposes of the Charter. The Charter expressly anticipates that there may be a need for some entities to be declared by regulations not to be a public authority (s 4(1)(k)).

Legal advice obtained by the Government suggests that the Boards may be subject to an unacceptable risk of being found not to comply with the obligations that public authorities have under the Charter, if the interim exemptions were not in place. The legal issues that arise in conducting these analyses are highly complex, and it is difficult to be definitive about the nature and extent of any risks in the absence of authoritative legal precedent. However, the following general positions seem likely to hold:

- First, the Boards would qualify as ‘public authorities’ for the purposes of the Charter (‘public authority’ is defined in section 4 of the Charter) in the absence of the interim exemptions, and would therefore be subject to the requirements of the Charter.
- Second, the s 38(1) obligation requires that public authorities give ‘proper consideration’ to any relevant human rights when making decisions. While consideration of these rights generally occurs in practice, it seems likely that the obligation requires more than the current approach applied by the Boards, which is deliberately flexible and informal. In conjunction with section 7(2), which requires that any decisions that limit human rights be ‘demonstrably justifiable’ and balanced against countervailing considerations, this obligation to give proper consideration to human rights requires a relatively formalised decision-making procedure that clearly assesses the likelihood and nature of any interference with all relevant human rights, and provides a structured assessment for determining whether any resulting limitation is justified.
- Third, the operation of section 69(2) of the Corrections Act and sections 438(2) and 449(2) of the Children, Youth and Families Act, which provide that the Boards are not bound by the rules of natural justice, would not exclude the requirements imposed by some rights under the Charter to observe certain elements of procedural fairness inherent in some rights (for example, section 21 which requires procedural fairness be afforded in cases where a person is detained). Consequently, in the absence of any exemption, the Boards would be required to introduce certain elements of procedural fairness to ensure the relative unassailability of some of their decisions.
- Finally, there is an issue with the fact that the Boards do not presently operate transparently (especially as to their decision-making in individual cases) or in accordance with any particular criteria. This gives rise to issues as to potential arbitrariness, and particularly to questions about whether any limitations on human rights applied by the Boards are ‘under law’ as required by section 7(2) and certain specific rights (for example, section 21(3), the right to liberty).

The effect of these considerations is that, if the interim exemptions expired without replacement, the Boards would be compelled to modify their existing practices in order to comply with the requirements of the Charter to avoid the risk of being found to have acted unlawfully or of having their decisions challenged. The nature of those changes, and the general effect on the Boards’ operations, is discussed in more detail below.

2.7 Interaction between the Boards’ operations and the Charter

The Boards make decisions that potentially have an impact on the human rights of offenders as part of the discharge of their functions and duties. In particular, decisions that are likely to have some impact on the human rights of offenders include:

- cancellation of parole; and
- the imposition and variation of conditions on parolees,

Specific rights likely to be engaged by these decisions include:

- **Liberty** rights, as discussed in more detail in Box 2.2 below. The key subsections of the Charter liberty right (section 21) are:
 - (2) A person must not be subject to arbitrary arrest or detention
 - (3) A person must not be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law.
 - (4) A person who is arrested or detained must be informed at the time of arrest or detention of the reason for the arrest or detention and must be promptly informed about any proceedings to be brought against him or her.

These requirements may be particularly pertinent with respect to decisions to cancel parole. Whilst it is arguable that the cancellation of a parole order is not a deprivation of liberty because the detention of a prisoner whose parole is revoked is pursuant to the original sentence of the sentencing court, there is a risk that the detention in these circumstances may nonetheless be regarded by a court as a ‘fresh’ period of detention that requires attention to these requirements.

- **Privacy** — Given that parole orders cover a range of limitations on the ways in which offenders may conduct themselves, including restrictions on contact with named individuals, accommodation requirements, and limitations on movement in certain areas, it is likely that such orders will amount to a *prima facie* limitation on the right to privacy.
- **Freedom of movement** — In many cases, parole orders will *prima facie* interfere with offenders’ freedom of movement under section 12 of the Charter.
- **Compulsory medical treatment** — Any circumstances in which treatment is imposed on an individual without his or her full, free and informed consent comprises a *prima facie* interference with a human right under section 10 of the Charter.
- **Children in the criminal justice process** — Section 15 of the Charter requires that families be protected by society and by the State, and that every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child. Section 23 of the Charter requires that a child who has been convicted of an offence must be treated in a way that is appropriate for his or her age.

The full set of liberty rights in the Charter is set out in Box 2.2 below.

Box 2.2

**RIGHT TO LIBERTY AND SECURITY OF PERSON – CHARTER OF HUMAN RIGHTS
AND RESPONSIBILITIES**

- 21 Right to liberty and security of person
- (1) Every person has the right to liberty and security.
 - (2) A person must not be subject to arbitrary arrest or detention.
 - (3) A person must not be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law.
 - (4) A person who is arrested or detained must be informed at the time of arrest or detention of the reason for the arrest or detention and must be promptly informed about any proceedings to be brought against him or her.
 - (5) A person who is arrested or detained on a criminal charge —
 - (a) must be promptly brought before a court; and
 - (b) has the right to be brought to trial without unreasonable delay; and
 - (c) must be released if paragraph (a) or (b) is not complied with
 - (6) A person awaiting trial must be automatically detained in custody, but his or her release may be subject to guarantee to appear —
 - (a) for trial; and
 - (b) at any other stage of the judicial proceeding; and
 - (c) if appropriate, for execution of judgement.
 - (7) Any person deprived of liberty by arrest or detention is entitled to apply to a court for a declaration or order regarding the lawfulness of his or her detention, and the court must:
 - (a) make a decision without delay; and
 - (b) order the release of the person if it finds that the detention is unlawful.
 - (8) A person must not be imprisoned only because of his or her inability to perform a contractual obligation.

Source: Charter of Human Rights and Responsibilities Act 2006 (Victoria).

2.8 Improving compliance with the Charter

As noted above, the Boards have been exempted from the operation of the Charter since it came into effect in 2006. In considering the impact of the Charter on the Boards, the focus of efforts to date has been in assessing what would be required of the Boards to comply with the Charter. To this end, detailed legal advice has been sought on several occasions to clarify the nature and extent of the Charter's potential application to the Boards. An inter-departmental steering committee was established to oversee the preparation of the advice, in consultation with the Boards.

It is noted that there is a view held by at least one stakeholder that achieving compliance with the Charter should not be particularly onerous for the Boards, as there is already a high degree of compatibility. However, the legal issues that emerge in respect of the application of the Charter to the Boards are complex, and it is difficult to say with certainty exactly what would be required of the Boards in order for them to meet their obligations under the Charter. This RIS demonstrates that the nature and extent of the changes that are still required to achieve compliance would not be insignificant and would have profound impacts on the operation of the Boards. In addition, other stakeholders have expressed concern that compliance would lead to a more conservative approach being taken by the Boards, to the detriment of rehabilitation outcomes.

Implementing the changes necessary to achieve compliance with the Charter would not merely be a formalisation of existing Board practices, nor a simple step-change.

At a minimum, it is likely that the Boards would have to institute a more formal and structured decision-making process. This would require:

- that the Boards properly consider *all* relevant human rights when making decisions, particularly when making decisions regarding the cancellation of parole or the imposition or variation of conditions on parolees;
- that this consideration include an assessment of the potential impact of any interference with any relevant human right or rights, taking into account any countervailing considerations, such that any limitation can be seen to be demonstrably justifiable under the Charter; and
- some measure of recording of decisions to demonstrate that the above processes have been applied, and that an appropriate balance has been struck in individual cases.

Certain elements of procedural fairness may also be necessary or advisable. Likely changes include:

- written reasons for Board decisions to be given in certain instances, most likely with respect to decisions to cancel parole and any decisions that significantly affect the right to privacy;
- increased opportunity for prisoners or parolees to respond to information (for example, information from victims or family members of victims) that may have an adverse effect on a prisoner or parolee's status or conditions. This is generally done in practice, but more formal measures, such as a gist statement (setting out the principal ground or gist of the adverse information relied upon), may be required; and
- prior warnings to be given, particularly in the event that a Board is considering cancelling parole. This generally occurs in practice, but not in every instance. There may also be some requirement to afford a prisoner or parolee the opportunity to be heard prior to cancellation depending on the factual situation.

It is also likely that the establishment of accessible and predictable criteria for decisions would be required in order to establish that any limitations on human rights are made 'under law'.² (Note that in the case of the YRB/YPB, the current guidelines are not mandatory, and so would arguably not meet the requirements of predictability.)

Accessible and predictable criteria could conceivably either be implemented completely in legislation, or with some principles and criteria set in legislation and supported by guidelines (as is the case in other areas). Even if such criteria were implemented in legislation supported by guidelines, they would nevertheless have a negative impact on the Boards' flexibility (as discussed below).

² The Sunday Times v United Kingdom 2 EHRR 245 at 271. The court considered the meaning of 'prescribed by law' (similar to the Charter definition of 'under law', and determined that there should be an adequate degree of accessibility and predictability in order for a limitation on rights to be said to have been 'prescribed by law'.

2.9 General effect on the operation of the Boards

Chapter 1 sets out the key aspects of practical operation of the Boards, highlighting that an important feature is the flexibility and interactivity of the Boards' processes, which are designed to build trust and facilitate the effective reintegration of offenders back into the community.

Analysis of the practices and procedures necessary to achieve compliance with the Charter suggests that, while assisting in meeting Charter obligations, they will likely inhibit the flexibility of the Boards' decision-making, and consequently could potentially undermine the effectiveness of the Boards in meeting their objectives. Chapter 5 will examine in more detail the costs and benefits associated with the changes, focusing on the following areas:

- The flexible case management approach currently employed by the Boards is central to their effectiveness, and it is apparent that it fosters a high degree of trust between the Boards and offenders. The case management approach is substantially dependent on the ability of the Boards to operate flexibly and to customise their decisions to individual cases. Specific criteria that mandate the balance of considerations in all cases will substantially erode this flexibility.
- Introducing requirements for more stringent decision-making processes is likely to change the nature of Board hearings from relatively open and informal to adversarial and restrictive. The Boards would be required to comply with certain requirements of procedural fairness (for example, providing further details to offenders, and allowing the right to be heard) that would formalise Board proceedings. This would be a substantial 'cultural' shift for the Boards, which presently operate in an open, informal manner that builds rapport and confidence. In addition, it is likely that the Boards would require more detailed and fulsome evidence be provided by support services (parole officers, mental health professionals, etc.) imposing a substantial administrative burden on these services.
- In 2008-09, the APB granted parole in 1,656 cases and refused parole in just 190 cases. This tendency to grant parole is largely dependent on the Boards' unfettered power to cancel parole, as the Boards have confidence that if parole orders are breached, they will be able to order the necessary cancellation. Fettering the power to cancel parole is therefore likely to inhibit the granting of parole. It is not possible to easily compare the performance of Victoria's parole system to that of other Australian jurisdictions given differences in rates of incarceration, prisoner populations, and parole systems and practices. Instead, this report compares aspects of Victoria's system to that operating in New Zealand because it seemed to offer a better basis for meaningful comparison, as explained in Chapter 5.
- Setting out criteria for imposing conditions, or requiring the Boards to go through a process of considering every relevant human right when making decisions with respect to conditions, would likely restrict the Boards from imposing conditions that it currently imposes, particularly those that may not be required to protect the public but are beneficial to the parolee (for example, conditions regarding residence, rehabilitation programs, avoidance of certain areas). This would act to the detriment of parolees and hinder their successful reintegration into the community.

It is probable that these effects would result in fewer paroles being granted in any given period. This would then have flow-on costs for the corrections and criminal justice systems, which would carry the burden of larger numbers of prisoners being incarcerated at any one time, and of fewer parolees being effectively reintegrated into the community.

In addition, legal advice suggests that a ‘side effect’ of introducing specific criteria or standard parole conditions in relation to Board decisions would be to clarify Parliament’s intention as to the basis of Board decisions. Whilst this would improve compliance with the Charter, it could also increase the risk of challenges to the Boards’ decisions on the basis of failure to have regard to any mandatory relevant considerations.

There would likely also be direct resource implications, including, for example, an increased burden on court reporting services that would be required to transcribe Board proceedings.

In counterpoint, it should be noted that parole also carries some risks and costs. Some of these are difficult to measure (for example, there may be a community perception of injustice that parole is granted in certain cases) while others cannot be divorced from the performance of the corrections system as a whole (for example, crimes committed by parolees are not necessarily evidence of a net ‘cost’ if managed release of prisoners – parole – leads to lower recidivism overall, as discussed in the impact analysis below). In terms of the financial cost to government, the direct cost of administering the APB in 2007-08 was \$1.9 million; the YRB/YPB cost \$417,200.

2.10 Problems associated with immediate compliance with the Charter

Should the exemptions under the Interim Regulations expire without replacement, the Boards will be immediately subject to the requirements of the Charter, and vulnerable to the risk of a finding of unlawfulness under s 38(1) of the Charter. This will require the institution of a range of measures designed to mitigate this risk.

Due to the uncertain application of the Charter to the Boards in the absence of guiding precedent, it is difficult to know exactly which changes would be required to completely obviate, or most effectively mitigate, the risk of a finding of unlawfulness.

In addition, the changes outlined above would substantially alter the existing practice and procedures of the Boards. While it is conceivable that such changes could be implemented over time, an abrupt shift to a new style of management would likely have a range of adverse consequences, including undermining the trust and confidence of participants and stakeholders (for example, existing prisoners and parolees who are accustomed to the present case-management style of the Boards) and administrative waste incurred as a result of ‘over-treating’ the perceived risk of litigation.

Finally, the Government is due to review the operation of the Charter by the end of 2011. While this review has not been commenced, it is expected that it will take account of the practical effect of the Charter on the public sector, and make findings about the degree and success of the implementation of human rights practice. Should the review recommend any changes to the content or application of the Charter, it is possible that any changes implemented by the Boards will be rendered inconsistent or redundant. In addition, the findings of the review could be valuable in formulating new modes of practice for the Boards.

Chapter 3

Regulatory objectives

An important goal of a RIS is to identify clearly the objective of the proposed regulations. The RIS process requires looking beyond the stated objective to identify the end to be achieved by the regulations (as this relates to the problem being addressed). There are three regulatory objectives for government in addressing the problems set out in this RIS:

- to protect and promote human rights;
- to ensure the effective rehabilitation and reintegration of offenders in the criminal justice system; and
- to ensure the effective and efficient operation of the criminal justice system.

Chapter 4

Options to achieve the Government's objectives

4.11 Base case — no regulation

The base case option is a 'no regulation' case — effectively that the current exemption under the Interim Regulations is allowed to lapse with no further government intervention or new regulations. In other words, under the base case the current exemption would expire, the Charter of Human Rights would apply to the Parole Boards, but the Boards would not change current practice and so could potentially be found non-compliant with the charter.

This approach is consistent with Victorian Government requirements for a RIS for sun-setting or lapsing regulations — that the base case be a no regulation position. In this case the Boards would maintain their current operations, exposing them to a risk of being found to have acted incompatibly with the Charter (in those ways described in Chapter 2 of this RIS).

4.12 Option 1 — Immediate compliance with the Charter via legislative and procedural change

Under this option, a range of procedural and legislative changes would be instituted to try to ensure the Boards' compliance with the Charter following the lapsing of the Interim Regulations. As indicated above, the exact changes required, and the precise nature of those changes, are difficult to assess; however, legal advice to the Government has suggested that the following changes would substantially improve the Boards' standing with respect to compliance with the Charter:

- implementing a more stringent decision-making process in which all relevant human rights are considered in each individual case, reasons for certain decisions are recorded to show compliance with human rights considerations, and where parole officers and others provide detailed evidence on compliance with parole conditions;
- creating specific criteria to guide Board decisions regarding cancellation of parole and the imposition or variation of conditions;
- giving prior warning when the Board is considering cancelling parole;
- conducting an oral hearing with the parolee in respect of some decisions involving the cancellation of parole where factual issues arise;
- implementing a review process of parole cancellations, where requested by the prisoner;
- increasing opportunities for prisoners or parolees to be provided with and respond to information that may have an adverse effect on their status or conditions; and
- providing written reasons for the cancellation of parole and limitations on the right to privacy.

4.13 Option 2 — Creation of a further four-year exemption, with further consideration of options to better comply with the Charter

Under this option, a further four-year exemption would be provided to the Boards, allowing them to continue to apply their current practices and procedures, while continuing to review their operations and processes in relation to the Charter.

During this four-year period the Boards would take on some additional staff (one VPSG6 assigned to the APB, and one VPSG6 assigned to the YRB/YPB) to review current processes and, where possible, develop new or modified processes that better align with the Charter. The overall length of the engagement of the staff members will depend on the outcomes of the review that they initiate, but it is likely that they will be required for around 12-24 months.

This review will take into account the objectives of Government as articulated in this RIS, as well as financial and logistical constraints on the Boards. Having a dedicated staff member attached to each Board will assist with what will be a complex and sensitive process of incremental change; in many cases, it may be necessary to apply an approach of trial and error, making continuous assessments of the impact of introduced changes over time.

Consequently, it is not possible to assert definitively what changes will be made to Board practices over the four-year exemption period – to do so would pre-empt the review and implementation work to be undertaken by the new staff. It is also not possible to state that the result of the reviews will be full compliance with the Charter; for the reasons identified in the impact analysis of this RIS, it is possible that some changes may be found to unduly interfere with the effective operation of the Boards (for example, by inhibiting flexibility).

The Boards will monitor progress over the exemption period and provide updates to the Government; in addition, a general review of outcomes will be provided at the end of the period. This review will also make recommendations for opportunities for further reforms. Importantly, providing the additional four-year exemption will allow the findings and recommendations in this review to be informed by the broader review of the Charter that is planned for completion in 2011.

Chapter 5

Impact analysis

This chapter discusses the costs and benefits of the different options to achieve the Government's objectives.

The costs and benefits of each of the options to achieve the Government's objectives (enumerated in Chapter 3) are set out below. The costs and benefits are estimated relative to the 'base case'. As described in Chapter 4, the base case for this RIS is a lapsing of the current exemption without any government action (consistent with the requirements in the Victorian Guide to Regulation). This base case provides a 'neutral' position from which to compare the relative costs and benefits of Option 1 and Option 2.

5.14 Criteria to assess options

Multi-criteria analysis is a tool for assessing various options. It is most suitable where there are difficulties evaluating benefits in a quantitative sense. While it is a second-best measure, it provides a transparent mechanism for comparing different approaches against clearly defined criteria.

Multi-criteria analysis is the approach taken for the impact analysis in this RIS because it provides the best means of comparing a range of qualitative and quantitative impacts. As it is not possible to quantify many of the impacts associated with the options in this RIS, a set of decision criteria is also outlined, which allows for comparison of the options, relative to the base case.

The criteria used to assess the options in this RIS are set out below. They reflect key aspects of a cost-benefit framework, as well as the objectives of the proposed regulations (which ensures that the options are being tested in regards to how they address the problem, as set out in Chapter 2 of this RIS).

Criterion 1 — Acting compatibly with human rights objectives

This criterion measures the extent to which, under each option, the Boards will act compatibly with human rights objectives. These include the objectives (and outcomes) established by the Charter. The assessment under this criterion is made compared with the base case. A positive score under this criterion reflects the degree to which the option provides a higher degree of compatibility with human rights objectives than the base case.

Criterion 2 — Reducing the risk of re-offending through rehabilitation and reintegration

A key objective of the Boards is to reduce the risk of re-offending by providing systems and processes to support effective prisoner rehabilitation and reintegration into the community. Parole is considered a key element of this strategy, as it provides for a managed re-entry to society that assists prisoners in adjusting to safely living in the community. This criterion measures the extent to which, under each option, the Boards' processes support this objective of rehabilitation and reintegration in the context of the importance of community safety.

Criterion 3 — Minimising the risk of litigation

This criterion reflects the risk to the Boards of litigation on the basis of the Charter. Risk of litigation is an on-going risk for governments in most aspects of their operations, though these risks can increase or decrease on the basis of policy or regulatory settings.

While litigation can impose a financial burden on governments, of greater concern is the potential it has to undermine administrative certainty and integrity. If decisions of the Boards were subject to repeated litigation as a result of the application of the Charter, it would decrease the confidence of stakeholders (including participants in the parole process and the public more broadly) in the capacity of the Boards to fulfil their functions.

This criterion will therefore assess the degree to which the options are likely to result in a higher or lower risk of litigation for the Boards, compared with the base case.

Criterion 4 — Cost (direct and indirect costs)

This criterion reflects the costs of each option, which includes:

- Direct costs to the Boards of each option, compared with the base case. This includes costs of transition or adjustment to a new structure, or new management approach, and on-going costs where an option involves a permanent change that requires continued increased resources.
- Costs to the criminal justice system more broadly of changes to the parole system. These costs are most likely to be incurred on the basis of reduced efficiency of the criminal justice system. This is assessed in terms of the timeliness of processes, the resources required, and how well elements of the system interact. A lack of efficiency may be identified through 'bottle necks' in processes, for instance where one part of the system is impacted because of delays in another part, or where additional resources are needed because of changes in other elements (for instance, for the parole system how decisions to grant parole impact on efficiency in prisons).

Criterion 5 — Minimising unintended consequences

This criterion reflects the extent to which any of the options have unintended consequences, emerging particularly as a result of attempting to achieve compliance with the Charter in the short term. In general, unintended consequences will occur when a course of action is implemented too quickly, without thorough analysis. It is therefore likely that, following the expiry of the proposed regulations, scores against this criterion will change, as the Government will have gathered more information about how to achieve its objectives without unintended consequences.

Weighting of criteria

In constructing a multi-criteria analysis, it is necessary to weight the criteria used according to their relative importance. In this case, two of the criteria (cost and minimising unintended consequences) are of lower significance than the other four criteria, as the other criteria have greater appreciable community or systemic impacts.

There are various documents outlining the government's aims in respect of human rights (including the Charter itself) and reducing re-offending through rehabilitation and reintegration (for example, the annual report of the APB nominates one of its objectives as "ensuring that offenders are properly prepared to reintegrate into the community"). In relation to minimising the risk of litigation, as discussed above this is important to preserving confidence in the administration of government functions, and is a fundamental operating precept of government. In the view of the Department, it should therefore be weighted the same as the first two criteria; each of these three criteria are weighted at 25 per cent.

By contrast, the direct costs are borne exclusively by Government and not by the community, and the indirect costs are also borne largely by Government; as a consequence, the cost criterion is weighted at 15 per cent. Similarly, while minimising unintended consequences is important to ensuring that outcomes in these first three domains are not reduced or distorted by unforeseen impacts, it is clearly secondary to the other criteria, and has been weighted at 10 per cent accordingly.

5.15 Assessment against criteria

The assessment of Option 1 and Option 2 against the criteria is set out in Table 5.1. These scores reflect the performance of each option compared with the base case (no government action). The scores are set on a scale from -5 to +5, with a negative score indicating a poor performance compared with the base case, and a positive score indicating a strong performance compared with the base case.

This assessment shows that Option 1 has an *unweighted* cumulative score of 0. Option 2 compares substantially better than the base case, with a cumulative score of +4. When weighted according to relative importance of the criteria (cost and minimising unintended consequences being weighted lower than the other criteria), Option 1 scores +0.75 and Option 2 scores +1.1.

The rationale for each score is provided in the following sections, with supporting evidence underpinning each assessment.

Table 5.1

ASSESSMENT OF REGULATORY OPTIONS AGAINST CRITERIA (COMPARED WITH THE BASE CASE)

	Weightings	Option 1 Immediate compliance	Option 2 Exemption
Acting compatibly with human rights	0.25	+5	+1 (due to intention to continue to review practice)
Reducing the risk of re-offending through rehabilitation	0.25	-2	0 (no better or worse than the base case)
Minimising the risk of litigation	0.25	+3	+4
Cost	0.15	-3	-1
Minimising unintended consequences	0.1	-3	0 (no better or worse than the base case)
Overall score (not weighted)		0	+4
Overall score (weighted)		+0.75	+1.1

Note: these scores reflect the impact of the regulatory options compared with the base case. The base case is the state in which the current exemption lapses and government does not act in any way to address the problems associated with the lapsing of the exemption (do nothing approach).

Acting compatibly with human rights objectives

Under this criterion, Option 1 is scored +5 and Option 2 is scored +1, against the base case. As outlined above, Option 1 involves changes to the Boards’ operations to meet requirements under the Charter, which sets out core human rights and the requirement (per section 38) for public authorities to act compatibly with these human rights. Consequently, this assessment reflects the greater degree to which the measures implemented under Option 1 would lead to Board processes and decisions reflecting human rights objectives.

It is important to note that the scores reflect that *current* Board operations (ie the base case) include aspects that meet human rights objectives. For instance, the APB in most cases provides a parolee with an opportunity to respond to concerns that the APB may have and, generally, an offender is given oral reasons for the APB’s decision (or such reasons will be apparent from an interview). In addition, an offender or a person acting on the offender’s behalf may request a review of the APB’s decision. These aspects are set out in more detail in Box 5.3.

Box 5.3

ELEMENTS OF CURRENT BOARD OPERATIONS THAT REFLECT HUMAN RIGHTS OBJECTIVES

- *Interviews* – Prisoners (with long sentences, those convicted of serious offences) are interviewed in custody, some on several occasions, before they are considered for parole. The number of interviews will vary depending on the sentence length, the apparent progress of the prisoner, program participation, reports of prison incidents,

and special issues such as mental health or intellectual impairment.

- *Reviews/Appeals* – An offender, or a person acting on the offender's behalf, may request a review of the Board's decision.
- *Possible Cancellations* – Generally, a parolee is given an opportunity to respond to concerns the Board may have and generally, an offender is given oral reasons for the Board's decision or such reasons will be apparent from an interview.
- *Warning System* – The Board requests progress reports, and expects to receive special or breach reports from Community Correctional Services in cases where matters are not progressing well. The Board will then determine the course to be followed. The possibilities include immediate cancellation if the situation is urgent or if the parolee has disappeared, instructing that a warning be given by the Centre Manager, and instructing the parolee to attend the Board. If the parolee is instructed to attend, the Board may proceed by merely discussing the position with the parolee, or may give a formal warning, or may consider cancellation, or may consider varying the parole conditions. The 'warning system' operated by the APB provides a degree of procedural fairness for parolees.

Source: Adult Parole Board

The base case describes a situation where there is only discretionary adherence to human rights objectives, and it is apparent that in practice (as discussed above) the Boards do not meet the formal requirements of the Charter in many of their processes. While there are benefits due to this approach that also benefit prisoners (notably, the high degree of flexibility available to the Boards), it is apparent that in some instances the approach will compromise human rights objectives. For example, the absence of formal requirements to adhere to set criteria reflecting the Charter principles could give rise to issues of arbitrariness or inconsistency in decision-making, potentially infringing on the human rights of prisoners.

While Option 2 broadly mirrors the base case in relation to this criterion, it is given a score of +1, a marginal improvement over the base case, reflecting the intention of the Boards during the four-year exemption period to devote new resources to further consider how their operations can reflect the objectives of the Charter. Therefore, this option will provide a greater degree of compatibility with human rights compared with the base case; however, the extent of this improvement is difficult to evaluate given that the nature of any potential changes has not yet been determined.

Reducing the risk of re-offending through rehabilitation and reintegration

Under this criterion, Option 1 is scored as –2, with Option 2 scored as 0 (same as base case). The negative score of Option 1 is based on the following predicted impacts:

- it would seriously undermine the flexible case management approach of the Boards;
- it would inhibit the effective use of conditions on parole orders; and
- it would constrain the discretion of the Boards to cancel parole.

The cumulative effect of these impacts would be a reduction in the rate of granting of parole, and an increased risk of poorer rehabilitation and reintegration outcomes.³ This is explored in more detail below.

By contrast, Option 2 largely aligns with the base case (i.e. the existing practices and procedures of the Boards would be preserved), and thus would have a neutral effect on rehabilitation and reintegration outcomes.

Impact on the Boards' flexible case management approach

As noted in Chapter 2 above, the changes required under Option 1 are likely to lead to:

- an erosion in the flexibility of the Boards' decision-making processes, particularly if they are required to apply prescribed tests for cancellation of parole and the imposition of conditions; and
- a more adversarial and restrictive approach to Board hearings, as specific, formal procedures would be required to be applied in particular circumstances.

The effect of these changes would be to undermine the informal, case-management approach presently adopted by the Boards. Board meetings would more closely resemble court hearings, and the ability of the Boards to work collaboratively with offenders on their rehabilitation would be limited.

It is difficult to assess the value of the case management model, but anecdotal evidence suggests that it fosters a high degree of trust between offenders and the Boards, leading to a relatively cooperative approach to rehabilitation and reintegration, and ultimately improved outcomes.

Potential impacts of impeding this collaborative, flexible approach are considered further with reference to the case study below.

Imposition of conditions on parole orders

The Board imposes conditions on an offender's parole as far as it considers it necessary to do so for the protection of the public, including individual members of the public, to prevent re-offending, and to support the rehabilitation of the offender, and the prisoner's successful reintegration into the community (see Box 5.4).

³ That this option does not score worse against this criterion reflects that it is not clear that the studies referred to below have consistently controlled for all possible factors in drawing their conclusions.

Box 5.4

STANDARD CONDITIONS OF PAROLE IN VICTORIA

The seven standard conditions of parole are:

- That you do not break any law.
- That you notify a community corrections officer of any change of address or employment within 48 hours of the change.
- That you do not leave the State of Victoria without the written permission of the Regional Manager.
- That you carry out the lawful instructions of community corrections officers.
- That you are under the supervision of a community corrections officer.
- That you report as and when directed by the community corrections officer.
- That you make yourself available for interview by the community corrections officer at such time and place as directed by the community corrections officer.

Source: Corrections Regs. 1998 Schedule 4 Form 1

The Board may also impose one or more ‘Special Conditions’, addressing accommodation, lifestyle and treatment issues, to support the prisoner’s successful reintegration into the community. Examples of special conditions include:

- attendance for assessment and treatment for alcohol or drug addiction, or submitting to medical, psychological or psychiatric assessment and treatment;
- testing for alcohol or drug use;
- attendance for personal development programs (often in conjunction with anger management programs);
- residence as directed by the Board;
- attendance for treatment at the Community Forensic Mental Health Centre;
- no employment in certain jobs;
- no contact, directly or indirectly, with the victim or certain potential victims;
- no unsupervised contact with children;
- participation in the sex offender maintenance program;
- avoidance of certain geographical areas;
- abstinence from alcohol;
- assessment by, and participation in, drug programs as directed by supervising Community Corrections Officers;
- participation in drug programs as directed by supervising Community Corrections Officers in consultation with the Community Offenders Advice and Treatment Service (COATS).

Effective compliance with the Charter when imposing the standard conditions will in many cases require consideration of individual human rights under the Charter, as part of a more stringent decision-making process that requires ‘proper consideration’ be afforded human rights. This requirement may lead in practice to fewer paroles being granted. This is because the processes for establishing that the standard conditions are justified may preclude their imposition, leading the Board to make an unfavourable assessment of the risk of releasing an offender without a particular condition in place.

In addition, the Boards’ present capacity to order special conditions may be restricted by the setting of criteria for the imposition of conditions. Research on the use of parole in the criminal justice system supports the use of ‘tailored’ conditions of supervision for parole, noting that conditions should be ‘realistic, relevant and research-based’ (The Pew Center 2008). Achieving the best set of conditions, within the context of compliance with the Charter, can be problematic if human rights considerations for conditions are also included in the development of conditions.

The changes necessary to comply with the Charter under Option 1 may therefore lead to a situation in which the full complement of conditions currently available to the Boards is reduced; in addition to a possible reduction in the granting of parole (as discussed below), this may also lead to situations in which offenders are released on parole without effective conditions in place to manage their reintegration. The APB reports that this would result in a less effective parole and would therefore represent a greater risk to the community. There is strong evidence supporting the role of supervision and conditions in the parole system — they have traditionally underpinned the value of parole as a means for managing a prisoner’s re-entry to the community.

Impact on frequency of granting parole

Currently, the Boards have a strong record of granting parole in a majority of cases. In 2008-09, the APB considered 8,605 cases – many of these cases involved monitoring offenders’ progress; for example, to review or make recommendations about a particular offender’s participation in rehabilitation programs. In instances where the APB made a decision about the granting of parole, it granted parole in 1,656 cases and denied parole in 190 cases. Option 1 would require the Boards to include a number of elements in their current practices that will limit the discretion of the Boards to cancel parole. This, in turn, is highly likely to reduce the frequency with which parole is granted.

In relation to cancellation of parole, Option 1 would require the Boards to:

- create specific criteria to guide Board decisions regarding cancellation of parole and the imposition or variation of conditions;
- conduct an oral hearing with the parolee on cancellation of parole;
- implement a review process of parole cancellations, where requested by the prisoner;
- give prior warning when the Board is considering cancelling parole; and
- provide written reasons for the cancellation of parole.

These additional processes would lengthen the time required to process parole cancellations, as well as leading to a higher risk of successful challenges to parole cancellation orders (as considered below under the minimising litigation risk criterion). Under this system, therefore, decisions to grant parole present a greater risk for the Boards, because their capacity to cancel parole quickly if required is reduced.

A reduction in granting of parole, in and of itself, may not be a strong rationale for not implementing processes to comply with the Charter. The broader point is that parole plays an important role in prisoner rehabilitation. As set out in Box 5.5, research suggests a positive linkage between rehabilitation and the use of parole as a means to manage prisoner re-entry into the community. These findings support the view that parole plays an important role in providing structure support for prisoners to assimilate back into the community. The system also provides a framework for monitoring parolees' behaviour when on parole, and conditions under which parole can be granted. These mechanisms provide much stronger structures than release from prison without parole.

Box 5.5

RESEARCH FINDINGS ON THE LINKAGES BETWEEN PAROLE AND REHABILITATION

There is some debate about the merits of parole as a means to effectively rehabilitate offenders and ensure the safety of the community. A study by Witmer of the history and purpose of parole notes the competing theories of the purpose of parole, promoting the view that 'the purpose of parole is to enable the law to keep in touch with all persons who have offended against it; to help them adjust themselves to life in free society again'. It is on this basis that the approach to the Victorian parole system is based; that parole plays an important role in supporting prisoner rehabilitation.

While public sentiment can often sway in favour of longer sentences and 'truth in sentencing' (ie that sentences prescribed by courts should be reflected in time actually served in custody), there is evidence to suggest that removal of parole has a detrimental impact on prisoner rehabilitation. Research on the role of parole by Petersilia notes that:

'parole makes release from prison a privilege that must be earned. When states abolish parole or reduce the amount of discretion that parole authorities have, they in essence replace a rational, controlled system of "earned" release for *selected* inmates with "automatic" release for nearly *all* inmates'.

He notes further that:

'the absence of parole means that offenders simply walk out of the door of prison at the end of a pre-determined period of time, no questions asked. No human being asks the tough questions about what has been done to make sure this criminal is no longer a danger before he is released'.

Research by the Citizens Alliance on Prisons and Public Spending (CAPPS) in the United States (CAPPS 2009) indicated that denying eligible prisoners parole does not improve the rate of recidivism. In fact, CAPPS found that denying prisoners parole makes them more likely to re-offend after release. The risk of re-offending was increased by up to 3.3 percentage points for prisoners released four years after they first became eligible for parole, compared to those released when they first became eligible (CAPPS 2009).

In addition, a study by Ellis and Marshall (2000) using data from England and Wales found significantly lower reconviction rates for offenders released on parole compared to non-parolees. This differential was still apparent after accounting for the predicted risk of re-offence. Furthermore, it took significantly longer for parolees to be reconvicted within two years from their date of release, than prisoners released at the end of their sentence, leading to the conclusion that 'parole at the very least delays re-offending' (Ellis & Marshall, 2000, p 314).

A number of the studies that have been done on this issue attempt to control for other

factors that may influence recidivism to varying degrees (although it is unclear whether all possible factors have been consistently controlled for, for example it may be that those granted parole are necessarily at a lower risk of re-offending than other prisoners, regardless of the type of offence). Nonetheless, these studies do suggest that keeping offenders in prison does not necessarily improve outcomes for the community. Instead, releasing offenders on parole and providing support to help them re-integrate into the community may achieve more positive outcomes than longer prison sentences.

Source: Adult Parole Board of Victoria (2008), Youth Parole Board and Youth Residential Board (2008)

In addition to the implications for rehabilitation and recidivism outlined above, this would then have flow-on costs for the corrections and criminal justice systems, which would carry the burden of larger numbers of prisoners being incarcerated at any one time, and of fewer parolees being effectively reintegrated into the community (this is discussed under the costs (indirect) criterion below).

Case study — Parole approach in New Zealand

To put the approach taken by the Victorian Boards into context, the approach taken by the New Zealand Parole Board (NZPB) provides a useful comparator because:

- it has a similar population (4.3m approx) to Victoria (5.2m approx);
- its legal tradition is based on English common law; and
- it has a Bill of Rights (the New Zealand Bill of Rights Act 1990) that operates in somewhat similar fashion to the Victorian Charter.

In addition, the governance of the NZPB contrasts with the APB (and YRB/YPB) in the following pertinent ways:

- The NZPB does not apply a case management approach. In many instances, the NZPB has no contact with offenders until they are eligible for parole.
- The process by which parole may be cancelled in New Zealand is highly prescribed by the *Parole Act 2002* (NZ). In particular, section 61 of the Act sets out the grounds on which an application for cancellation (referred to as 'recall' in the Act) may be made, section 66 prescribes that the Board may only make a final recall order if one or more of these grounds is made out, and section 63 prescribes that an offender subject to a recall application must be given an opportunity to be heard by the Board.
- The NZPB must apply a legislative test when determining whether to impose special conditions, which requires that a special condition must not be imposed unless it is designed to reduce the risk of re-offending, facilitate rehabilitation or reintegration, or provide for the reasonable concerns of the victims of the offender (section 15 of the Parole Act).
- Sections 43 to 50 of the Parole Act set out in detail the requirements for proceedings of the NZPB. In particular, the Act sets out requirements for notification of hearings, interviews in the event that hearings are unattended by the offender, and the availability of review of decisions in the event that a hearing is unattended.

- Section 67 of the New Zealand Parole Act establishes that an offender who is the subject of any decision of the NZPB may apply for a review of that decision within 28 days. The grounds for an application of review include that the NZPB failed to comply with the procedures set out in the Parole Act.
- For every decision made by the New Zealand Board, comprehensive reasons must be provided.

It is not suggested that implementing Option 1 would lead in Victoria to the creation of an equivalent parole system to New Zealand. In addition, there are limitations associated with making a direct comparison of this sort, including the inability to control for differences in:

- judicial sentencing practices, which affect the availability of parole;
- the demographics of offender populations, as well as the distribution of offence types;
- custodial conditions and the availability and effectiveness of custodial treatment programs.

If accurate, granulated data were available on these matters (and others, including for example, recidivism rates across the two jurisdictions), and it were possible to adequately control for differences in the data, a more comprehensive comparison of the effectiveness of parole across the jurisdictions could be constructed.

However, it is apparent that many of the measures that would be required under Option 1 mirror those already in operation in New Zealand. Given the broad similarities between the jurisdictions, it is reasonable to suggest that at least some of the differences in parole decision-making outcomes reflected in Table 5.2 are attributable to these practices. Therefore, while it is not possible to draw direct deductive conclusions from the New Zealand experience, it provides a useful contextual comparison.

The data in Table 5.2 show that, compared to the New Zealand Parole Board, the Adult Parole Board of Victoria made more parole orders given the number of cases considered, denied parole in significantly fewer cases, and cancelled parole less than was the case in New Zealand.

Table 5.2

COMPARATIVE STATISTICS – VICTORIAN PAROLE BOARDS AND NEW ZEALAND PAROLE SYSTEM (2007-08)

	Adult Parole Board of Victoria	New Zealand Parole Board
(Cases involving a decision about the granting of parole)	1,787	4,261
Parole orders made	1,601	1,252
Parole orders denied	186	3,009
Parole orders cancelled	435	405
% of parole orders made given the number of cases considered	89.6%	29.4%
% of parole orders denied given the number of cases considered	10.4%	70.6%
% of cancellations given the number of parole orders made/granted	27%	32%

Source: Data provided by the Victorian Adult Parole Board.

Overall, the data suggests that, to the extent that Option 1 reflects the New Zealand parole model, it would lead in Victoria to an overall decline in the number of parole orders made in a given year. In cases where a decision was made about parole, the APB decided in 89.6 per cent of cases to grant parole; in New Zealand, the comparable figure is 29.4 per cent.

Minimising the risk of litigation

Litigation risks are difficult to assess in practice, and it is rare to attain complete confidence in the mitigation of litigation risks. The following general observations can be made with respect to the options under consideration:

- The base case presents a considerable risk of litigation. As noted in Chapter 2, legal advice has indicated that the current practices of the Boards raise significant issues concerning potential incompatibility with the Charter, and the application of section 38(1) – the conduct obligation on ‘public authorities’ – will present particular difficulties. Under the base case, it is likely that the Boards will be determined to be ‘public authorities’ for the purposes of the Charter, and will consequently be at risk of a finding of unlawful conduct under section 38, should it be deemed that their practices in a given case were incompatible with a human right or rights.
- Option 1 substantially reduces the risk of litigation, by instituting practices and legislative changes that render the practices of the Boards largely compatible with the Charter. However, a risk of litigation remains, as is reflected in the score of +3. In particular, establishing set criteria for Board decisions may give rise to an increased risk of litigation, in that the Boards may be open to a claim that they have failed to have regard to a mandatory relevant consideration in a given case.

Similarly, it may be open to a claimant to suggest that a Board has inadequately applied procedures designed to protect human rights with respect to a given decision (for example, by failing to provide adequate opportunity to respond to evidence considered by the Board), giving rise to a claim under section 38 of the Charter.

- Option 2 further reduces the risk from litigation compared to the base case by declaring the Boards not to be ‘public authorities’ for the purposes of the Charter. This effectively removes the obligation imposed under section 38. However, some issues may remain that could give rise to litigation involving the Charter. In particular, it would still be open to a claimant to suggest that the legislation that prescribes the operation of the Boards is incompatible with the Charter, possibly leading to a declaration of ‘inconsistent interpretation’ under section 36 of the Charter.

The ‘impact rating’ of this risk (ie of inconsistent interpretation) is less than for a risk of a finding of unlawfulness under section 38, because it would not affect the validity of the decision of the Board in question. The likelihood of its realisation is also lower, because no remedy is available to a claimant if a declaration of inconsistent interpretation is delivered (see section 36(5)), nor does a finding of inconsistent interpretation ‘create in any person a legal right or give rise to any civil cause of action’ (s 36(5)(b)).

Costs

The cost criterion reflects the direct costs to the Boards of each option, as well as the indirect costs of changes in the parole system to the broader criminal justice system (i.e. where changes to the parole system impose costs on other parts of the criminal justice system).

Under this criterion, Option 1 has a score of –3, with Option 2 a score of –1. Each option will require more resources, and therefore have a higher cost, than the base case, though Option 1 will be a higher cost option (primarily due to increased process and operational pressures through compliance with the Charter). Option 1 will also incur significant indirect, systemic costs that are not incurred under Option 2. The underlying data reflecting the scores is provided below.

Costs for the Boards of complying with the Charter (Option 1)

Enacting changes that will allow the Boards to comply with the Charter fully and immediately will impose substantial costs on the Boards. The recommended changes to be made in order to maximise compliance are:

- conducting an oral hearing with the parolee on cancellation of parole;
- implementing a review process of parole cancellations, where requested by the prisoner;
- implementing a more stringent decision-making process where all relevant human rights are considered, decisions are recorded to show compliance with human rights considerations, and where parole officers and others provide detailed evidence on compliance with parole conditions;

- creating specific criteria to guide Board decisions regarding cancellation of parole and the imposition or variation of conditions;
- giving prior warning when the Board is considering cancelling parole;
- increasing opportunities for prisoners or parolees to respond to information that may have an adverse effect on their status or conditions; and
- providing written reasons for the cancellation of parole and limitations on the right to privacy.

An overview of the additional costs from implementing these requirements can be found in Table 5.3 for the APB and Table 5.4 for the YRB/YPB. The additional costs are significant compared to the Boards' current budgets. The total extra cost estimated by the APB is \$1,635,916 per year, 73 per cent of their 2008-09 budget of \$2,232,135. The total extra cost estimated by the YRB/YPB is \$390,600 in the first year with \$255,600 per year in subsequent years. This is 47 per cent greater than their current budget for 2009-10 of \$549,000.

Oral hearings on cancellation of parole

The APB has indicated that the requirement to conduct oral hearings on cancellation of parole will require significant additional resources. The APB estimates that in order to meet this requirement the Board will have to change from sitting once per week, every Wednesday, to sitting Monday to Friday. At a cost of \$1,382 per sitting day in member's fees, this would increase costs by \$287,456 per year. The YRB/YPB has recently introduced a policy to hold an oral hearing with all parolees returned to custody following cancellation for non-compliance with conditions. This will add an additional workload to the Boards.

Implementing a review process

A review process would allow prisoners to request a review within seven days of the cancellation of parole. The review should be completed within 28 days of the notification of appeal. The prisoner should be given reasonable opportunity to put material before the Board for the purposes of the review.

The APB is of the opinion that implementing a review process reinforces the need to sit five days a week. The Board estimates that it could hear and determine ten to twelve cases per sitting day. However, in order to support the Board when sitting five days a week, additional resources are needed.

It is envisaged that additional Board memberships would be needed in order to manage the caseload. In addition, more support staff would be needed. This includes additional administrative and human resources staff to coordinate the recruitment, induction and training necessary to implement the greater procedural transparency needed to comply with the Charter. It would also be necessary that the Board obtain independent legal advice to assist with appeals and other matters; a media/communications officer would also be needed to deal with media enquiries. Because of the expected increase in staff, there are also implications for information technology systems, office accommodation, and security arrangements in relation to parolees or others presenting to the Board. In addition, it may be necessary for the APB to move to larger premises to accommodate the extra staff it expects to hire.

The exact composition of extra staff and expected cost, as estimated by the APB, are outlined in Table 5.3.

If a review process were in place, the YPB Secretary would send a letter to the young person involved detailing the grounds for cancellation and their right to have it reviewed. This letter is expected to include a form for the young person to fill out and return to the YPB Secretary. If a review were requested, the YPB Secretary would obtain information about the cancellation and facilitate a review hearing within 28 days of cancellation. The YPB expects an additional twelve board meetings per year are needed to conduct cancellation reviews.

More stringent decision-making process

In order to comply fully with the Charter, the decision-making process of the Boards would have to be more stringent. In particular, the Boards would be required to:

- Consider all relevant human rights when making decisions, particularly regarding cancellations and the imposition of conditions;
- Assess the potential impact of any interference with any relevant human right, so that any resulting limitations are demonstrably justifiable under the Charter;
- Record decisions to demonstrate that the above processes have been applied; and
- Require parole officers, external witnesses, health/mental health professionals, drug and alcohol services, etc. to provide more detailed, fulsome evidence on compliance with parole orders when cancellations occur.

In order to comply with these requirements, the APB and YRB/YPB would have to keep more detailed records than they do currently. The APB estimates that it would cost an additional \$1,000 per sitting day to produce transcripts of hearings.

In order to increase record keeping the YRB/YPB would employ a member of staff at VPSG 5 for twelve months to develop and document operational guidelines to assist the Boards to apply Charter considerations in decision-making and recording. A further staff member at VPSG 4 will be needed on an ongoing basis to develop new systems for recording Board decisions and assist with documentation. The Board would have to engage a transcription service to record decisions on parole cancellations and the imposition of conditions, to ensure accuracy in the event of a court challenge and any subsequent Supreme Court proceedings.

The APB has also noted there is a possible indirect cost to the imposition of a more stringent decision-making process. The Board foresees that it may have to impose more conditions on parole orders, and provide more detailed evidence on compliance or breaches when cancellations occur. This would result in additional workload to support services such as drug and alcohol services, counselling, etc.

Giving prior warning in the event the Board is considering cancellation of parole

The Boards do not expect to incur any specific cost due to this requirement, beyond the extra cost of needing additional sitting days outlined previously. It should be noted that in most cases the Boards are already giving prior warning to parolees, except in some cases where the parolee cannot be reached (e.g. if the parolee has gone ‘missing’).

Increasing opportunities for prisoners or parolees to respond to information that may have an adverse effect on their status or conditions

The Boards do not expect to incur any specific cost due to this requirement, beyond the cost of needing additional sitting days outlined previously. The Boards already generally give prisoners or parolees an opportunity to respond, but making this a requirement confirms the need for additional sitting days.

Providing written reasons on cancellation of parole and limitations on the right to privacy

The APB proposes for the chair of the decision to prepare written reasons on the day after the sitting. This increases the workload for the chair significantly, and would increase costs by \$131,560 per year.

The Youth Boards have not provided a specific additional cost for this requirement. However, they suggest that upon cancellation of parole, the YPB Secretary would send a letter to the young person outlining the reasons for cancellation. In many cases the cancellation of parole is based on an assessment of risk which would be very hard to document in a way the young person could understand.

Young persons are already provided with reasons for the imposition of conditions on parole. This is to help them understand why the conditions are imposed and what sort of behaviour is expected of them while on parole. The YPB has suggested that it would be possible to provide reasons for each condition in writing as well.

Table 5.3

ADDITIONAL COST OF OPTION 1 (APB)

Action needed	Additional cost per annum
Increase sitting days from weekly to daily#	\$287,456 (member's fees)
Hiring extra staff to assist with the increased work load, as follows: <ul style="list-style-type: none"> • Administrative support (2 staff at VPSG 2) • Administrative support (2 staff at VPSG 3) • Legal officer (VPSG 5) • Media and communication officer (VPSG 5) • Professional development officer (VPSG 5) 	\$560,000 (salary including on costs)
Moving to a larger premises to accommodate extra staff	\$396,900
Producing transcripts from hearings	\$260,000
Chair to prepare written reasons, at extra cost	\$131,560
Total	\$1,635,916

Source: Adult Parole Board. # A five-day a week sitting model would be required as a result of the aggregate effect of the changes associated with this option. The NZPB operates much more like Option 1, and sits five days a week.

Table 5.4

ADDITIONAL COST OF OPTION 1 (YRB/YPB)

Action needed	Additional cost per annum
Ongoing additional costs	
Additional 12 board meetings to conduct cancellation review	\$9,600
Administrative support (1 staff at VPSG 4)	\$110,000 (salary including on costs)
Specialist legal support to prepare material for court appeals	\$50,000
Cost of recording proceedings	\$36,000
Additional printing, advertising, IT, communications, postage, catering, conferences	\$50,000
Total ongoing costs	\$255,600
Temporary additional costs in first year	
Administrative support to document operational guidelines for YPB (VPSG 5) for one year	\$135,000
Total additional cost in first year	\$390,600

Source: Youth Residential Board and Youth Parole Board

Direct costs of Option 2

Under this option the cost of operation of the Boards would remain largely unchanged, with the exception of additional resources for the Boards to conduct internal review of the potential to improve compatibility with the Charter over the four year period of the exemption. The Boards report that the requirement would be for one VPS Grade 6 staff member for each Board. The length of the engagement of the staff members will depend on the outcomes of the review that they initiate, but it is likely that they will be required for around 12-24 months, at a cost of \$175,000, salary and on-costs, for each Board, per year, giving a total cost of \$350,000 per year.

Indirect costs across the criminal justice systems

In addition to the direct costs to the Boards of compliance with the Charter, there will be broader costs across the criminal justice system. It is anticipated that Option 1 would have a cost impact across the system because of the reduction in the granting of parole. As discussed above, the rate of granting of parole would decline, due to more stringency being placed on the cancellation of parole and the conditions than can be placed on parolees. This change would have flow-on effects, particularly to prisons, youth residential centres and youth justice centres, which would see an increase in the overall number of prisoners as fewer prisoners were released on parole. While it is not possible to fully cost this impact, because the total change in the frequency of the granting of parole is uncertain, these costs can be estimated within a reasonable range, based on known costs of maintaining prisoners with the prison system.

- the estimated cost of maintaining a prisoner within the Victorian prison system is \$287.90 per prisoner per day (2007-08 estimates), with an estimated 4177 prisoners in the system in 2007-08 (SCRGSP 2009).
- maintaining an offender within a youth residential / youth justice centre was costed in 2006-07 to be from \$408.70 per bed per day (Victorian Auditor General 2008).

Based on these estimates, a small percentage increase in annual prison ‘days’ in the system, for example of 5 per cent, would result in an increased annual cost of \$21.9 million to the prison system (for the adult system). A more critical issue is how such a change would impact on infrastructure in the system, and create a potential need to upgrade to newer facilities or expand equipment purchasing on the basis of this change in the parole system. In particular, the size of the Youth Justice system is such that even modest increases in demand would result in the need for additional capital expenditure (for example, to fund the building of new accommodation).

A final consideration is that the Boards would require more detailed and fulsome evidence be provided by support services (parole officers, mental health professionals, etc.) imposing a substantial administrative burden on these services.

For example, at present, a Community Corrections Officer (CCO) will prepare and present a report to the Board and there may be some brief discussion between the Board and the CCO.

However, under Option 1, if a CCO alleges a breach of parole, then the CCO may be required to present oral evidence at the cancellation hearing and be subject to cross-examination by the offender in the event that the offender disputes the breach.

During 2007/08, the Board considered 887 breach reports, which equates to 17 hearings per week, 3 to 4 per day. If CCOs were required to give evidence and be subject to cross-examination, it is predicted that this process would take approximately 1 to 2 hours per case.

Minimising unintended consequences

This criterion reflects the extent to which options have any unintended consequences, emerging particularly as a result of attempting to achieve compliance with the Charter in the short term. In general, unintended consequences will occur when a course of action is implemented too quickly, without thorough analysis.

Option 1 has the potential to involve significant unintended consequences. As outlined at 2.10 above, it is difficult to know exactly which changes would be required to ensure Charter compliance.

In addition, Option 1 would substantially alter the existing practice and procedures of the Boards. While it is conceivable that some, if not many, of the necessary changes could be implemented over time, an abrupt shift to a new style of management could undermine the trust and confidence of participants and stakeholders (for example, existing prisoners and parolees who are accustomed to the present case-management style of the Boards). It may also lead to administrative waste incurred as a result of ‘over-treating’ the perceived risk of litigation.

Finally, the Government is due to review the operation of the Charter by the end of 2011. While this review has not been commenced, it is expected that it will take account of the practical effect of the Charter on the public sector, and make findings about the degree and success of the implementation of human rights practice. Should the review recommend any changes to the content or application of the Charter, it is possible that any changes implemented by the Boards will be rendered inconsistent or redundant. In addition, the findings of the review could be valuable in formulating new modes of practice for the Boards.

For these reasons, Option 1 receives a score of -3 against this criterion.

In contrast, Option 2 is not expected to have any significant unintended consequences. This is because this option would see the Boards reviewing current processes – taking into account the government’s objectives, as well as financial and logistical constraints on the boards – to better inform the development of any processes that better align with the Charter. In many cases, it may be necessary to apply an approach of trial and error, making continuous assessment of the impact of introduced changes over time. For these reasons, this option receives a zero, reflecting the fact that it is expected to be no better or worse than the base case.

Chapter 6

Impacts on small business and competition

6.16 Introduction

This chapter looks at the small business and competition impacts of the preferred approach.

6.17 Small business impacts

It is good practice for RISs to include a specific impact of the proposal on small business. The purpose of this is to ensure that government regulation does not unduly impact on business productivity and growth in Victoria, with particular emphasis being given to how proposed measures will affect small businesses. In effect, the concern is that:

Uniform application of regulatory requirements...gives a competitive advantage to larger firms, which have lower per-unit compliance cost due to economies of scale. This increases the size of firm that can survive, and drives smaller, marginal firms out of business. In addition, the increased costs to small firms resulting from economies of scale will raise barriers to entry and eliminate the potential competition on which we rely so heavily to keep prices in line. (Bradford 2004, p.29)

The proposed regulations assessed in this RIS do not have any direct impact on small business. The direct and indirect costs associated with the regulatory options are costs incurred by government agencies, such as the Boards, Corrections Victoria, and DHS (Youth Justice).

Table 6.5

FACTORS TO BE CONSIDERED WHEN REGULATING SMALL BUSINESS

Factor	Answer
The variation in the compliance burden between a typical small business and a large business	No direct compliance burden on small business
Where possible, estimates should be provide of typical compliance costs for small, medium and large entities, with details of how these estimates are derived	No direct compliance burden on small business
The relative impact of penalties and non-compliance	No direct compliance burden on small business

6.18 Competition assessment

Any new legislation in Victoria must not restrict competition unless it can be demonstrated that:

- the benefits of the restriction, as a whole, outweigh the costs; and

- the objectives of the legislation can only be achieved by restricting competition.

A legislative amendment is considered to have an impact on competition if any of the following questions in the table below can be answered in the affirmative.

The proposed regulations are expected to have very low impact on competition, as the services being impacted are being provided by government agencies.

Table 6.6

CRITERIA FOR DETERMINING ADVERSE COMPETITION IMPACTS

Question	Answer	Significance
Is the proposed measure likely to affect the market structure of the affected sector(s) – i.e. will it reduce the number of participants in the market, or increase the size of incumbent firms?	No	Low
Would it be more difficult for new firms or individuals to enter the industry after the imposition of the proposed measure?	No	Low
Would the costs/benefits associated with the proposed measure affect some firms or individuals substantially more than others (e.g. small firms, part-time participants in occupations, etc)?	No	Low
Would the proposed measure restrict the ability of businesses to choose the price, quality, range or location of their products?	No	Low
Would the proposed measure lead to higher ongoing costs for new entrants that existing firms do not have to meet?	No	Low
Is the ability or incentive to innovate or develop new products or services likely to be affected by the proposed measure?	No	Low

Source: Government of Victoria 2007, pp. 5–22.

Sub-clause 1(3) of the *Competition Principles Agreement* provides guidelines for assessing the net public benefit. It sets out the circumstances in which the weighing up process is called for, and also some of the factors that need to be taken into account in making the decision:

Without limiting the matters that may be taken into account, where this Agreement calls:

- for the benefits of a particular policy or course of action to be balanced against the costs of the policy or course of action; or
- for the merits or appropriateness of a particular policy or course of action to be determined; or
- for an assessment of the most effective means of achieving a policy objective;

the following matters shall, where relevant, be taken into account:

- government legislation and policies relating to ecologically sustainable development;
- social welfare and equity considerations, including community service obligations;

- (c) government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;
- (d) economic and regional development, including employment and investment growth;
- (e) the interests of consumers generally or of a class of consumers;
- (f) the competitiveness of Australian businesses; and
- (g) the efficient allocation of resources.

Chapter 7

The preferred option

7.19 Summary of preferred option

Based on the analysis in Chapter 5 of this RIS, the preferred option is Option 2 — a four year exemption for the Boards from compliance with the Charter. This conclusion is made on the basis that Option 2 provides a stronger net benefit compared with both the base case and Option 1, measured against criteria.

Option 2 provides a degree of improved compatibility with human rights objectives (through the intention to review and develop practices that better align with these objectives), while at the same time preserving the benefits of the current approach of the Boards, which is built on the case management model and is highly flexible and responsive, and which ultimately supports rehabilitation objectives.

Option 1, while providing the strongest compatibility with human rights objectives, would have:

- a negative impact on the rehabilitation objectives for the Boards compared with the base case and Option 1, due to the changes in current Board practices required to comply with the Charter;
- higher costs in terms of both Board resources and the efficiency of the criminal justice system. These costs are incurred through increased resource needs for each Board to meet the process requirements of the Charter (such as publishing decisions and applying criteria). Indirect costs result from an expected reduction in the frequency of parole granted, which increases prison costs (and reduces the timeliness of decisions making in the system); and
- greater potential for unintended consequences as a result of attempting to implement an abrupt short-term shift to a Charter-compliant model.

It is therefore recommended, based on options assessed in this RIS, that regulations be made to exempt the Boards from compliance with the Charter until 2013.

7.20 Change in the administrative burden

The Guidelines note that measurement of changes to the administrative burden of a new regulatory proposal — through the application of the Standard Cost Model — is not required if changes are immaterial (that is, if they generate less than \$250 000 in new costs or savings per annum).

The calculations in this RIS demonstrate that the additional administrative costs to business directly attributable to the regulations fall below this threshold. As such, a Standard Cost Model report is not required.

7.21 Implementation and enforcement

Implementation of the preferred option would involve government introducing new regulations to create a new exemption to the end of 2013, under the Proposed Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2009.

The existing exemption is made under Interim Regulations that are due to expire on 29 December 2009. The new regulations will therefore need to be made before that date.

7.22 Evaluation strategy

An important feature of best practice regulation is for it to be reviewed regularly to ensure that it represents the most appropriate means of meeting the regulatory objectives.

Under the preferred option, the Boards will review their current practice in respect of the Charter over the term of the exemption, including by hiring additional staff to identify and manage potential changes, as outlined in 4.13 above. The exemption will therefore be subject to a process of ongoing review.

By the time that the proposed regulations expire, the Boards should be in a position to provide advice regarding any ongoing issues regarding compatibility with the Charter, drawing on:

- Current legal advice regarding the nature of their obligations.
- Changes identified and implemented over the term of the exemption.
- Analysis of the effect of any changes on parole objectives.
- The broader review of the Charter, which is scheduled to be completed by the end of 2011.

Appendix A

Consultation undertaken

The following Government agencies have been closely involved in preparing the proposed regulations and the supporting Regulatory Impact Statement (RIS).

- Department of Justice
- Department of Human Services
- Corrections Victoria

In addition, the Adult Parole Board, the Youth Residential Board and the Youth Parole Board have been involved in preparing the regulations and the supporting RIS. The preferred option reflects the views of these Government bodies.

A stakeholder workshop was also convened to inform the development of the RIS. Invited participants included:

- Victorian Equal Opportunity and Human Rights Commission
- Victoria Legal Aid
- Human Rights Law Resource Centre
- Federation of Community Legal Centres
- Youthlaw
- Victorian Association for the Care and Resettlement of Offenders

This group expressed broad support for the existing work of the Boards. There was also general agreement that gradually modifying the practice of the Boards to better comply with the Charter would be desirable.

There were some different views regarding the potential difficulty for the Boards in complying with the Charter. Some stakeholders expressed concern that the Boards would become more conservative and less likely to grant parole under a more Charter-compliant model. Another view, from a community legal organisation, was that the shift to a more compliant model should not be particularly onerous for the Boards, as there is already a high degree of compatibility.

The preferred option attempts to balance these concerns with the broader objectives of the regulations.

The RIS will be available for 28 days for public consultation. The 28-day period is due to the requirement to make the regulations in December 2009.

The availability of the RIS will be advertised in the Government Gazette and a daily newspaper circulating generally throughout Victoria. Members of the public and bodies and offices affected by the regulations will be able to make submissions to the Department of Justice on the proposed regulations. Relevant departments and Government officials will be informed directly about the RIS.

Appendix B

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