

**IN THE VICTORIAN CIVIL
AND ADMINISTRATIVE
TRIBUNAL
ADMINISTRATIVE DIVISION
GENERAL LIST**

NO G 366 OF 2007

BETWEEN

Western Suburbs Legal Service

Applicant

-and-

Department of Justice

Respondent

WITNESS STATEMENT OF PHILIP LYNCH

Date of document	24 October 2007
Prepared by:	
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On 13 November 2007 I, Philip Lynch of level 1, 550 Lonsdale Street, Melbourne, Victoria 3000 will say:

1 Personal qualifications

1.1 I am the Director and Principal Solicitor of the Human Rights Legal Resource Centre. The Centre is Australia's first specialist human rights legal service and was established to promote and protect human rights through litigation, casework, advocacy, legal education and capacity building.

1.2 I have been in this position since 2006.

2 Human Rights Obligations

- 2.1 I have been informed that the Applicant seeks access to a report prepared by the Corrections Inspectorate entitled “Review of Administration of Separation Orders High Security and Management Units” (the “**Report**”)
- 2.2 I have read the witness statements of William McKendry and Roderick Wise both dated 8 October 2007 filed on behalf of the Respondent.
- 2.3 Mr Wise asserts that the Report is not a qualitative or quantitative evaluation about the impacts of separation on prisoners. Mr McKendry asserts that the Report does not deal with the effects that separation of a prisoner may have on the prisoner, or the laws relating to separation, or any human rights issues behind those laws.
- 2.4 Australia is a party to the *International Covenant on Civil and Political Rights*. Article 50 of the ICCPR provides that, in federations such as Australia, the obligations of the Covenant are binding on the federation as a whole and must extend across all parts of that federation, without any limitations or exceptions. This means that, in Australia, all branches of government (legislative, executive and judicial) and other public or governmental authorities, at state or federal level, must act to respect, protect and fulfil human rights.¹
- 2.5 Relevantly to the present case, Victoria has the following obligations to give effect to the ICCPR:
- (i) the obligation to prohibit and protect prisoners from cruel, inhuman or degrading treatment or punishment (article 7), which includes the obligation to fully, properly, effectively and transparently investigate, punish and remedy alleged breaches of the right;
 - (ii) the obligation to ensure that no person is subject to arbitrary detention (article 9), which requires that any detention be in accordance with law and, in addition, necessary in all the

¹ UNHRC, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add13 (2004) [4]. See also art 27 of the *Vienna Convention on the Law of Treaties* which provides that a State party ‘may not invoke the provisions of its internal law as justification for its failure to perform a treaty’: *Vienna Convention on the Law of Treaties*, GA Res A/41, UN GAOR, 41st sess, 95th plen mtg, Supp 53, art 27, UN Doc A/DEC/41/420 (1986).

circumstances, just, appropriate and proportionate.² Further, it is a basic principle that 'except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain their human rights and fundamental freedoms',³

- (iii) the obligation to uphold the right to freedom of expression, which subsumes the right to impart and *receive* information of all kinds subject only to such restrictions as are necessary for the protection of national security, public order, public health, public morality or the rights and reputations of others (article 19). State-imposed limitations on the right to freedom of expression must not put the right itself in jeopardy;⁴ and
- (iv) the obligation to ensure that all persons deprived of their liberty be treated with humanity and respect for the inherent dignity of the human person (article 10), which requires that prison management, operations and conditions be compatible with the *Standard Minimum Rules for the Treatment of Prisoners* and the *Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment*.⁵

2.6 Principle 29(1) of the *Body of Principles* provides that 'in order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment'. Rule 55 of the *Standard Minimum Rules* provides that 'there shall be a regular inspection of penal institutions and services by qualified and experienced inspectors appointed by a competent authority. Their task shall be in particular to ensure that these institutions are

² *A v Australia*, HRC, Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) [9.2]. See also *Van Alphen v The Netherlands*, HRC, Communication No 305/1988, UN Doc CCPR/C/39/D/305/1988 (15 August 1990) [5.8].

³ *Basic Principles for the Treatment of Prisoners*, UN GA Res 45/111 (14 December 1990), Principle 5.

⁴ HRC, *General Comment No 10: Freedom of Expression* (1983) [4].

⁵ Mark Bossuyt, *Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights* (1987) 233; *Kurbanov v Tajikistan*, HRC, Communication No 1096/2002, UN Doc CCPR/C/79/D/1096/2002 [7.8]; *Mukong v Cameroon*, HRC, Communication No 458/1991, UN Doc CCPR/C/51/D/458/1991 (1994) [9.3]; HRC, *General Comment No 21 (Replaces General Comment 9) concerning Humane Treatment of Persons Deprived of Liberty* (1992), [5]; *Wu v Minister for Immigration for Ethnic Affairs* (1996) 64 FCR 245, 265 (per Carr J).

administered in accordance with existing laws and regulations and with a view to bringing about the objectives of penal and correctional services.’ Expert commentary on these principles and rules state that the inspections authority should be fully independent of the authority responsible for prison administration and that best practice should involve publication of any reports.⁶

*Independent inspectors should publish all parts of their reports on prisons except those that are related to confidential security information or details of individual persons. The effectiveness of any system of inspection, formal or informal, will be undermined if inspectors do not submit reports on their findings or if such reports are ignored.*⁷

- 2.7 Relevantly to the present case, Victoria also has an obligation under articles 11 and 16 of the *Convention Against Torture* to systematically review ‘interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest detention or imprisonment’, with a view to preventing torture and any other form of cruel, inhuman or degrading treatment or punishment.
- 2.8 Pursuant to the *Victorian Charter of Rights and Responsibilities 2006* (the **Charter**), the Respondent is a “public authority”. As a “public authority”, section 38(1) of the Charter provides that the Respondent must act in a way that is compatible with a human right prescribed under the Charter and must give proper consideration to relevant human rights in making any decision. Pursuant to section 32(1), so far as it is possible to do so consistently with their statutory purpose, the Respondent must also interpret and apply all statutory provisions in a way that is compatible with human rights. The obligations arising under sections 32 and 38 commence on 1 January 2008. Since 1 January 2007, however, the Respondent has had an obligation under section 7(1)(g) of the *Public Administration Act 2004* to “respect and promote the human rights set out in the Charter of

⁶ Office of the United Nations High Commissioner for Human Rights, *Human Rights and Prisons: Manual on Human Rights Training for Prison Officials* (2005) 134-9;

⁷ Andrew Coyle, *A Human Rights Approach to Prison Management: Handbook for Prison Staff* (King’s College London and UK Foreign and Commonwealth Office, 2002) 115.

Human Rights and Responsibilities by (i) making decisions and providing advice consistent with human rights; and (ii) actively implementing, promoting and supporting human rights”.

- 2.9 The ‘human rights’ prescribed under the Charter are largely modelled on the civil and political rights contained in the ICCPR. Pursuant to section 7 of the Charter, they 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’, which requires that any such limitation pursue a legitimate aim, be proportionate and rationally connected to that aim, and be the least restrictive means reasonably available to achieve that aim.
- 2.10 Relevantly to the present case, from 1 January 2008, the Respondent is required to act compatibly with and give proper consideration to:
- (i) the right to freedom and protection from torture and any form of cruel, inhuman or degrading treatment or punishment (section 10);
 - (ii) the right to freedom of expression, which includes the right to seek, receive and impart information and ideas of all kinds (section 15);
 - (iii) the right to liberty and security, including the right not to be subject to arbitrary arrest or detention (section 21);
 - (iv) the right, when deprived of liberty, to be treated with humanity and with respect for the inherent dignity of the human person (section 22).
- 2.11 It is likely that these rights will be interpreted and applied having regard to the interpretation and application of the provisions of the ICCPR on which they are modelled. Section 32(2) of the Charter provides that ‘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’. Further, it is an accepted principle of domestic law that it is legitimate to have regard to the opinions and decisions of bodies established to receive reports or determine claims under the treaty over

which it has jurisdiction.⁸ It is also well established that it is desirable, as far as possible, that expressions used in international agreements be construed in a uniform and consistent manner by both municipal courts and international courts and panels.⁹

2.12 I have read the witness statement of Charandev Singh filed on behalf of the Applicant. Mr Singh's statement refer to the statutory provisions which prescribe the procedures which must complied with when separation , segregation and isolation orders ("**separation orders**") are made.

2.13 The use of separation orders and the administration of such orders is a matter of great public interest. If the Report was to reveal that the Respondent (and/or its delegates) are not complying with the relevant statutory and procedural provisions, questions are raised as to whether prisoners have been/are being separated unlawfully and/or improperly and/or arbitrarily and whether the Respondent is consequently breaching its human rights obligations. This is also the case if the Respondent (and/or its delegates) are failing to ensure that the administration of separation orders are at all times consistently and strictly applied, timely and properly reviewed and available for internal and external scrutiny. Equally, if the Report reveals that the Respondent (and/or its delegates) are complying with the relevant statutory provisions and procedures, there is a great public interest in dissemination of that fact.

3 Public Debate regarding High Security Units

3.1 I have read the Respondent's Statement of Public Interest Grounds. In that Statement, the Respondent contends that "(t)here is no ongoing public debate on matters the subject of the documents in question which would be meaningfully enhanced by or contributed to by the release of the document."

3.2 I have read the recent judgments of Justice Bongiorno, Justice Osborn and Justice Teague in relation to three proceedings in the Supreme Court of Victoria regarding bail applications and a stay application.

⁸ See, eg, *Commonwealth v Bradley* (1999) 95 FCR 218, 237 [39] per Black CJ; *Commonwealth v Hamilton* (2000) 108 FCR 378, 387 [36], 388 [39].

⁹ See, eg, *Rocklea Spinning Mills Pty Ltd v Anti Dumping Authority* (1995) 56 FCR 406, 421E; *Povey v Qantas Airways Ltd* (2005) 216 ALR 427, 433 [25] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

- 3.3 In their judgments, the Judges of the Supreme Court of Victoria comment on the oppressive conditions in which people are held under separation orders. This is demonstrative of the fact that the administration of separation orders is a significant matter of public interest.
- 3.4 In November 2004, Joseph Terrence Thomas was arrested and charged with offences under the *Criminal Code Act 1995* (Cth) and the *Passports Act 1938* (Cth). Mr Thomas was imprisoned in the high security unit of Port Philip Prison in Victoria from November 2004 to February 2005. On 14 February 2005, in his oral decision granting a bail order in favour of Mr Thomas, the Chief Magistrate commented on the oppressive conditions under which Mr Thomas was being remanded.¹⁰
- 3.5 The Chief Magistrates' decision to grant bail was appealed to the Supreme Court of Victoria by the Director of Public Prosecutions (**DPP**). Justice Teague, in his decision to dismiss the DPP's appeal, commented that the conditions of Mr Thomas' confinement were abnormally restrictive and exceptionally so in relation to other remandees.¹¹
- Attached to this witness statement and marked "**PL-1**" is a copy of the decision made by Justice Teague on 15 March 2005.
- 3.6 In two other recent Supreme Court of Victoria decisions, Justice Osborne and Justice Bongiorno also commented on the circumstance of custody of 13 men who have been charged with offences under section 102.3 of the *Criminal Code Act 1995* (Cth). The 13 men are being held in the Acacia Unit, maximum security unit at Barwon Prison.
- 3.7 In January 2006, Justice Osborn heard an application for bail made by one of the 13 accused. Justice Osborn commented:

"In the present case the applicant is held in seriously confined conditions. It can be said that he has access to a variety of facilities within his confined circumstances and is one of a group which appears to be mutually supportive. Nevertheless the basic fact remains that Unit 1 is restricted in space with very little access

¹⁰ See paragraphs [7] and [15] of the Chief Justice's unrevised reasons in Annexure B to the decision of Justice Teague in *DPP v Thomas* [2005] VSC 85 (15 March 2005)

¹¹ *DPP v Thomas* [2005] VSC 85 (15 March 2005)

to the open air and his opportunities for outside contact are materially limited. The fact that Unit 1 and in turn the block which contains it are fully or substantially occupied on an ongoing basis exacerbates these problems. These conditions, which I have personally observed, are not those in which ordinary Australians would expect any member of the public to be held on remand for extended periods of time when charged with no more than membership of an organisation.”¹²

Attached to this witness statement and marked “**PL-2**” is a copy of the decision made by Justice Osborn on 20 January 2006.

- 3.8 On 6 September 2007, Justice Bongiorno heard an application for bail made by another of the 13 accused. Justice Bongiorno commented:

“Close confinement, shackling, strip searching and other privations to which the inmates at Acacia Unit are subject all add to the psychological stress of being on remand, particularly as some of them seem to lack any rational justifications. This is especially so in the case of remand prisoners who are, of course, innocent of any wrongdoing. In due course, it may become necessary, in another context, for the court to revisit this issue, but, having regard to my conclusions in this case, it is not appropriate to do so at present.”¹³

Attached to this witness statement and marked “**PL-3**” is a copy of the decision made by Justice Bongiorno on 6 September 2007.

- 3.9 On 9 May 2007, the UN Working Group on Arbitrary Detention, a body of independent human rights experts mandated by the UN Human Rights Council to investigate and report on allegations of arbitrary detention, considered and adopted an ‘Opinion’ (No 7/2007 (Australia)) on the conditions of detention of the 13 accused. Attached to this Witness Statement and marked “**PL-4**” is a copy of the Opinion dated 9 May 2007. In the Opinion of the Working Group:

¹² Haaddara v DPP [2006] VSC 8 (20 January 2006)

¹³ Raad v DPP [2007]VSC 330 (6 September 2007) [6]

- (i) the “conditions of detention, as described by the source and not contested by the Government, are particularly severe, especially taking into account that they have been imposed upon persons who have not yet been declared guilty and who must, accordingly, be presumed innocent (para 23);
- (ii) “the law appears to make the detention under extraordinarily restrictive conditions the rule for any person charged with a terrorist offence, without sufficient room for consideration of the specific charges against the detainees and their individual circumstances or dangerousness” (para 27);
- (iii) the submissions from both the source and the Government “suggest that the judges deciding on bail applications might not have sufficient discretion to consider these matters either, at least in the absence of “exceptional circumstances””. (para 27)

3.10 The conditions of detention of the 13 accused were also considered in a number of reports tabled before the 4th Session of the Human Rights Council (including: the Report of the Special Rapporteur on the independence of judges and lawyers (Mr Leandro Despouy) (A/HRC/4/25/Add.1); the Report of the Special Rapporteur on freedom of religion or belief (Ms Asma Jahangir) (A/HRC/4/21/Add.1); and the Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (Mr Martin Scheinin) (A/HRC/4/26/Add.1).

3.11 There has been significant public debate regarding the conditions in which prisoners and accused are confined as a result of separation orders being made and as a result of the above judgments/ judicial comments. I have read numerous newspaper articles regarding these issues. This further demonstrates the public interest in the administration of separation orders.

Attached to this witness statement and marked "PL-5" is a copy of a number of media articles.

Made at Melbourne in the)
State of Victoria)
this 24 day of October 2007)
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Philip Lynch