

IN THE CORONERS COURT OF VICTORIA

AT MELBOURNE

INQUEST INTO THE DEATH OF TYLER CASSIDY

HUMAN RIGHTS LAW RESOURCE CENTRE
SUBMISSIONS ON SCOPE OF THE INQUEST

A. Introduction

1. The Human Rights Law Resource Centre (the **HRLRC**) has been granted leave to appear at the inquest for the purpose of assisting the Coroner by making submissions in respect of the application of the *Charter of Human Rights and Responsibilities 2006* (Vic) (the **Charter**) to the issues raised in the inquest, including relevant principles of international human rights law.
2. These submissions serve two functions:
 - (a) they set out the HRLRC's view on the scope of the inquest, responding to the draft scope document provided by solicitors assisting the Coroner on 8 April 2010, and relevant witnesses;
 - (b) they address the request made by the Coroner on 7 May 2010 to "explain in detail how, on the basis of the factual material currently provided to [the HRLRC] the facts in this case potentially enliven the sections of the Charter in the way that [the HRLRC] asserts, and if [the HRLRC] would also identify all the relevant international jurisprudence on which [the HRLRC] relies and explain how it is connected to the facts of this case".
3. For the reasons set out below, the HRLRC submits that the circumstances surrounding the death of Tyler Cassidy engage both the right to life (s 9) and the right to protection of family and children (s 17) under the Charter. The HRLRC further submits that the engagement of these Charter rights impacts upon the scope of the inquest.
4. Read in connection with the purposes and preamble of the *Coroners Act 2008* (Vic) (the **Act**), the Charter applies to the task of the Coroner in relation to the conduct of the investigation and inquest into Tyler's death (as described below).
5. These submissions on the scope of the inquest identify the core issues that the HRLRC considers ought to be addressed by the inquest from a human rights perspective. The HRLRC is not suggesting that the scope of the inquest should be limited to these core issues. The HRLRC considers that the draft scope document provided on 8 April 2010 is sufficiently broad to encompass these issues.

B. Obligations under the Coroners Act 2008

6. The office of Coroner is one of the most ancient offices in the common law world which for many centuries has had amongst its functions the protection of life through the investigation of deaths and the circumstances in which they occur. The Preamble to the Act notes the important role played by the coronial system in Victoria and, in particular, confirms the Coroner's role as an independent investigator of deaths. The purposes of the coronial system, as set out in s 1 of the Act, include "(c) to contribute to the reduction of the number of preventable deaths through the findings of investigations and the making of recommendations by coroners", and as set out in the Preamble, "the promotion of public health and safety and the administration of justice".
7. A Coroner investigating a death must find, if possible:
 - (a) the identity of the deceased;
 - (b) the cause of death;
 - (c) the circumstances in which the death occurred (unless the deceased was not a person placed in custody or care¹ and there is no public interest to be served in making a finding regarding those circumstances); and
 - (d) any other prescribed particulars.²
8. A coroner may also comment on any matter connected with the death, including matters relating to public health and safety or the administration of justice.³
9. A coroner may report to the Attorney-General on a death which the coroner has investigated, and may make recommendations to any Minister, public statutory authority or entity on any matter connected with a death, including recommendations relating to public health and safety or the administration of justice.⁴

C. The impact of Charter obligations

10. There are two ways the Charter may impact on this inquest and the parties to it. They are:
 - (a) the obligation on public authorities to act compatibly with human rights; and
 - (b) the requirement to give legislation an interpretation consistent with human rights.The potential impact of each is discussed below.

¹ 'Person placed in custody or care' includes a person who a police officer is attempting to take into custody or who dies from injuries sustained while being taken into custody: the Act, s 3.

² The Act, s 67(1) and (2).

³ The Act, s 67(3).

⁴ The Act, s 72.

The Coroner is a public authority when conducting an inquest

11. Section 38(1) of the Charter provides that a 'public authority':
 - (i) must act⁵ in a way that is compatible with a human right; and
 - (ii) in making a decision, must give proper consideration to a relevant human right.
12. 'Public authority' is defined in s 4 of the Charter and includes, among other things, an entity (including a natural person) established by a statutory provision that has functions of a public nature.
13. The Coroners Court is established as an inquisitorial court by s 89 of the Act and consists of the coroners and registrars of the Coroners Court. A Coroner constitutes the Coroners Court when exercising functions under the Act.⁶
14. A court or tribunal is not a public authority except when it is acting in an administrative capacity.⁷ The definition of 'court' in s 3 of the Charter includes the Coroners Court.
15. Accordingly, when performing functions of an administrative nature, the Coroners Court (and each of the coroners) is bound as a public authority by the obligations on public authorities set out in s 38 of the Charter. Although the functions and powers conferred on Coroners by the Act include functions that are judicial in nature,⁸ for the reasons that follow, when conducting an inquest, the Coroner is acting in an administrative capacity.
16. The meaning of 'administrative capacity' is primarily a question of statutory construction. This phrase should, however, be given a broad construction in order to promote the purpose and object of the Charter, namely to protect and promote human rights.⁹
17. The meaning of 'administrative capacity' is also informed by applying the well-established distinction between administrative power and judicial power. In *Albarran v Companies Auditors and Liquidators Disciplinary Board* the High Court held that judicial power:

...classically, involves either the governance of a trial for the determination of criminal guilt and its punishment or, more broadly, the determination of a dispute inter partes regarding the existence of a legal right or obligation and the application of that law to facts as determined.¹⁰
18. Some of the recognised indicia of judicial power are that it involves the ascertainment of antecedent rights in accordance with legal principle¹¹ and the making of orders capable of independent enforcement.¹²

⁵ 'Act' is defined in s 3(1) of the Charter to include a failure to act and a proposal to act.

⁶ The Act, s 89(3).

⁷ The Charter, s 4(1)(j).

⁸ See the examples given in [19].

⁹ *Interpretation of Legislation Act 1984* (Vic), s 35(a); the Charter, s 1(2). See also *R v Momcilovic* [2010] VSCA 50, [107]; *Kracke v Mental Health Review Board & Ors (General)* [2009] VCAT 646, [28]-[36].

¹⁰ *Sabet v Medical Practitioners Board of Victoria* [2008] 20 VR 414, [126] citing *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350, 358 [16] per Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ; 377-8 [94] per Kirby J.

¹¹ *Queen Victoria Hospital v Thornton* (1953) 87 CLR 422.

19. The task of a Coroner in conducting an inquest is confined to discharging the task set out in s 67 of the Act – namely, making certain findings and taking steps ancillary to the making of those findings. It does not involve either the determination or punishment of guilt, or the determination of a dispute *inter partes* or legal rights. It does not result in the making of enforceable orders. The conduct of an inquest is therefore distinguishable from the exercise of judicial power. Instances where the Coroner is acting in a judicial capacity might be, for example, ruling on the lawfulness of a subpoena which is under challenge, or punishment for contempt. In such circumstances there is a dispute *inter partes* of a kind not present during the substantive inquest itself.
20. Significantly, in its review of the Coroners Bill 2008, the Scrutiny of Act and Regulations Committee questioned the basis for exempting the Coroners Court from the Charter's obligations to act compatibly with and give proper consideration to human rights and asked the Minister to clarify what capacities of the Coroners Court are non-administrative. In his response, the Minister stated that "when exercising the majority of its powers, the Coroners Court will be acting in an administrative capacity and will therefore be bound as a public authority by the obligation in s 38 of the Charter".¹³

Obligation to interpret laws compatibly with human rights

21. Irrespective of whether the Coroner is a public authority, when interpreting Statutes the Coroner is bound to apply s 32 of the Charter:
 - (1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.
 - (2) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.
22. The interpretive obligation in s 32 of the Charter is 'a statutory directive, obliging courts (and tribunals) to carry out their task of statutory interpretation in a particular way'.¹⁴ As the Court of Appeal held in *R v Momcilovic*, this 'statutory directive' requires all persons engaged in the task of statutory interpretation to 'explore all 'possible' interpretations of the provision(s) in question, and adopt that interpretation which least infringes Charter rights'.¹⁵
23. Section 32(2) of the Charter explicitly authorises the consideration of international human rights jurisprudence in interpreting a statutory provision.' Section 32(2) complements the broader principle that it is desirable, as far as possible, that expressions used in

¹² *British Imperial Oil v FCT* (1925) 35 CLR 422; see also *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 258.

¹³ Scrutiny of Acts and Regulations Committee, *Alert Digest No 15 of 2008 – Ministerial Correspondence* (2008). The Minister also stated that, where the Coroners Court acts in a non-administrative capacity, it will be bound by the interpretative obligation in s 32, as explained below.

¹⁴ *R v Momcilovic* [2010] VSCA 50, [102].

¹⁵ *R v Momcilovic* [2010] VSCA 50, [103].

international agreements be construed in a uniform and consistent manner by both municipal courts and international courts and panels.¹⁶

24. The interpretive obligation requires that the Act – in particular, the nature and scope of the task the Coroner is required by s 67 to discharge when investigating a death – must be interpreted in a way that is compatible with human rights, so far as it is possible to do so consistently with its purpose.
25. It is both possible and consistent with the purposes of the Act to give the provisions of the Act, and s 67 in particular, an interpretation compatible with the right to life and the right to protection of family and children. As discussed above, the Preamble and s 1 of the Act make clear that the purposes of the Victorian coronial system include contributing to the reduction of the number of preventable deaths, and promoting public health and safety and the administration of justice.
26. Further, if the Coroner is not a public authority because it is a court acting in a judicial capacity, the Coroner nevertheless has obligations to conduct an investigation which complies with the Charter by virtue of the obligations on courts arising under s 6(2)(b) of the Charter and the right to life.
27. In making any recommendations in relation to Victoria Police, as provided for under s 67(3) of the Act, the Coroner will necessarily have regard to the Charter, because the Victoria Police is a public authority bound to act compatibly with human rights as set out in the Charter.¹⁷

D. The right to life and the Coronial process

The Right to Life

28. The right to life is set out in s 9 of the Charter, which states:

Every person has the right to life and has the right not to be arbitrarily deprived of life.'
29. It is well established in international jurisprudence that the right to life imposes upon States obligations that can be conveniently divided into 'substantive' obligations and 'procedural' obligations.
30. The obligations connected with each of the substantive and procedural dimensions of the right to life are set out below. Further, a detailed overview of the international jurisprudence on the right to life is set out in Annexure 1. This includes both general obligations on the State and also specific instruments which set out the obligations as they practically apply to law enforcement officials.

¹⁶ See *Rocklea Spinning Mills Pty Ltd v Anti Dumping Authority* (1995) 56 FCR 406, 421E; see also *Povey v Qantas Airways Ltd* (2005) 223 CLR 189, 202 [25] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

¹⁷ The Charter, s 38(1).

Coronial system to give effect to the right to life

31. The procedural dimension of the right to life has been interpreted to include an obligation on the State to investigate any death at the hands of State authorities. The purpose of this obligation is to ensure that the right to life is rendered practical and effective.
32. According to the international jurisprudence, the requirement on a state, in circumstances where such a death occurs, is to conduct an investigation capable of satisfying certain requirements. However, the international jurisprudence does not prescribe a specific form of investigation for satisfaction of these requirements. As has been confirmed in the UK experience, a coronial inquest is one form of investigation, which, when satisfying the requirements in the jurisprudence, is apt to fulfil the State's obligations in this respect.
33. The Victorian Government has expressly recognised the existence of the obligation to investigate and has stated that it will rely upon the coronial system in order to discharge this obligation. In the Statement of Compatibility for the Coroners Bill 2008, the Attorney-General stated:

In other jurisdictions [the right to life] has been interpreted to include an obligation on government to ensure an effective investigation into certain deaths. As the most significant investigative mechanism into reportable and reviewable deaths, the coronial system gives effect to this right.¹⁸
34. Accordingly, in the absence of a public inquiry or other independent investigation, the Coroner is obliged to conduct the investigation and inquest into the circumstances surrounding Tyler's death in a manner which is compatible with the right to life and which secures the effective implementation of the right in domestic law.
35. In many respects, the Coroner is well equipped under the Act to conduct an investigation into a death compatibly with the Charter. The UK experience has been that, with minimal adjustments,¹⁹ the Coronial inquest has been an effective method for the discharge of the procedural obligations connected to the right to life.

¹⁸ Charter of Human Rights and Responsibilities Statement of Compatibility, Coroners Bill 2008, found at Victoria, *Parliamentary Debates*, Legislative Assembly, 9 October 2008, 4030 (Rob Hulls, Attorney-General).

¹⁹ See, for example, *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, where a slightly broader interpretation of the inquiry 'how' a deceased came to their death was required, encompassing not only 'by what means' but also 'in what circumstances'.

E. Engagement/content of the right to life

Substantive obligations of the right to life

36. The substantive obligations to respect the right to life oblige the State to ensure that:²⁰
- (a) the right to life is protected by law;
 - (b) no one is arbitrarily deprived of life; and
 - (c) appropriate legislative and administrative measures are taken to protect life and to guard against the arbitrary deprivation of life.
37. These substantive obligations have been interpreted in international and foreign jurisprudence to require the following:
- States must refrain from taking life ‘intentionally’.²¹
 - States must take appropriate steps to safeguard life.²²
 - States have a duty to establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent practicable, protect life.²³
 - States have a positive duty to adopt clear and detailed domestic law on the use of lethal force which should strictly regulate its use in accordance with the right to life.²⁴
 - The use of force by State officials which has resulted in a deprivation of life must have been ‘absolutely necessary’ and ‘strictly proportionate’ to the achievement of the permitted purpose.²⁵
 - In assessing whether the use of force is strictly proportionate, regard must be had to the nature of the aim pursued, the dangers of life and limb inherent in the situation, and the degree of risk that the force employed might result in loss of life.²⁶

²⁰ *R (Humberstone) v Legal Services Commission* [2010] EWHC 760, [44]; *Savage v South Essex NHS Trust* [2009] 1 AC 681, [76]. See also *R (Gentle) v The Prime Minister* [2008] 1 AC 1356; *Hertfordshire Police v Van Colle* [2009] 1 AC 225.

²¹ *McCann v United Kingdom* (1996) 21 EHRR 97; *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182; *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, [19]; *Osman v United Kingdom* (1998) 29 EHRR 245, [115].

²² *McCann v United Kingdom* (1996) 21 EHRR 97; *R (Middleton) v West Somerset Coroner* [2004] 2 AC 192; *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, [19]; *Osman v United Kingdom* (1998) 29 EHRR 245, [115].

²³ *McCann v United Kingdom* (1996) 21 EHRR 97, [150], [156], [161]; *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, [2]; *LCB v United Kingdom* (1998) 27 EHRR 212, [36]; *Osman v United Kingdom* (1998) 29 EHRR 245; *Keenan v United Kingdom* (2001) 33 EHRR 913, [88]-[90]; *Edwards v United Kingdom* (2002) 35 EHRR 487, [54]; *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, [30].

²⁴ *Leonidis v Greece* [2009] ECHR 5, [56]; *Simsek v Turkey* [2005] ECHR 546, [104]. See also *McCann v United Kingdom* (1996) 21 EHRR 97, [151]-[156].

²⁵ *McCann v United Kingdom* (1996) 21 EHRR 97, [148]-[149].

²⁶ *McCann v United Kingdom* (1996) 21 EHRR 97, [193]-[194].

- The use of force will be disproportionate if the authorities failed, whether deliberately or through lack of proper care, to take steps which would have avoided the deprivation of life without putting the lives of others at risk.²⁷
- The State has a responsibility to ensure that the way in which an operation is planned and executed does not require the use of unnecessary lethal force.²⁸
- Law enforcement agents must be trained to assess whether there is an absolute necessity to use firearms, not only on the basis of the relevant regulations, but also with due regard to the pre-eminence of respect for human life as a fundamental value.²⁹
- The positive obligation to provide a legal system to protect life requires a State to facilitate an effective independent judicial system to determine the cause of any death and, if necessary, to hold accountable those responsible for it.³⁰

Procedural obligation of the right to life

38. An actual or potential breach of the substantive obligations engages the 'procedural' obligation.
39. International jurisprudence establishes that the procedural obligation on the State involves a number of limbs.
 - (a) States must ensure that there is some form of effective and official investigation where individuals have been killed as a result of the use of force by State agents.³¹
 - (b) The investigation must be:
 - hierarchically, institutionally and practically independent from those implicated in the events giving rise to the investigation;³²
 - effective, in that it is capable of identifying the facts and leading to a determination of whether the force used was justified and the identification and punishment of those who may be responsible for the death of a person;³³ and

²⁷ *McCann v United Kingdom* (1996) 21 EHRR 97, [193]-[194].

²⁸ *Leonidis v Greece* [2009] ECHR 5, [55].

²⁹ *Leonidis v Greece* [2009] ECHR 5, [57].

³⁰ *Dodov v Bulgaria* (2008) 47 EHRR 41, [80]; *Vo v France* (2005) 40 EHRR 12, [90]-[91]; *Calvelli and Ciglio v Italy* [2002] ECHR 3, [49]; *Powell v United Kingdom* (2000) 30 EHRR CD 362.

³¹ *McCann v United Kingdom* (1996) 21 EHRR 97, [161]; *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, [20].

³² *Jordan v United Kingdom* (2001) 37 EHRR 52, [106]; *McKerr v United Kingdom* (2002) 34 EHRR 20, [112]; *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, [20].

³³ *McKerr v United Kingdom* (2002) 34 EHRR 20, [159], [161]; *Simsek v Turkey* [2005] ECHR 546, [116]; *Tahsin Acar v Turkey* [2004] ECHR 149, [223], [229]-[234]; *Jordan v United Kingdom* (2001) 37 EHRR 52, [107].

- sufficiently open so as to allow public scrutiny, so that accountability is secured in practice as well as in theory.³⁴
- (c) The purposes of an investigation are to ensure:
- the effective implementation of domestic laws which protect the right to life;
 - as far as possible that the full facts are brought to light;
 - accountability for deaths occurring under the responsibility of State agents;
 - that culpable and discreditable conduct is exposed and brought to public notice;
 - that suspicion of deliberate wrong doing (if justified) is allayed;
 - that dangerous practices and procedures are rectified; and
 - that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from their death may save the lives of others.³⁵
- (d) It may be necessary to examine not only the means by which a person died and the actions of the State agents, but also the broad surrounding circumstances, including such matters as the relevant legal and regulatory framework in place and the planning and control of the actions under examination.³⁶
- (e) The State may fail to meet its obligation to conduct an effective investigation where there is a deficiency in the primary investigation that undermines its ability to achieve its outcome.³⁷
- (f) The investigation must be prompt and carried out with reasonable expedition.³⁸

³⁴ *McCann v United Kingdom* (1996) 21 EHRR 97, [194]; *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653 [20], [23]; *McKerr v United Kingdom* (2002) 34 EHRR 20, [115].

³⁵ *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, [31]; *McKerr v United Kingdom* (2002) 34 EHRR 20, [111]; *Edwards v United Kingdom* (2002) 35 EHRR 487, [69]; *Jordan v United Kingdom* (2001) 37 EHRR 52, [105]; *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182; *Leonidis v Greece* [2009] ECHR 5, [67].

³⁶ *McKerr v United Kingdom* (2002) 34 EHRR 20, [109]; *Leonidis v Greece* [2009] ECHR 5, [53]; *McCann v United Kingdom* (1996) 21 EHRR 97, [146]-[147].

³⁷ *Menson v United Kingdom* [2003] 37 EHRR CD 220. See also *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, [10]; *McKerr v United Kingdom* (2002) 34 EHRR 20, [113]; *Jordan v United Kingdom* 37 EHRR 52, [107]; *Leonidis v Greece* [2009] ECHR 5, [68].

³⁸ *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, [22], [25]; *McKerr v United Kingdom* (2002) 34 EHRR 20, [114]; *Leonidis v Greece* [2009] ECHR 5, [68].

F. Engagement/content of the right to protection of families and children

40. Section 17(2) of the Charter states 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.

41. A detailed overview of the international jurisprudence on the right of the child to protection is set out in Annexure 2. The key principles are summarised below.

42. The right of the child to protection can be seen from foreign and international jurisprudence to impose the following obligations on the State:

- (a) administrative bodies are required to consider how children's rights and interests are or will be affected by their decisions and actions;³⁹
- (b) special measures should be adopted to protect children and their human rights;⁴⁰ and
- (c) the State must treat a child's best interests as a primary consideration.⁴¹

G. Impact of human rights on the scope of the Inquest

Overview: Issues to be addressed

43. In order for the Coroner to discharge her obligations under the Act (as interpreted compatibility with the Charter) and the Charter (as a public authority, and consistently with the State's reliance upon the coronial process to discharge the State's procedural obligation under the right to life), the HRLRC submits that the scope of the inquest ought to encompass at least the following issues:

- (a) the precise nature of the force used;
- (b) who used such force,
- (c) why that person used lethal force, including what was known or reasonably suspected or feared about the threat posed to life at the time, and the availability of alternatives to the use of lethal force;
- (d) the immediate circumstances leading up to Tyler's death, including the actions and response of emergency services, police officers and others that led to the use of lethal force;
- (e) the regulatory framework controlling the use of force, particularly lethal force;
- (f) the policies, procedures, practices and training of Victoria Police in relation to the use of force;

³⁹ *General Comment No 5*, UN CRC, 34th sess, [12], UN Doc CRC/GC/2003/5 (2003).

⁴⁰ *General Comment No 17*, UN HRC, 35th sess, [1] (1989).

⁴¹ See generally *General Comment No 5*, UN CRC, 34th sess, [12] UN Doc CRC/GC/2003/5 (2003).

- (g) the policies, procedures, practices and training of Victoria Police in relation to engagement with children;
- (h) the policies, procedures, practices and training of Victoria Police in relation to engagement with people in mental crisis;
- (i) the adequacy of provision of information to family members in relation to the investigation of Tyler's death; and
- (j) the promptness, thoroughness and independence of the investigation into Tyler's death.

The circumstances of Tyler's death

44. The Coroner is required to find the circumstances in which the death occurred in accordance with s 67 of the Act. These circumstances are addressed by items 1 to 7 in the Coroner's 'Outline of proposed scope for Directions Hearing 9 April 2010' (**Proposed Scope**).

Whether the steps taken by the State of Victoria to protect life were appropriate

45. From a human rights perspective, investigation of the circumstances leading to Tyler's death serves to determine whether the State of Victoria took adequate steps to protect Tyler's life. In practical terms this requires the scope to extend to:
- whether the use of force by members of Victoria Police was both absolutely necessary and strictly proportionate;
 - whether Victoria Police took appropriate steps to safeguard life;
 - whether steps could have been taken by members of Victoria Police which would have avoided the deprivation of life without putting the lives of others at risk;
 - whether the incident was managed and controlled by Victoria Police in a way which sought to avoid the unnecessary use of lethal force;
 - whether the response was appropriate in light of Tyler's status as a child and what, if any, special measure were adopted to protect Tyler and his human rights.
46. The policies, procedures, practices and training of Victoria Police from part of the broader circumstances surrounding the death and, from a human rights perspective, ought to be investigated in order to:
- determine the nature and content of the relevant policies, procedures, practices and training, both in relation to the use of force as well as alternative responses such as control, containment and de-escalation of incidents;
 - determine whether the policies, procedures, practices and training sufficiently protected the right to life, including whether:
 - the policies and procedures contained clear and detailed rules regulating the use of force in accordance with the right to life;

- the policies and procedures contained adequate and appropriate guidance in relation to strategies for avoiding the use of force;
- the policies and procedures contained adequate and appropriate guidance in relation to dealing with young people and people in crisis;
- the training provided to members of Victoria Police was adequate and appropriate, in particular, whether police members were trained to identify and implement alternatives strategies to the use of force, received adequate training in relation to dealing with young people and people in crisis and to give due regard to the pre-eminence of the right to life;
- the practices of Victoria Police, both generally and in relation to this particular incident, were in accordance with the relevant policies, procedures and training; and
- identify whether the Coroner should make any recommendations to ensure that Victoria's laws and Victoria Police policies, procedures, practices and training are in accordance with and effectively implement human rights under the Charter.

47. Each of these issues is addressed by item 9 in the Proposed Scope.

Whether the investigation into Tyler's death had the necessary independence to satisfy the requirements of the procedural dimension to the right to life

48. In relation to the effectiveness and independence of the investigation, the HRLRC submits that the inquest must inquire into:
- the appropriateness, quality and effectiveness of the primary investigation conducted by Victoria Police;
 - what policies, procedures, guidelines or agreements are in place within and between Victoria Police, the Office of Police Integrity, the Coroner's Court and any other relevant bodies, relating to the investigation of deaths involving members of Victoria Police;
 - whether any such policies, procedures, guidelines or agreements are sufficient to ensure the effective and independent investigations into such deaths in a manner which satisfies the procedural obligation under the right to life.

49. This issue is addressed by items 8 and 10 in the Proposed Scope.

Witnesses

50. The HRLRC assumes that the Coroner will call all relevant eye witnesses and others involved in the immediate circumstances leading up to Tyler's death. However the HRLRC reserves its right to make further submissions in relation to particular witnesses who HRLRC considers are critical to the effectiveness of the investigation if it appears those witnesses will not be called.

51. In order to effectively investigate the relevant policies, procedures, practices and training of Victoria police, in relation to the use of force as well as alternative responses such as control, containment and de-escalation of incidents, the HRLRC submits that the Coroner may also be assisted by a witness from within Victoria Police who has particular knowledge and experience of these issues. The relevance of such a witness, and who that witness may be, may need to be assessed once the relevant policies, manual and training materials have been made available to interested parties.
52. The HRLRC considers that, for the purposes of (1) assessing the policies, procedures, practices and training of Victoria Police in relation to engagement with children and people in mental crisis, and (2) assessing the effectiveness and independence of the investigation into Tyler's death, the Coroner will be assisted by expert evidence. Such evidence would be focused upon assisting the Coroner to understand best practice in these areas, including, where relevant, the experience and models adopted in other jurisdictions.
53. The HRLRC has liaised with Victoria Legal Aid to ensure there is no unnecessary duplication of expert evidence on these matters. In light of these discussions, the HRLRC has identified Mr Jim Coupland (Senior Director of Investigations, Police Ombudsman for Northern Ireland) as a potential expert with appropriate expertise and experience to assist the Coroner in relation to the issue of the effectiveness and independence of the investigation into Tyler's death. The HRLRC has contacted Mr Coupland's office and have been advised that he is in principle happy to assist in the Inquest. Mr Coupland is currently travelling, and the HRLRC hopes to be able to provide further information about his potential involvement at the next directions hearing on 8 July 2010.

**Brian Walters SC
Sam Ure**

11 June 2010

Annexure 1 - The right to life

A. Overview of key international jurisprudence

1. The 'right to life' has fundamental importance in all forms of human rights law. As it was put by the Inter-American Court of Human Rights: 'When the right to life is not respected, the other rights vanish because the bearer of those rights ceases to exist'.⁴²
2. Article 3 of the Universal Declaration of Human Rights, which takes the form of a resolution of the General Assembly of the United Nations (**Declaration**), states that 'Everyone has the right to life, liberty and the security of person'.
3. The International Covenant on Civil and Political Rights (**ICCPR**) is a treaty signed and ratified by most of the world's nations, including Australia. Article 6(1) states that:

Every human being has an inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
4. Section 9 of the Charter reflects article 6(1) of the ICCPR, stating that 'Every person has the right to life and has the right not to be arbitrarily deprived of life'.
5. At the international level, the ICCPR is interpreted, and human rights law developed, through three main avenues:
 - the series of *General Comment* documents promulgated by the United Nations Human Rights Committee (**UNHRC**) established under the ICCPR;
 - the decisions of the UNHRC under articles 1 and 2 of the First Optional Protocol to the ICCPR; and
 - various guidelines and 'soft law' instruments developed by United Nations bodies, which are useful in applying human rights principles to concrete cases.⁴³
6. As to the last of these avenues, the key instruments are the following:
 - the Code of Conduct for Law Enforcement Officials (**Code of Conduct**);⁴⁴
 - the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (**Basic Principles**);⁴⁵ and

⁴² *Case of the 'Juvenile Reeducation Institute' v Paraguay – Series C No. 112* [2004] IACHR 8, [156].

⁴³ International soft law instruments can be referred to by municipal courts for the purpose of interpreting rules of international law and human rights law: *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 219 per Stephen J; *Commonwealth v Tasmania* (1983) 158 CLR 1, 174-177 per Murphy J; *Re Little Joe Rigoli* [2005] VSCA 325, [5] and footnote 1 per Maxwell P. Lord Bingham of Cornhill made extensive reference to international soft law instruments in his speech in *A v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221.

⁴⁴ Annexed to *Resolution on Code of Conduct for Law Enforcement Officials*, GA Res 34/169, UN GAOR, 34th sess, 106th plen mtg, UN Doc A/RES/34/169.

⁴⁵ Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1990).

- the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (***Executions Principles***).⁴⁶
7. The Code of Conduct sets out principles concerning the use of force and firearms, and sets out in broad terms the situations in which force and firearms may be used.
 8. The Basic Principles relate the use of force by law enforcement officials to human rights in two ways. First, the recitals acknowledge that law enforcement is essential to the enjoyment of rights to life, liberty and security by all citizens, and that any threat to the life and safety of law enforcement officials threatens the security of society as a whole. Secondly, the recitals state that the use of force and firearms by law enforcement officials should be commensurate with due respect for human rights.
 9. The Executions Principles are relevant to the actions of police in that article 2 anticipates that the unlawful use of force by a police officer may amount to an extra-legal or summary execution. Detailed and practical guidelines on investigations of possible breaches of the Executions Principles are found in the Model Protocol for a Legal Investigation of Extra-legal, Arbitrary and Summary Executions (often referred to as the 'Minnesota Protocol').
 10. In considering the right to life, the UNHRC has described killing by State authorities as 'a matter of the utmost gravity'.⁴⁷

B. Comparative provisions

11. Many countries with a common law tradition such as Canada, New Zealand, South Africa and the United States recognize the right to life in domestic human rights instruments. In addition, many regional organizations have adopted treaties incorporating the right to life. The African Charter of Human and Peoples' Rights, the Arab Charter of Human Rights, and the American Convention on Human Rights (which is interpreted by the Inter-American Court of Human Rights) are examples.
12. The European Convention on Human Rights (***European Convention***) should be mentioned specifically, as the jurisprudence of the European Court of Human Rights (***European Court***) established under the European Convention has been influential and is highly evolved. Article 2 of the European Convention is in the following terms:

⁴⁶ Recommended by the United Nations Economic and Social Council on 24 May 1989 and 'welcomed' by the General Assembly in *Resolution on Summary or Arbitrary Executions*, GA Res 44/159, UN GAOR, 44th sess, 82nd plen mtg, UN Doc A/RES/44/159.

⁴⁷ *General Comment No 6*, UN HRC, 16th sess, [3] (1982).

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
 - (a) in defence of any person from unlawful violence;
 - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.
13. By schedule 2 to the *Human Rights Act 1998* (UK), the United Kingdom has incorporated European Convention rights into domestic law. United Kingdom case law is therefore helpful, as the European Convention right to life is analogous to the Charter right to life, and because the United Kingdom provides an example of the application of human rights concepts to the jurisprudence and institutions of a common law country.

C. Content of the right to life

Distinction between substantive and procedural obligations

14. Observance of the right to life involves a number of obligations on the State. These obligations are often described in foreign and international jurisprudence in terms of 'substantive' obligations and 'procedural' obligations. The substantive obligations are, in general terms, to protect life, not arbitrarily take life, and have in place laws, rules and procedures to guard against the arbitrary deprivation of life. The 'procedural' obligations are to ensure that potential breaches of the right to life are adequately investigated, with a view to ensuring that the right to life is better protected in the future.
15. Other distinctions have also been drawn to describe the different aspects of the right to life. For example, the Inter-American Court refers to the 'negative' obligation on the State not to take life, and the 'positive' obligation to take steps to protect and preserve life and to see that life is not arbitrarily taken.⁴⁸ The Inter-American Court sees the duty to investigate possible violations of the right to life as forming part of the positive obligation.⁴⁹
16. The 'procedural' or 'positive' obligation to investigate deaths at the hands of State officials that may involve violations of the right to life has been a long-standing concern of human

⁴⁸ *Case of the 'Juvenile Reeducation Institute' v Paraguay – Series C No. 112* [2004] IACHR 8, [158], [181]-[184].

⁴⁹ See *Case of the Gómez-Paquiayauri Brothers v Peru – Series C No. 110* [2004] IACHR 6, [129]-[132].

rights bodies.⁵⁰ The aspects of this obligation have been developed in the most detail by the jurisprudence of the European Court.

Substantive obligations

17. The 'substantive' obligations to respect the right to life oblige the State to ensure that:
 - the right to life is protected by law;
 - no one is arbitrarily or 'intentionally'⁵¹ deprived of life; and
 - laws, rules and procedures to protect life and guard against the arbitrary deprivation of life are in place.⁵²
18. The meaning of 'arbitrary' was recently considered by the Victorian Civil and Administrative Tribunal (**VCAT**) in *Kracke v Mental Health Review Board*⁵³ (**Kracke**), in the context of when a right is limited 'under law'. VCAT held that 'under law' did not mean 'under a law', but rather that a limitation cannot be arbitrary. The decision goes on to provide the following examples of when a limitation is arbitrary:
 - if there are inadequate safeguards on its use;
 - if its use was in bad faith or disproportionate to the ends sought to be achieved; or
 - if the limitation imposed by the law is itself vague or uncertain.⁵⁴
19. Significantly, in Australian and foreign jurisprudence, it has been recognised that an 'arbitrary' deprivation of life may occur even in cases where conduct is authorised by law, if the use of force is affected by arbitrariness in the application of the law or even in the expression of the law itself.⁵⁵
20. To fulfill these substantive obligations, the State must:

⁵⁰ See for example the UNHRC's comments in *Herrera Rubio v Colombia*, Communication No 161/1983, UN HRC, 34th sess, [10.3], [11], UN Doc CCPR/C/OP/2 (1988).

⁵¹ *McCann v United Kingdom* (1996) 21 EHRR 97; *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182; *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, [19]; *Osman v United Kingdom* (1998) 29 EHRR 245, [115].

⁵² This includes a duty to adopt clear and detailed domestic law on the use of lethal force which should strictly regulate its use in accordance with the Convention. See *McCann v United Kingdom* (1996) 21 EHRR 97, [150], [156], [161]; *R (Middleton) v West Somerset Coroner* [2004] 2 AC 192, [2]; *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, [30]; *Osman v United Kingdom* (1998) 29 EHRR 245; *LCB v United Kingdom* (1998) 27 EHRR 212, [36]; *Keenan v United Kingdom* (2001) 22 EHRR 913, [88]-[90]; *Edwards v United Kingdom* (2002) 35 EHRR 487.

⁵³ [2009] VCAT 646.

⁵⁴ *Kracke* [187], [190], [193].

⁵⁵ See, for example, *Kracke* [169]; *Nolan v MBF Investments Pty Ltd* [2009] VSC 244, [168]-[171], [289]; *R v Governor of Brockhill Prison; Ex parte Evans* [2001] 2 AC 19; *R v Secretary of State For The Home Department; Ex Parte Daly* [2001] 2 AC 532, [27]; *A v Secretary of State for the Home Department* [2005] 2 AC 68, [30].

- take appropriate steps to safeguard life;⁵⁶
- ensure that any use of force by State officials that results in a deprivation of life is 'absolutely necessary' and 'strictly proportionate'⁵⁷ to the achievement of a permitted purpose;⁵⁸
- ensure that the planning and execution of an operation does not require the use of unnecessary lethal force;⁵⁹
- ensure that law enforcement agencies are trained to assess whether there is an absolute necessity to use firearms with due regard to the pre-eminence of respect for human life as a fundamental value; and
- facilitate an effective independent judicial system to determine the cause of any death and, if necessary, to hold accountable those responsible.⁶⁰

Procedural obligations

21. Although the primary obligation on State authorities is not to take life arbitrarily, there is also a recognised obligation on the State to investigate deaths at the hands of officials such as the police, with the aim of bringing to justice anyone who may be responsible for the death of a person, and to prevent similar incidents in future.⁶¹ The procedural obligation is engaged by an actual or potential breach of the substantive obligation.⁶²
22. The purpose of an investigation into a death at the hands of State authorities is to 'secure the effective implementation of the domestic laws which protect the right to life and, in

⁵⁶ *McCann v United Kingdom* (1996) 21 EHRR 97; *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182; *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, [19]; *Osman v United Kingdom* (1998) 29 EHRR 245, [115].

⁵⁷ In assessing proportionality, regard must be had to the nature of the aim pursued, the dangers of life and limb inherent in the situation and the degree of risk that the force employed might result in loss of life. The use of force will be disproportionate if the authorities failed, whether deliberately or through lack of proper care, to take steps which would have avoided the deprivation of life of the suspects without putting the lives of others at risk: *McCann v United Kingdom* (1996) 21 EHRR 97, [193]-[194].

⁵⁸ *McCann v United Kingdom* (1996) 21 EHRR 97; *McKerr v United Kingdom* (2002) 34 EHRR 20 [110]; *Leonidis v Greece* [2009] ECHR 5 [54]-[55].

⁵⁹ *Leonidis v Greece* [2009] ECHR 5, [55]; *McCann v United Kingdom* (1996) 21 EHRR 97.

⁶⁰ *Dodov v Bulgaria* (2008) 47 EHRR 41, [80]; *Vo v France* (2005) 40 EHRR 12, [90]-[91]; *Calvelli and Ciglio v Italy* [2002] ECHR 3, [49]; *Powell v United Kingdom* (2000) 30 EHRR CD 362.

⁶¹ *McCann v United Kingdom* (1996) 21 EHRR 97, [161]; *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, [20].

⁶² The European Court of Human Rights has found that where a death occurs in circumstances which are unclear, the lack of any effective procedure to investigate the cause of the death could, itself, raise an issue under the Convention: *McCann v United Kingdom* (1996) 21 EHRR 97, [194]. It has further found that the State must initiate the necessary proceedings where there is a credible case that the Convention may have been breached: *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, [20]; *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, [20].

those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility'.⁶³

23. The obligation to investigate potential breaches of the right to life is recognised in several international instruments. The Basic Principles require that:
- where incidents are reported under the Basic Principles, governments and law enforcement agencies ensure an effective review process is available and that independent authorities can exercise jurisdiction where appropriate;⁶⁴ and
 - persons affected by the use of force and firearms have access to an independent process, including the judicial process.⁶⁵
24. The Executions Principles also require a thorough, prompt and impartial investigation of all cases where excessive or illegal force may have been used, if necessary through an independent commission of inquiry.⁶⁶
25. An investigation of possible breaches of the right to life must be:
- hierarchically, institutionally and practically independent from those implicated in the events giving rise to the investigation;
 - effective, in that it is capable of identifying the facts and leading to the punishment of any individuals who may be responsible for the death of a person; and
 - sufficiently open so as to allow public scrutiny, so that accountability is secured in practice as well as in theory.⁶⁷
26. An investigation into such a death should seek to ensure:
- as far as possible that the full facts are brought to light;
 - accountability for deaths occurring under the responsibility of State agents;
 - that culpable and discreditable conduct is exposed and brought to public notice;
 - that suspicion of deliberate wrongdoing (if unjustified) is allayed;
 - that dangerous practices and procedures are rectified; and
 - that those who have lost their relative may have the satisfaction of knowing that lessons learned from the death may save the lives of others.⁶⁸

⁶³ *Jordan v United Kingdom* (2001) 37 EHRR 52, [105].

⁶⁴ Basic Principles, article 22.

⁶⁵ Basic Principles, article 23.

⁶⁶ Executions Principles, [8], [11].

⁶⁷ *Ramsahai v Netherlands* [2007] ECHR 393, [325]. See also *McCann v United Kingdom* (1996) 21 EHRR 97, [159], [161]; *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, [20], [23]; *McKerr v United Kingdom* (2002) 34 EHRR 20, [113], [115].

⁶⁸ *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, [31]; *McKerr v United Kingdom* (2002) 34 EHRR 20, [111]; *Edwards v United Kingdom* (2002) 35 EHRR 487, [69];

27. There are two substantive requirements which an investigation into such a death must meet to ensure that the essential purpose of the investigation is fulfilled.
28. First, the investigation must be directed at determining who the deceased was, and how, when and where they came by their death. The House of Lords has considered that, in respect of the requirement that the investigation be directed at determining how the deceased came by their death, 'how' must be interpreted in the broader sense in order to meet the requirements of Article 2 of the European Convention. This means seeking to determine not just 'by what means' but 'by what means and in what circumstances' the death occurred: *R (Middleton) v West Somerset Coroner*.⁶⁹
29. Secondly, the investigation must be capable of achieving this outcome. In *Jordan v United Kingdom*,⁷⁰ the European Court of Human Rights found that the investigation must be effective, in that it is capable of leading to a determination of whether the force used was justified and the identification and punishment of those responsible. This 'is not an obligation of result, but of means'.
30. The Basic Principles require that, where incidents are reported under the Basic Principles, governments and law enforcement agencies ensure an effective review process is available and that independent authorities can exercise jurisdiction where appropriate.⁷¹
31. There is no specific form of investigation necessary for satisfaction of the State's obligation to investigate a death involving State responsibility.⁷²
32. The following procedural requirements of an investigation into a death involving State responsibility have been identified as necessary to ensure that the investigation is capable of achieving its outcome; that is, of determining who the deceased was, and how, when and where they came by their death.⁷³
 - the investigation must be independent (both hierarchically and practically);

Jordan v United Kingdom (2001) 37 EHRR 52, [105]; *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182; *Leonidis v Greece* [2009] ECHR 5 [67].

⁶⁹ [2004] 2 AC 182. The broad surrounding circumstances include such matters as the relevant legal or regulatory framework in place and the planning and control of the actions under examination. See also *McKerr v United Kingdom* (2002) 34 EHRR 20, [109]; *Leonidis v Greece* [2009] ECHR 5, [53]; *McCann v United Kingdom* (1996) 21 EHRR 97, [146]-[147].

⁷⁰ (2001) 37 EHRR 52.

⁷¹ Basic Principles, article 22.

⁷² *Jordan v United Kingdom* (2001) 37 EHRR 52; *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653.

⁷³ *Jordan v United Kingdom* (2001) 37 EHRR 52, [41]; *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653; *McCann v United Kingdom* (1996) 21 EHRR 97; *R (Takoushis) v Inner North London Coroner (CA)* [2006] 1 WLR 461; *McKerr v United Kingdom* (2002) 34 EHRR 20; Executions Principles. See also Basic Principles, article 23, in relation to the requirement of access to an independent process.

- the investigation must be effective;
 - the investigation must be reasonably prompt;
 - there must be a sufficient element of public scrutiny; and
 - the next of kin must be involved to an appropriate extent.⁷⁴
33. Where both a primary and subsequent investigation are conducted, these procedural requirements have been found applicable to both.⁷⁵
34. The requirement that the investigation be practically independent means that it must involve a formally independent body and be carried out with genuine independence.⁷⁶ Further:
- An investigation will not be hierarchically independent if the investigators inquire into the actions of those in the same chain of command.
 - An investigation will not be institutionally independent from those implicated in the death if the persons under investigation are from the same body as those investigating.
 - It is not sufficient for an independent body to have oversight of an investigation where the investigation itself is carried out by police officers connected organisationally with those under investigation.⁷⁷
35. The State must act of its own motion in conducting an investigation into such a death. This obligation will not be satisfied where it is left to the next of kin to lodge a formal complaint or take responsibility for the conduct of investigative procedures,⁷⁸ or where it is open for the next of kin to commence a civil action against those alleged to be responsible.⁷⁹
36. The investigation must be carried out with reasonable expedition.⁸⁰

⁷⁴ The State's obligation to involve the next-of-kin has been found by the European Court to arise in part from its obligation to respect family life: *Jordan v United Kingdom* (2001) 37 EHRR 52, [41]; *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, [22]; *McKerr v United Kingdom* (2002) 34 EHRR 20, [115]. See also *R (Humberstone) v Legal Services Commission* [2010] EWHC 760.

⁷⁵ *Jordan v United Kingdom* (2001) 37 EHRR 52.

⁷⁶ *McKerr v United Kingdom* (2002) 34 EHRR 20; *Simsek v Turkey* [2005] ECHR 546, [122]-[123]; *Tahsin Acar v Turkey* [2004] ECHR 149, [229]-[234].

⁷⁷ *Jordan v United Kingdom* (2001) 37 EHRR 52, [120]; *McKerr v United Kingdom* (2002) 34 EHRR 20, [128]; *Kelly v United Kingdom* [2001] ECHR 328, [114].

⁷⁸ *Menson v United Kingdom* [2003] 37 EHRR CD 220; *Jordan v United Kingdom* (2001) 37 EHRR 52.

⁷⁹ *R (Takoushis) v Inner North London Coroner (CA)* [2006] 1 WLR 461, [99].

⁸⁰ *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, [22]-[25]; *McKerr v United Kingdom* (2002) 34 EHRR 20, [114]; *Leonidis v Greece* [2009] ECHR 5, [68].

37. The primary investigators must take reasonable steps to secure the evidence concerning the incident. The State may fail to meet its obligation to conduct an effective investigation where there is a deficiency in the primary investigation that undermines its ability to achieve its outcome.⁸¹ Where police officers are not required to give evidence, or are instructed to conceal information, legitimate doubts will be raised as to the overall integrity of the investigative process.⁸²
38. Where there has been a killing by the State, it is essential that the investigation be subject to some form of open and objective oversight.⁸³
39. In *McKerr v United Kingdom*,⁸⁴ the European Court of Human Rights found that where police officers are not required to give evidence, or are instructed to conceal information, legitimate doubts will be raised as to the overall integrity of the investigative process.
40. Notably, United Kingdom case law provides a useful reference for interpreting the Charter right to life, as it applies a right to life that is analogous to the Charter right, and is a common law country. In the United Kingdom, as in Victoria, an important means of investigating suspicious deaths is by an inquest.⁸⁵ Inquests in England and Wales involve a finding of fact by a jury, although a Coroner may report on any matters which he or she considers might prevent future similar deaths.
41. A series of European Court decisions,⁸⁶ concerned the inquest procedure used in Northern Ireland. The European Court held that an inquest did not adequately safeguard the right to life in circumstances where it:
- examined only the immediate causes of a person's death and not, for example, the planning and control of operations;
 - did not require police to give evidence; and

⁸¹ *Menson v United Kingdom* [2003] 37 ERR CD 220. See also *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, [10]; *McKerr v United Kingdom* (2002) 34 EHRR 20, [113]; *Jordan v United Kingdom* (2001) 37 EHRR 52, [107]; *Leonidis v Greece* [2009] ECHR 5, [68].

⁸² *McKerr v United Kingdom* (2002) 34 EHRR 20, [127].

⁸³ *McCann v United Kingdom* (1996) 21 EHRR 97.

⁸⁴ (2002) 34 EHRR 20, [127].

⁸⁵ The obligation to ensure an effective investigation is also dealt with through common law criminal proceedings, these being the means by which individuals are tried and punished for crimes. However, criminal trials may deal with narrow issues (such as the state of mind of the accused) and not explore the full extent of the State's human rights obligations (see *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, [30]; see also *R (Amin) v Home Secretary* [2004] 1 AC 653, [34]-[38]). For example, they may not extend to the training of police, the planning and control of operations, or even the clarity of the laws under which police operate.

⁸⁶ See *Jordan v United Kingdom* (2001) 37 EHRR 52; *McKerr v United Kingdom* (2002) 34 EHRR 20; *Kelly v United Kingdom* [2001] ECHR 328.

- did not impose a legal obligation on the Director of Public Prosecutions to consider the Coroner's report, and any decision the Director made as to prosecution could be made without giving reasons.⁸⁷
42. In *R (Middleton) v West Somerset Coroner*, the House of Lords concluded that in cases in which state responsibility for a death was engaged, it would be necessary to examine not only the means by which a person died (the previous narrow interpretation of the phrase 'how the deceased met his death') but also the broad circumstances. That might require, in particular cases, either a narrative verdict from the jury or answers to a series of questions posed by the Coroner.⁸⁸

D. Nature and extent of police duties

Duties in using force or firearms

43. As part of their obligations to uphold the right to life, police have duties relating to:
- the use of force and firearms;
 - the planning and execution of operations that may involve the use of force and firearms; and
 - the training of police who may be called on to use firearms.

Use of force and firearms

44. The Code of Conduct requires police to uphold human rights (including the right to life).⁸⁹ It also requires police to use force only when 'strictly necessary and to the extent required for the performance of their duty'.⁹⁰ The commentary to this article states that 'the use of firearms is considered an extreme measure' and requires the use of proportionality in the application of force. It also states that '[e]very effort should be made to exclude the use of firearms, especially against children.'
45. Similarly, the Basic Principles require proportionality and restraint by police in the use of force and firearms, and the need to use non-violent means of law enforcement where possible to do so.⁹¹
46. The following principles regarding the use of force and firearms by police can be gleaned from foreign and international jurisprudence.

⁸⁷ See for example *McKerr v United Kingdom* (2002) 34 EHRR 20, [122]; cf *McCann v United Kingdom* (1996) 21 EHRR 97, [162]-[163].

⁸⁸ *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, [35]-[36].

⁸⁹ Code of Conduct, article 2.

⁹⁰ Code of Conduct, article 3.

⁹¹ Basic Principles, articles 4, 5.

47. Police must not use lethal force unless it is 'absolutely necessary'⁹² and 'reasonable' to do so. As a matter of both human rights law⁹³ and Victorian criminal law,⁹⁴ reasonableness has a subjective and an objective element. The police officer using lethal force must believe that conduct to be necessary to defend himself or herself or another person from the infliction of death or really serious injury – the subjective element. The officer must have reasonable grounds for that belief – the objective element.
48. In particular, it is never appropriate to use firearms where less severe measures are available and have not been used.⁹⁵ It is also inappropriate to use firearms to apprehend non-violent offenders,⁹⁶ even if the offender may escape as a result.⁹⁷
49. Clear rules must specify the circumstances in which police are authorised to carry firearms, when they are permitted to discharge them, and prohibiting the use of firearms in a way that causes unwarranted injury or risk.⁹⁸ It will not be sufficient for guidelines to police on the use of firearms to be in broad or vague terms.⁹⁹

Planning and control of operations

50. In planning and executing operations, police must consider alternative strategies to using force and firearms, particularly non-violent strategies such as negotiation.¹⁰⁰
51. It is, of course, relevant to the assessment of the planning and control of a police operation to assess the amount of time police are given to react to the incident.¹⁰¹ Even in situations that require a quick reaction, however, there should be a clear chain of command and the operation should not be uncontrolled.¹⁰²
52. Importantly, the overall control of an operation can result in the breach of the right to life if it creates a situation where recourse to firearms is inevitable.¹⁰³ For example, in *McCann*

⁹² See for example *McCann v United Kingdom* (1996) 21 EHRR 97, [148]; *Jordan v United Kingdom* (2001) 37 EHRR 52.

⁹³ Basic Principles, articles 4, 5; *McCann v United Kingdom* (1996) 21 EHRR 97, [134].

⁹⁴ *Crimes Act 1958* (Vic) s 9AC, s 9AD.

⁹⁵ *Simsek v Turkey* [2005] ECHR 546, [108]; *Ogur v Turkey* (2001) 31 EHRR 40.

⁹⁶ *Leonidis v Greece* [2009] ECHR 5; Basic Principles, articles 4, 5.

⁹⁷ *Nachova v Bulgaria* (2006) 42 EHRR 43, [105]; Basic Principles, articles 9, 16.

⁹⁸ Basic Principles, article 11; *Makaratzis v Greece* (2005) 41 EHRR 49, [58]-[59].

⁹⁹ For example 'only when absolutely necessary and when all other methods have been exhausted' has been found to be vague and therefore arbitrary: *Leonidis v Greece* [2009] ECHR 5, [65]; *Makaratzis v Greece* (2005) 41 EHRR 49, [62].

¹⁰⁰ See *Andronicou v Cyprus* (1998) 25 EHRR 491, [181].

¹⁰¹ *Makaratzis v Greece* (2005) 41 EHRR 49, [68]; see also *Leonidis v Greece* [2009] ECHR 5, [63].

¹⁰² The car chase involved in *Makaratzis* is an example of an uncontrolled operation which drew the criticism of the European Court.

¹⁰³ *McCann v United Kingdom* (1996) 21 EHRR 97, [213].

*v United Kingdom*¹⁰⁴ SAS soldiers were sent to apprehend three suspected terrorists, after allowing the suspects to park a car believed to contain a car bomb. The soldiers were instructed that, if confronted, the suspects might attempt to detonate a radio-controlled car bomb using a hand-held remote control device. The three suspects were shot and killed in two separate incidents. The European Court held that the operation breached the suspects' right to life, in that the soldiers' instructions made violence almost inevitable.

Training of police

53. In order to ensure the right to life is upheld, a State must ensure that police are trained:
- in the use of alternatives to use of force and firearms, including the peaceful settlement of conflicts;¹⁰⁵
 - (if police will be using firearms) in the use of firearms;¹⁰⁶ and
 - generally, to respect and uphold human rights.¹⁰⁷

Independence of investigations into deaths caused by police

54. As a practical matter, where police have some involvement in the death of a person, the police will generally be among the first people at the scene. Consequently, police are likely to play a role in the securing of evidence. Indeed, the obligation to investigate possible breaches of the right to life requires that evidence, including forensic evidence and potential witnesses, be secured as quickly as possible.
55. For these reasons, police will necessarily be involved in the initial investigations of suspicious deaths and in particular securing evidence. This involvement is not contrary to a State's obligations, and in fact promotes the effectiveness of the investigation by ensuring evidence is not lost.¹⁰⁸
56. As mentioned above, however, the European Court requires that the investigation be institutionally, hierarchically and practically independent of the organisation being investigated. The transition from a police investigation to an independent investigation must take place as quickly as is practicable. The European Court has held that in the

¹⁰⁴ (1996) 21 EHRR 97.

¹⁰⁵ Basic Principles, article 20.

¹⁰⁶ Basic Principles, article 19.

¹⁰⁷ Code of Conduct, article 2; Basic Principles, article 20; *Simsek v Turkey* § 108.

¹⁰⁸ *Ramsahai v Netherlands* [2007] ECHR 393, [337]-[338]; *Jordan v United Kingdom* (2001) 37 EHRR 52, [118]-[119]. Contrast, for example, *Simsek v Turkey* [2005] ECHR 546, [122]. On securing the scene, see also Model Protocol for a Legal Investigation of Extra-legal, Arbitrary and Summary Executions, Section C.

absence of any explanation, a fifteen and a half hour delay in transferring the investigation to an independent body was not acceptable.¹⁰⁹

57. The three aspects of independence impose different obligations. An investigation is not hierarchically independent if the investigators inquire into the actions of those in the same chain of command. An investigation is not institutionally independent from those implicated in the relevant events if the persons under investigation are from the same body as those investigating. The requirement that the investigation be 'practically' independent means that the investigation must, as well as involving a formally independent body, be carried on with genuine independence and not, for example, with uncritical reliance on the versions of events of police.¹¹⁰
58. The European Court has repeatedly held it is not sufficient to discharge a State's obligations for an independent body to have oversight of an investigation, where the investigation itself is carried out by police officers connected organisationally with those under investigation.¹¹¹
59. The independent body must carry out the investigative work itself in order to ensure public confidence in the investigations.
60. Commentators have suggested that the culture of the organisation investigating police needs to be considered in addition to formal organisational independence.¹¹² In particular, it has been argued that a formally independent body may be ineffective if it employs a significant number of police who still identify culturally as police.¹¹³
61. It has also been suggested that the investigation of police ought to be independent of the prosecution of offences, so that potential complainants can speak openly to investigators.¹¹⁴

Openness of investigations

62. Any investigation into a possible violation of the right to life must be sufficiently open to ensure public scrutiny and accountability. The European Court has placed increasing

¹⁰⁹ *Ramsahai v Netherlands* [2007] ECHR 393, [339].

¹¹⁰ *Simsek v Turkey* [2005] ECHR 546, [122]-[123]; *Tahsin Acar v Turkey* [2004] ECHR 149, [229]-[234].

¹¹¹ *Jordan v United Kingdom* (2001) 37 EHRR 52, [120]; *McKerr v United Kingdom* (2002) 34 EHRR 20, [128]; *Kelly v United Kingdom* [2001] ECHR 328, [114].

¹¹² Tamar Hopkins, *An Effective System for Investigating Complaints Against Police* (13 April 2009) 34-35, 43-45.

¹¹³ Tamar Hopkins, *An Effective System for Investigating Complaints Against Police* (13 April 2009) 43-45, 48.

¹¹⁴ Tamar Hopkins, *An Effective System for Investigating Complaints Against Police* (13 April 2009) 56.

emphasis on involving the next-of-kin in investigations (although in cases of suspicious deaths the State must initiate an investigation of its own motion).¹¹⁵

63. It is noted that the requirement that the next of kin be involved does not necessarily mean that the next-of-kin must be granted access to all documents and files of police, if there are operational reasons for refusing that access.¹¹⁶
64. In suspicious circumstances where the State and the police have failed to give any convincing explanation of events, the European Court has tended to find violations of the right to life.¹¹⁷
65. In Victoria, it has been suggested that making an independent body subject to freedom of information requests would be one way of seeking to ensure openness.¹¹⁸

¹¹⁵ *Jordan v United Kingdom* (2001) 37 EHRR 52, [105], [133]; see also *Nachova v Bulgaria* (2006) 42 EHRR 43.

¹¹⁶ *Ramsahai v Netherlands* [2007] ECHR 393, [348]-[349].

¹¹⁷ A notable example is *Anguelova v Bulgaria* (2004) 38 EHRR 31.

¹¹⁸ Tamar Hopkins, *An Effective System for Investigating Complaints Against Police* (13 April 2009) 78.

Annexure 2 – The Right of Families and Children to Protection

A. Overview of key international jurisprudence

1. Article 25(2) of the Declaration states that 'Motherhood and childhood are entitled to special care and assistance. All children... shall enjoy the same social protection.'
2. Article 24(1) of the ICCPR states that:

Every child shall have... the right to such measures of protection as are required by his (sic) status as a minor, on the part of his family, society and the State.
3. The special rights of children are also specifically addressed by the United Nations Convention on the Rights of the Child (**CROC**), including:
 - article 3(1), which requires States, in all actions concerning children by 'administrative authorities' (among other bodies), to consider the best interests of the child as a 'primary consideration';
 - article 3(2), which requires States to 'undertake to ensure the child such protection and care as is necessary for his or her well-being';
 - article 3(3), which requires States to ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities...';
 - article 6(2), which provides that 'States Parties shall ensure to the maximum extent possible the survival and development of the child'; and
 - article 19(1), which provides that 'States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical and mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation...'
4. Australia is a signatory to CROC and has not made any relevant reservations.
5. Section 17(2) of the Charter reflects the ICCPR and CROC, stating that:

Every child has the right... to such protection as is in his or her best interests and is needed by him or her by reason of being a child.

B. Content of the right of a child to protection

6. The Committee on the Rights of the Child has commented in relation to article 3 of CROC that:

Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions...¹¹⁹

¹¹⁹ *General Comment No 5*, UN CRC, 34th sess, [12], UN Doc CRC/GC/2003/5 (2003).

7. It follows that administrative bodies must consider in advance how children's rights may be affected by the actions of that body, and (by implication) implement policies that address the potential effect of their actions upon children.
8. In General Comment No 17, the UNHRC in discussing the right of a child to protection under article 24 of the ICCPR stated that:

the implementation [of article 24] entails the adoption of special measures to protect children, in addition to the measures that States are required to take under article 2 to ensure that everyone enjoys the rights provided for in the Covenant.¹²⁰
9. Two decisions of the UNHRC concerning allegations of a breach of article 24 of the ICCPR by Australia illustrate the scope of the right of a child to protection. In *Bakhtiyari v Australia*¹²¹ the Bakhtiyari family lodged a complaint with the UNHRC arguing that the Australian government had violated article 24(1) of the ICCPR by keeping the Bakhtiyari children in immigration detention for almost three years. The UNHRC stated:

the principle that in all decisions affecting a child, its best interests shall be a primary consideration, forms an integral part of every child's right to such measures of protection as required by his or her status as a minor, on the part of his or her family, society and the State, as required by article 24, paragraph 1, of the Covenant.¹²²
10. The UNHRC decided that the detention had not been guided by the best interests of the children and was therefore a violation of article 24(1) of the ICCPR.
11. In *D & E v Australia*¹²³ an Iranian family that was detained for over three years by the Australian government complained that, amongst other things, this was a breach of article 24(1) of the ICCPR. The UNHRC found, however, that:

in the light of the State party's explanation of the efforts undertaken to provide children with appropriate educational, recreational and other programs, including outside the facility, that a claim of violation of their rights under article 24 has, in the circumstances, been insufficiently substantiated, for purposes of admissibility.¹²⁴
12. As noted above, General Comment No 17 of the UNHRC Committee states that the obligations imposed by article 24 of the ICCPR include the adoption of special measures by the State to protect children. Children are to be afforded a right to 'special protection' in addition to those measures that States are required to take under article 2 to ensure that everyone enjoys the rights provided for in the Covenant. The precise nature of such

¹²⁰ *General Comment No 17*, UN HRC, 35th sess, [1] (1989).

¹²¹ Communication No. 1069/2002, UN HRC, 79th sess, UN Doc CCPR/C/79/D/1069/2002 (2003).

¹²² *Bakhtiyari v Australia*, Communication No. 1069/2002, UN HRC, [9.7], UN Doc CCPR/C/79/D/1069/2002 (2003).

¹²³ Communication No. 1050/2002, UN HRC, 87th sess, UN Doc CCPR/C/87/D/1050/2002 (2006).

¹²⁴ *D & E v Australia*, Communication No. 1050/2002, UN HRC, 87th sess, [6.4], UN Doc CCPR/C/87/D/1050/2002 (2006).

special protection has not been enunciated, but it is clear that the State is required to take additional measures to protect children due to their more vulnerable position as children.

13. For example, in *Bulacio v Argentina*¹²⁵ which was concerned with provisions in the Inter-American Convention on Human Rights, including the right to life (Article 4), the Court stated:

The State must respect the right to life of all persons under its jurisdiction, enshrined in Article 4 of the American Convention. This obligation expresses itself in special modes in the case of minors, taking into account the provisions regarding protection of children set forth in the American Convention and in the Convention on the Rights of the Child. The role of the State as guarantor with respect to this right carries with it the obligation to prevent situations that might lead, by action or omission, to negatively affect it.¹²⁶

14. As well as these special protection obligations, case law around article 24 of the ICCPR indicates that there is an obligation on the State to treat a child's best interests as a primary consideration.

15. As discussed above, the Code of Conduct (Article 3) requires police to use force only when strictly necessary and to the extent required for the performance of their duty, and makes special reference to children. The commentary included in Article 3 states:

3(c) The use of firearms is considered an extreme measure. Every effort should be made to exclude the use of firearms, *especially against children*. In general, firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender.¹²⁷ (emphasis added).

¹²⁵ *Case of Bulacio v Argentina – Series C No. 100* [2003] IACHR 3.

¹²⁶ *Case of Bulacio v Argentina – Series C No. 100* [2003] IACHR 3, [138].

¹²⁷ Annexed to *Resolution on Code of Conduct for Law Enforcement Officials*, GA Res 34/169, UN GAOR, 34th sess, 106th plen mtg, UN Doc A/RES/34/169.