JOSEPH TERRENCE THOMAS

Appellant

V

THE DIRECTOR OF PUBLIC PROSECUTIONS FOR THE COMMONWEALTH OF AUSTRALIA

Respondent

Re Application by Amnesty International Australia for leave to make submissions as *amicus curiae*

SUBMISSIONS

1. Amnesty International Australia ("AIA") seeks leave to appear and make submissions as *amicus curiae* in the present appeal in relation to the principles and human rights considerations that are relevant to the exercise of the public policy discretion to exclude evidence obtained from a person suspected of terrorist offences who is being held in detention in a developing country and has not been afforded his right to legal counsel during questioning.

A. AMNESTY'S STANDING TO MAKE SUBMISSIONS AS AMICUS CURIAE

2. The Court has a broad discretion to hear submissions from amicus curiae: *Levy v Victoria* (1997) 189 CLR 579, at 604. An amicus is often heard on the basis that the person is able to offer the court a submission on law or on relevant facts that will assist the Court in a way in which the court may not otherwise have been assisted: *Levy* at 604 per Brennan CJ. If granted leave AIA proposes to make submissions in relation to international human rights jurisprudence and authorities that are relevant to the public policy discretion. AIA submits that it is in a position to assist the Court in a way in which it would not otherwise have been assisted concerning those matters. AIA also submits that the issues of principle in relation to the discretion that are raised in the present appeal can have important ramifications for other cases concerning alleged terrorist offences.

3. Amnesty International is an independent, international and politically impartial organisation which aims to promote the international recognition of

human rights. It was established in 1961, and has over 1.8 million members and supporters and national operations in more than 150 countries around the world: see affidavit of Ms Nicole Bieske, a Board Member of AIA, filed by AIA in support of its application for leave to be heard as amicus curiae in this appeal, at par 8.

4. Amnesty International has been accorded consultative status by the United Nations and other international intergovernmental organisations, including the United Nations Economic and Social Council, the United Nations Organisation for Education, Science and Culture, and the Council of Europe.[1]

5. Amnesty International and its sections have been granted leave to make submissions as interveners or as amicus in a number of cases which raise human rights issues, including in the context of rights of persons detained in the course of the investigation of terrorist offences. Amnesty International has been granted leave to make submissions as amicus curiae or as an intervener in recent House of Lords cases : see *A v Secretary of State for the Home Department* [2005] UKHL 71 (which related to the question of whether evidence obtained as a result of torture by agents of a third party state could be admitted in English courts) and *Jones v Ministry of the Interior of Saudi Arabia* [2006] UKHL 26 (which related to the conflict between the principles of the sovereign state immunity and the universal prohibition on torture).

6. In Australia, AIA has been granted leave to appear in the High Court and the Federal Court as amicus curiae in:

    - *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473;
    - *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 206 ALR 130;
    - *Victorian Council for Civil Liberties Incorporated v Minister for Immigration and Multicultural Affairs* [2001] FCA 1297.[2]

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1 Affidavit of Nicole Bieske, par 13.
2 Affidavit of Nicole Bieske, par 20.

B. THE RECORD OF INTERVIEW AND THE PUBLIC POLICY DISCRETION

(1) The right to communicate with a legal practitioner

7. AIA understands that the evidence upon which Mr Thomas was convicted consisted principally of a record of interview with officers of the Australian Federal Police ("AFP"), conducted in Pakistan on 8 March 2003. Mr Thomas was not informed, before the officers commenced the interview, that he had a right to communicate with a legal practitioner, nor was he permitted to have that communication, as required by s 23G of the *Crimes Act 1914* (Cth). Section 23G(1) provides:

> Subject to section 23L, if a person is under arrest or a protected suspect, an investigating official must, before starting to question the person, inform the person that he or she may:
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> (a) communicate, or attempt to communicate, with a friend or relative to inform that person of his or her whereabouts; and
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> (b) communicate, or attempt to communicate, with a legal practitioner of the person's choice and arrange, or attempt to arrange, for a legal practitioner of the person's choice to be present during the questioning;
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> and the investigating official must defer the questioning for a reasonable time to allow the person to make, or attempt to make, the communication and, if the person has arranged for a legal practitioner to be present, to allow the legal practitioner to attend the questioning.

8. Section 23L provides the following exceptions to the rights conferred by s 23G:

> (1) Subject to subsections (2) and (4), if a requirement imposed on an investigating official by this Part is expressed as being subject to this section, the requirement does not apply if, and for so long as, the official believes on reasonable grounds that:
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> (a) compliance with the requirement is likely to result in:
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> (i) an accomplice of the person taking steps to avoid apprehension; or
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> (ii) the concealment, fabrication or destruction of evidence or the intimidation of a witness; or
>
> (b) if the requirement relates to the deferral of questioning—the questioning is so urgent, having regard to the safety of other people, that it should not be delayed by compliance with that requirement.
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> (2) If the requirement relates to things done by or in relation to a legal practitioner, subsection (1) only applies:
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> (a) in exceptional circumstances; and

(b) if:

(i) an officer of a police force of the rank of Superintendent or higher; or

(ii) the holder of an office prescribed for the purposes of this section, other than an office in a police force;

has authorised the application of subsection (1) and has made a record of the investigating official's grounds for belief.

(3) If the application of subsection (1) is so authorised:

(a) the record of the investigating official's grounds for belief must be made as soon as practicable; and

(b) the investigating official must comply with the requirement as soon as possible after subsection (1) ceases to apply.

(4) If the application of subsection (1) results in:

(a) preventing or delaying the person from communicating with a legal practitioner of his or her choice; or

(b) preventing or delaying a legal practitioner of the person's choice from attending at any questioning;

the investigating official must offer the services of another legal practitioner and, if the person accepts, make the necessary arrangements.

As far as AIA is aware it has not been argued that any of the exceptions in s23L apply in the present case.

(2) The public policy discretion[3]

9. Where evidence has been obtained by a process which involves unlawful or unfair acts, the trial judge is required to consider whether or not the evidence should be excluded pursuant to the public policy discretion.

10. The nature of the public policy discretion to exclude evidence was authoritatively expressed by Barwick CJ in *R v Ireland* (1970) 126 CLR 321 at 334-335: [4]

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[3] The absence of any ability on Mr Thomas' part to communicate with a legal practitioner prior to being questioned by the AFP officers, in combination with the maltreatment to which Mr Thomas had been subjected while in custody in Pakistan prior to the interview, will also be relevant to the considerations of (i) whether any admissions made during the interview were truly voluntary in the necessary sense and (ii) whether it would be fair to the accused to admit the record of interview into evidence, given the significant forensic disadvantage occasioned to Mr Thomas by the failure to observe his procedural rights under the *Crimes Act*. However, the submissions of Amnesty International will focus on the exercise of the public policy discretion as it is in this context that international human rights standards have the most significant application.

> Evidence of relevant facts or things ascertained or procured by means of unlawful or unfair acts is not, for that reason alone, inadmissible. This is so, in my opinion, whether the unlawfulness derives from the common law or statute. But it may be that acts in breach of a statute would more readily warrant the rejection of the evidence as a matter of discretion: or the statute may on its proper construction itself impliedly forbid the use of facts or things obtained or procured in breach of its terms. On the other hand evidence of facts or things so ascertained or procured is not necessarily to be admitted, ignoring the unlawful or unfair quality of the acts by which the facts sought to be evidenced were ascertained or procured. Whenever such unlawfulness or unfairness appears, the judge has a discretion to reject the evidence. He must consider its exercise. In the exercise of it, the competing public requirements must be considered and weighed against each other. On the one hand there is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion.

11. The basis for the public policy discretion to exclude evidence has been expressed as follows by Stephen and Aickin JJ in *Bunning v Cross* (1978) 141 CLR 54 at 77-8:

> Were there to occur wholesale and deliberate disregard of these [procedural safeguards for the individual] its toleration by the courts would result in the effective abrogation of the legislature's safeguards of individual liberties, subordinating it to the executive arm. This would not be excusable however desirable be the end in view, that of convicting the guilty. In appropriate cases it may be 'a less evil that some criminals should escape than that the Government should play an ignoble part'…per Holmes J in *Olmstead v United States* ….

(3) The background to the record of interview: the treatment of Mr Thomas prior to the interview

12. AIA understands that evidence was given in the course of the proceedings in relation to the manner in which Mr Thomas was treated while detained in Pakistan in the period prior to the AFP questioning on 8 March 2003.[5] AIA has not had access to all of the evidence before the trial court but is not aware of any ruling that rejected this evidence. The substance of that evidence is that, by the time of the AFP questioning, Mr Thomas:

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[4] Since affirmed as representing the settled law on this issue in *Bunning v Cross* (1978) 141 CLR 54, 69 and *Pollard v R* (1992) 176 CLR 177, 201.

[5] *DPP v Thomas* [2006] VSC 120 (Sentencing), at [1]-[2]; *DPP v Thomas* [2005] VSC 85 (Teague J), Appendix B, para 5.

- had been taken into custody by Pakistani officials on 4 January 2003;[6]
- had been held in detention in Pakistan for over two months;
- was during that time usually detained in solitary confinement and had been at times chained in his cell;
- was hooded, handcuffed behind the back and shackled when taken from the cell to be interrogated (but not during interrogation);[7]
- had been subjected to an attempt to strangle him with the cord of the hood he was required to wear;
- was subjected to threats of physical violence including electrocution and the crushing of his testicles, as well as threats that his wife would be raped;
- was, after the interview, held in detention in Pakistan until 5 June 2003 when he was returned to Australia;[8]
- was, as a result of his treatment in Pakistan, "totally broken down".[9]

(4) The admission of the record of interview

13. The admissibility into evidence of the record of interview was challenged in a voir dire on the basis that (i) it was not voluntary; (ii) it should be excluded on the basis that its admission would be unfair to the accused and (iii) that it should be excluded as its admission would be contrary to public policy. One of the matters relied upon was that Mr Thomas had not been permitted to communicate with a legal practitioner. [10]

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[6] *DPP v Thomas* [2006] VSC 243, par [5].

[7] *DPP v Thomas* [2005] VSC 85, Appendix B, para 5; *DPP v Thomas* [2006] VSC 243, [8]

[8] *DPP v Thomas* [2006] VSC 243, par [6-7].

[9] *DPP v Thomas* [2005] VSC 85, Appendix B, para 5.

[10] The publicly available transcript of the record of interview (the record of interview referred to in Ruling No 3 is Exhibit OO) includes the following questions and answers in relation to the right to communicate with a legal practitioner:
Q25: Now, under Australian law you're entitled to ah, consult with a legal practitioner…
A M'mm.
Q26. …or a lawyer – however um, we've been advised that in this case, um, this right will not be available to you today. This is outside of our control. Do you clearly understand?
A Yep.

14. The trial judge, the Honourable Cummins J, declined to exclude the record of interview on any of those bases.

15. In the original public ruling No 3, the learned trial judge summarised the factual findings in relation to the issue of access to legal advice as follows:

> The officers, rather than inform the accused of that dual right, informed him that 'this right will not be available to you today'…. Normally, failure to avail an interviewee of that right would be fatal to the admission of a subsequent interview. That is, because the right is an important right in the system of justice. However, that requirement is not absolute. Here, the officers had ascertained that that provision would not be permitted in Pakistan. They were faced with a choice of conducting an interview or postponing it for an indefinite period to an indefinite place.[11]

16. In the more recently released full ruling on that issue, his Honour held:[12]

> I find that the provisions of Part 1C *Crimes Act 1914* (Cth) applied to the AFP interview of 8 March 2003. That is because the accused was a protected suspect within the meaning of section 23B(2) of the Act. The Act applied extraterritorially: s 3A. The terms of section 23B(2)(a), (b) and (c)(i) were fulfilled. Thus ordinarily the accused should, pursuant to section 23G(1)(b) of the Act, have been informed by the investigating officers that he may communicate with or attempt to communicate with a legal practitioner of his choice and arrange or attempt to arrange for a legal practitioner to be present during questioning, and the questioning should have been deferred for a reasonable time to allow that communication to occur. The interviewing officers, rather than inform the accused of that dual right, informed him that "this right will not be available to you today" (question 29).
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> Normally, failure to avail an interviewee of that right would be fatal to the admission of a subsequent interview. That is because the requirement is of central importance. It is not to be danced around, the subject of artifice or pretended blindness, or the subject of trammelling or undermining.
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> However, the requirement is not absolute, nor can it be. The officers in this case had ascertained that the provision of legal access would not be permitted in interview in Pakistan. …

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[11] *DPP v Thomas,* Ruling No 3, [2005] VSC 523, at [5]. This was version of the ruling originally made publicly available. Subsequently, a complete version of that ruling has been made available: *DPP v Thomas* [2006] VSC 243 (7 April 2006).

[12] *DPP v Thomas*, [2006] VSC 243, [18-21].

17. His Honour found that the officers had not sought to utilise the non-access to legal advice "for a collateral purpose, or as a pretext, or to defeat or deflect the requirements of Part 1C of the Act" (at [21]) and concluded, in relation to the question of discretionary exclusion of the record of interview (at [22]):

> Finally, on the question of legal access, if I considered there were impropriety, or it was unfair, by reason of lack of legal access, to admit the interview I would exclude it. I do not so consider. The matter must be judged on the circumstances, objective and subjective, then and there obtaining, tested against abiding and powerful legal principle and the provisions of the legislation. The interviewing officers acted fairly and properly. The principle of exclusion in *Bunning v Cross* does not here apply. Nor is it unfair to receive the evidence. The effective choice was between no interview in Pakistan or an interview there and then. That situation was not contrived or engineered by the interviewing officers. It would have been bad interviewing practice to let the trail run cold.

18. AIA does not understand there to have been any evidence put before the trial judge as to:

    - the basis upon which the AFP officers had "ascertained that the provision of legal access would not be permitted in interview in Pakistan",[13] or the basis on which Pakistani officials had advised the AFP officers that no such legal access would be permitted;

    - the existence of any legal basis in Pakistan for refusing access to legal counsel in circumstances where authorities of an independent foreign state are conducting an interview for the purposes of potential criminal charges under the legislation of that foreign state, to be tried in a court of that state; or

    - whether the laws of Pakistan provided for the detention of the accused by Pakistani authorities.

19. The trial judge's findings that the interviewing officers (i) did not inform Mr Thomas of the right to communicate with a legal practitioner and (ii) did not permit such communication prior to the interview, had the consequence that s23G was not complied with. Accordingly, the trial Judge was required to

[13] *DPP v Thomas* [2006] VSC 243, [20].

consider, and did consider, whether the record of interview should be excluded pursuant to the public policy discretion.

(5) AIA's focus in relation to the exercise of the public policy discretion:

20. The admission into evidence of the record of interview raises three issues which AIA wishes to address.

21. The first relates to the treatment to which Mr Thomas was subjected during his detention in Pakistan and prior to the interview. International jurisprudence on the prohibition of cruel inhuman and degrading treatment, which is referred to below, is relevant to the characterisation of that treatment. A person who is held in detention in a foreign country such as Pakistan, and who has been subjected to mistreatment so severe as to be prohibited by international law will, inevitably, be anxious to bring that detention to an end and be more likely to co-operate with any relevant authorities (particularly those from his home state) if that might achieve that outcome. Such antecedent mistreatment would, it is submitted, be likely to impair the ability of such persons to make a choice in their own best interests as to whether, and if so how, to participate in such an interview. Indeed, it is submitted that a usual purpose of such mistreatment will be to achieve precisely that co-operation.

22. The second matter is the denial of the right of access to legal counsel, which is not only a fundamental protection in Commonwealth criminal procedure, but is an internationally recognised human right. In the present case Mr Thomas' right to a lawyer was rendered all the more crucial by his isolation, prior mistreatment and the problematic nature of the charges he might face.

23. The third matter is the relevance of the first two matters to the public policy discretion in the present case and in other analogous cases. AIA submits that the present case is precisely the kind of case in which the Court may require compliance with s23G as a condition of admissibility.

C. CRUEL, INHUMAN AND DEGRADING TREATMENT

(1) The international legal standards relating to torture and cruel, inhuman and degrading treatment

24. Torture and cruel, inhuman or degrading treatment or punishment are prohibited under international law. *The Universal Declaration of Human Rights* ("UDHR"), adopted after World War II,[14] contains a prohibition against torture and other ill treatment in article 5:

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

25. The *International Covenant on Civil and Political Rights* ("ICCPR"),[15] which has been ratified by Australia, also contains, in Article 7, a prohibition on torture and other ill treatment.

26. The *Declaration on the Protection of All Persons from being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* was adopted by General Assembly resolution 3452 (XXX) of 9 December 1975 and demonstrates the absolute nature of the prohibition. Article 3 of the Declaration provides

> No state may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment. Exceptional circumstances such as a state of war or a threat of war, internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

27. The *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* ("CAT")[16] is founded on the prohibitions on torture and ill treatment contained in the ICCPR and UDHR and contains a range of provisions aimed at the prevention and punishment of torture, and cruel, inhuman or degrading treatment.

28. The universality of the international condemnation of torture and cruel, inhuman or degrading treatment is demonstrated by the express prohibition of such conduct in the context of international and internal armed conflicts in

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[14] The Universal Declaration was adopted and proclaimed by General Assembly Resolution 217A (III) of 10 December 1948.

[15] (New York, 16 December 1966), [1980] Australian Treaty Series 23

[16] (New York, 10 December 1984), [1989] Australian Treaty Series 21. Australia has ratified the CAT with effect 7 September 1989.

the *Geneva Conventions of 1949.* [17] Article 3, which is common to each of the four Geneva Conventions, prohibits various acts with respect to persons taking no active part in hostilities, including cruel treatment and humiliating and degrading treatment [article 3 (1)(a) and (c)]. [18]

29. Further, in specific recognition of the vulnerability of persons held in detention to mistreatment, the "Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment", adopted by the United Nations General Assembly on 9 December 1988[19] contains provisions focussing on torture and cruel, inhuman or degrading treatment. The Body of Principles provides in Principle 6:

> No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

30. The Body of Principles notes that:

> The term 'cruel, inhuman or degrading treatment or punishment' should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time.

31. The nature of the conduct will constitute cruel, inhuman or degrading treatment has been judicially considered in several contexts.

32. The European Court of Human Rights has considered various forms of treatment and has developed jurisprudence on the meaning of inhuman and

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[17] Cruel, inhuman and degrading treatment is prohibited for example, by article 3 of the *Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949* (Geneva, 12 August 1949), ratified by Australia with effect 14 April 1959. [1958] Australian Treaty Series 21.

[18] The customary international law status of core provisions of the *Rome Statute of the International Criminal Court* has been recognised by the Full Court of the Federal Court in *SRYYY v Minister for Immigration* (2005) 147 FCR 1. In Australia, the Commonwealth *Criminal Code Act 1995* enacts into law various offences which are also the subject of the Rome Statute of the International Criminal Court, including "inhumane acts" as a crime against humanity: section 268.34.

[19] UN/Res 43/173

degrading treatment for the purposes of the European Convention. For instance, in the case of *Selmouni v France* the European Court stated:[20]

> [t]he acts complained of were such as to arouse in the applicant feelings of fear, anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical and moral resistance. The Court therefore finds elements which are sufficiently serious to render such treatment inhuman and degrading… In any event, the Court reiterates that, in respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3.

33. The International Tribunal for the Former Yugoslavia, established by resolution of the Security Council of the United Nations,[21] has also considered the meaning of inhuman treatment in the context of the prohibitions in the *Geneva Conventions.* In the case of *Prosecutor v Delalic and ors,* the Appeals Chamber of the Tribunal has defined inhuman treatment as follows:

> .... inhuman treatment is an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.[22]

(2) The treatment to which Mr Thomas appears to have been subjected by non-Australian agents prior to the AFP interview

34. AIA understands there to be evidence, which was not rejected, that Mr Thomas was subjected, prior to interview, to the treatment referred to at paragraph 12 above, which includes solitary confinement; hooding, handcuffing and shackling; attempted strangulation; and threats of physical violence including electrocution and the crushing of his testicles, as well as threats that his wife would be raped.

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[20] *Selmouni v France* (1999) 29 EHRR 403, [99].

[21] The United Nations International Criminal Tribunal for the Former Yugoslavia ("ICTY") was established in 1993: UN Security Council Resolution 827 (25 May 1993) adopted the Statute of the International Tribunal.(S/RES/827). The Statute of the Rwanda Tribunal was adopted in 1994 by UN Security Council resolution 955 of 1994.

[22] *Prosecutor v Delalic & ors* (UN ICTY Appeals Chamber), IT-96-21-A, 20 February 2001 para 426

35. The following jurisprudence and authoritative statements of international organs are relevant to the characterisation of such treatment in international law.

Solitary Confinement

36. Article 7 of the United Nations Basic Principles for the Treatment of Prisoners states:

> [e]fforts addressed to the abolition of solitary confinement as a punishment, or to the restriction of its use, should be undertaken and encouraged.

37. The Human Rights Committee (which is established by part IV of the ICCPR and, under the First Optional Protocol to the ICCPR,[23] can receive and consider communications from individuals claiming to be victims of violations of rights in the ICCPR) has stated that 'prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7 [of the ICCPR]'.[24] The Human Rights Committee has found individual violations of the prohibition of torture and ill-treatment and of the obligations to respect human dignity in cases where prisoners had been held in solitary confinement.[25]

38. The Committee against Torture established under the CAT[26] has also expressed concern about the practice of holding people in solitary confinement. For instance, in its Concluding Observations on Switzerland in 1994, the Committee stated:

> The system of holding persons incommunicado during pre-trial detention is of concern, as is the problem of solitary confinement of prisoners for long periods, which may constitute inhuman treatment.[27]

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[23] (First) Optional Protocol to the International Covenant on Civil and Political Rights (19 December 1966), ratified by Australia with effect 25 December 1991, 1991] ATS 39, article 2.

[24] In General Comment 20 on Article 7 of the ICCPR, paragraph 6.

[25] *Rosa Espinoza de Polay v Peru* CCPR/C/61/D/577/1994 9 January 1998

[26] The Committee against Torture is comprised of 10 experts, and considers state reports and may issue General Comments. If the State party has made a declaration under Article 22 of the *CAT*, individuals may make complaints to the Committee against the State.

[27] Switzerland, CAT, A/49/44 (1994) 20 at para. 133.

Hooding and shackling, threats of violence

39. As noted above at paragraph 29, the United Nations *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* expressly recognises that cruel, inhuman or degrading treatment encompasses "the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time."

40. Further, the *Standard Minimum Rules for the Treatment of Prisoners,* which were developed under United Nations auspices[28] relevantly provide in rule 33:

> Instruments of restraint, such as handcuffs, chains, irons and strait-jackets, shall never be applied as a punishment. Furthermore, chains or irons shall not be used as restraints.

41. The use of hooding of prisoners has also been regarded by international bodies as contravening the prohibition on cruel, inhuman or degrading treatment. In its consideration of the report of Israel to the Human Rights Committee in 1998, the Human Rights Committee expressed deep concern that

> …under the guidelines for the conduct of interrogation of suspected terrorists authority may be given to the security service to use "moderate physical pressure" to obtain information considered crucial to the "protection of life". … The Committee notes also the admission by the State party delegation that the methods of handcuffing, hooding, shaking and sleep deprivation have been and continue to be used as interrogation techniques, either alone or in combination. The Committee is of the view that the guidelines can give rise to abuse and that the use of these methods constitutes a violation of article 7 of the Covenant in any circumstances. The Committee stresses that article 7 of the Covenant is a non-derogable prohibition of torture and all forms of cruel, inhuman or degrading treatment or punishment. The Committee urges the State party to cease using the methods referred to above.[29]

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[28] The Standard Minimum Rules were adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

[29] CCPR A/53/40 (1998) para 315

42. Again, in relation to hooding and the use of threats against detainees, the Committee Against Torture has stated, in the context of considering Israel's 1997 report under the CAT:

> Those methods include: (1) restraining in very painful conditions, (2) hooding under special conditions, (3) sounding of loud music for prolonged periods, (4) sleep deprivation for prolonged periods, (5) threats, including death threats, (6) violent shaking, and (7) using cold air to chill, and are, in the Committee's view, breaches of article 16 and also constitute torture as defined in article 1 of the Convention. This conclusion is particularly evident where such methods of interrogation are used in combination, which appears to be the standard case.[30]

43. The Committee Against Torture stated that

> Interrogations applying the methods referred to above and any other methods that are in conflict with the provisions of articles 1 and 16 of the Convention cease immediately.[31]

44. The European Court of Human Rights considered similar treatment in *Ireland v United Kingdom*. [32] The techniques used in that case were wall standing; hooding; subjection to noise; deprivation of sleep pending interrogation and deprivation of food and drink. The Court found that the techniques constituted inhuman and degrading treatment in breach of Article 3 of the European Convention on Human Rights.

D. THE RIGHT TO LEGAL ADVICE IN INTERNATIONAL LAW

45. The right, pursuant to s23G of the *Crimes Act*, of suspects under arrest and of suspects to communicate with a legal practitioner accords with the requirements of international conventions and human rights standards and jurisprudence on this issue.

46. The right of communication with legal counsel is recognised by article 14(3) of the ICCPR, which deals with the right to a fair trial. Article 14(3) provides, relevantly:

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[30] A/52/44 para 257
[31] A/52/44 paras 257, 260
[32] (1979-80) 2 EHRR 25

> (3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
> …
> (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
> …
> (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

47. The relevance of the recognition of the right to counsel at trial as a component of the international right to a fair trial in the ICCPR was expressly noted by Murphy J in *McInnis v R* (1979) 143 CLR 575, 593. In particular, his Honour noted that, pursuant to article 2(3)(a) of the ICCPR, every State Party to the convention undertakes

> "to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity."

48. The reference in art 14(3)(b) to the right to communicate with counsel in the context of preparation of the defence has been repeatedly affirmed to require legal assistance at all stages of proceedings, including in the context of pre-trial investigation. The Human Rights Committee has described as "axiomatic" that the rights to counsel in articles 14(3)(b) and (d) require that the accused "is effectively assisted by a lawyer at all stages of the proceedings".[33] Denying an accused person the right to consult with a legal adviser prior to or during interrogation may contravene article 14(3)(b).[34]

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[33] *Kurbanova v Tajikistan,* 12 November 2003, CCPR/C/79/D/1096/2002, par 6.5.

[34] As was found by the Committee to have occurred in *Gridin v Russian Federation,* 20 July 2000, CCPR/C/69/D/770/1997, par 8.5: "[The State Party] has not, however, refuted the author's claim that he requested a lawyer soon after his detention and that his request was ignored. Neither has it refuted the author's claim that he was interrogated without the benefit of consulting a lawyer after he repeatedly requested such access and interrogating him during that time constitutes a violation of the author's rights under article 14, paragraph 3(b)."

This is because communication with a legal adviser prior to trial is "one of the most important facilities for the preparation of [the accused's] defence".[35]

49. It is also relevant that the governing instruments of international criminal courts and tribunals have recognised the right of a person suspected of crimes to have access to legal advice during questioning and investigation of a crime. These instruments confirm the international community's views on the basic procedural rights which must be accorded in criminal trials.

50. The United Nations *ad hoc* tribunals for Yugoslavia and Rwanda include the right to defence counsel at both pre-trial and trial phases in their respective Rules of Procedure and Evidence. The Statute of the United Nations International Criminal Tribunal for the Former Yugoslavia ("ICTY") incorporates in Article 21 rights of the accused which reflect the rights in article 14 of the ICCPR. The *Rules of Procedure and Evidence* of the ICTY make more specific provision as to the exact nature of the legal assistance required, in rule 42:[36]

> **Rights of suspects during investigation**
>
> (A) A suspect who is to be questioned by the Prosecutor shall have the following rights, of which the Prosecutor shall inform the suspect prior to questioning, in a language the suspect speaks and understands:
>
> (i) the right to be assisted by counsel of the suspect's choice or to be assigned legal assistance without payment if the suspect does not have sufficient means to pay for it;
>
> ....
>
> (B) Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived

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[35] *Drescher Caldas* v *Uruguay*, 21 July 1983, CCPR/C/19/D/43/1979, at paragraph 13.3. The Committee observed at par 13.3 that "the holding of a detainee incommunicado for six weeks after his arrest is not only incompatible with the standard of humane treatment required by article 10(1) of the [ICCPR], but it also deprives him, at a critical stage, of the possibility of communicating with counsel of his own choosing as required by article 14(3)(b) and, therefore, of one of the most important facilities for the preparation of this defence". See also *Boimodurov v Tajikistan* 16 November 2005, CCPR/C/85/D/1042/2001, at par 7.3: "In the absence of any explanation from the State Party, the Committee considers that the facts as presented to it regarding the author's son being held incommunicado for a period of 40 days reveal a violation of this provision [article 14(3)(b)] of the Covenant."

[36] The same rights are contained in the *Rules of Procedure and Evidence* of the United Nations International Criminal Tribunal for Rwanda, rule 42.

> the right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or been assigned counsel.

51. The *Rome Statute of the International Criminal Court*,[37] which Australia ratified with effect 1 September 2002, states, in article 55(2):

> Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned:
>
> (a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;
>
> (b) To remain silent without such silence being a consideration in the determination of guilt or innocence;
>
> (c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and
>
> (d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

52. The right to communicate with a legal adviser during interrogation is not only a vital component of the ultimate right to a fair trial, but it is also, in circumstances where a suspect is in detention, an important safeguard against mistreatment and abuse of a detainee. This is recognised by the "12 point Program for the Prevention of Torture", established by Amnesty International first adopted in 1984.[38] That Program refers to the importance of ensuring access to prisoners, including by lawyers and doctors (point 2) and to the need to provide safeguards during detention and interrogation, such as the presence of a lawyer during interrogation (point 4).

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[37] (Rome, 17 July 1998); [2002] ATS 15.

[38] See affidavit of Nicole Bieske, affirmed 29 June 2006, par 21 (b).

53. If Mr Thomas had the access to legal counsel to which he is entitled under the norms of Australian and international law, it is less likely that

- he would have been subjected to mistreatment of the type to which AIA understands him to have been subjected;
- he would have participated in the interview in the manner the record of interview discloses.

Limitations on the right to counsel?

54. In the ruling on the admission into evidence of the AFP record of interview his Honour the trial judge observed that the requirement of access to legal advice "is not absolute". As noted above, s 23G of the *Crimes Act 1914* (Cth) expressly notes that the right is subject to the exceptions in s 23L. However, those exceptions are very narrowly drawn and there is nothing in the Ruling or in the publicly available evidence to the effect that any of the exceptional circumstances in s 23L applied in Mr Thomas' case.

55. The questions of limitations under international law on the rights of access to legal advice has been judicially considered in the context of both international and regional human rights instruments which recognise the right to counsel as a core protection in the broader right to a fair trial. For example, the *European Convention for the Protection of Human Rights and Fundamental Freedoms 1950,* article 6(3)(c) provides that a person charged with a criminal offence has the right to defend himself in person or through legal counsel of his own choosing. Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation.[39] Although the European Court of Human Rights has accepted that there may be a restriction of that right for good cause, it has held that such restrictions will raise the question, in each case, as to whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing: *Murray v United Kingdom,* 8 February 1996, (41/1994/488/570), par 63. Even a lawfully

[39] *Ocalan v Turkey* 46221/99 [2005] ECHR 282 (12 May 2005), [131]. (The Grand Chamber); *Imbrioscia v Switzerland* (1997) EHRR 441.

exercised power of restriction may deprive an accused of fair procedure: *Murray* at par 65.[40]

56. The nature of permissible limitations on the right of access to counsel is addressed by the United Nations General Assembly "Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment" of 9 December 1988.[41] Principle 17 requires that a detained person be informed of the right to legal counsel promptly after arrest and provided with reasonable facilities for exercising that right. Principle 18 provides, in relevant part:

> 1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.
>
> 2. A detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel.
>
> 3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.

57. In the present case, the only limitations specified by the law of the Commonwealth on the right of access to legal counsel conferred by s 23G (1) of the *Crimes Act* are the exceptions set out in s 23L. Those exceptions reflect the legislature's assessments of the security and operational considerations which are of sufficient gravity to curtail the otherwise absolute right of access by suspected persons to legal advice. The very restricted nature of those limitations are emphasised by the requirement that even where the exceptional factual circumstances referred to in s 23L arise, access

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[40] In *Murray*, the European Court of Human Rights held, in the case of a suspect held for questioning on terrorism related offences, that in circumstances where an adverse inference could be drawn from silence during questioning, "the concept of fairness enshrined in Article 6 requires that the accused has the benefit of the assistance of a lawyer already at the initial stages of police interrogation. To deny access to a lawyer for the first 48 hours of police questioning, in a situation where the rights of the defence may well be irretrievably prejudiced, is – whatever the justification for such denial – incompatible with the rights of the accused under Article 6".

[41] UN/Res 43/173

to a legal practitioner can only be curtailed in exceptional circumstances, and when a police officer of senior or other prescribed authority authorises the application of s 23L(1). Even then, if the application of s 23L results in preventing or delaying the person from communicating with a legal practitioner of his or her choice, or prevents or delays the legal practitioner from attending at any questioning, this does not mean that the right to legal counsel is suspended. Rather, it requires the investigating official to offer the services of an alternative legal practitioner.

58. The Ruling of his Honour refers to the possibility that a "trail" may "run cold", but does not disclose how it was perceived that "the trail would run cold" in relation to the matters the subject of Mr Thomas' interview.[42] In circumstances where Mr Thomas had already been interviewed at length by officers of the Inter Services Intelligence Directorate (ISID) of Pakistan, and on six occasions by officers of ASIO, the nature of the investigative "trail" or facts which would have been disclosed by the further interview and which had not already been disclosed, is not apparent. In any event, the prospect that an investigative trail may run cold is not among the s 23L exceptions. Also, the issue in the present context is not one that concerns an investigative 'trail'. Rather, it concerns whether an interview in Pakistan, presumably created for the purpose of being relied upon as evidence in Australia, should be admitted into evidence against Mr Thomas.

59. In light of the clear terms of sections 23G and 23L, against the background of international human rights principles mandating access to legal advice in such circumstances, there is no scope for reading the rights in s 23G(1) as being subject to any further limitation.

60. In particular, any suggestion that the right of access to legal advice when being questioned by Australian law enforcement officials, in relation to potential offences under laws of the Commonwealth of Australia, could be curtailed on the basis that the questioning is occurring in another country cannot, in AIA's respectful submission, be supported. Such a view is

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[42] *DPP v Thomas* [2006] VSC 243 at [20] and [22].

contradicted by the express provision in s 3A of the *Crimes Act* that the act applies "beyond the Commonwealth and the Territories". Were there any ambiguity about that issue, the generally applicable international standards referred to above, and in particular the rights conferred by the ICCPR, would not support any such interpretation.

E INTERNATIONAL LAW ON EXCLUSION OF EVIDENCE OBTAINED IN CONTRAVENTION OF BASIC HUMAN RIGHTS

(1) International instruments requiring exclusion of evidence obtained in contravention of human rights

61. The international instruments which specify the right to legal counsel for persons suspected of crime make it clear that violations of that right must not go without an effective remedy. Pursuant to article 2(3)(a) of the ICCPR, every State Party to the convention undertakes

> …to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.

62. That undertaking by States Parties to the ICCPR – to ensure that violations of the rights in the ICCPR, and particularly the rights to legal advice are the subject of an effective remedy – was noted by Murphy J in *McInnis v R* (1979) 143 CLR 575, 593. In the Australian context, the development of the principles relating to the public policy discretion to exclude evidence provide appropriate scope for effective remedies for the contravention of the ICCPR right of accused persons to have access to legal advice.

63. The response which has been adopted by international criminal institutions such as the UN ad hoc tribunals and the International Criminal Court to violations of suspected persons' right to counsel in the investigative phase of criminal proceedings is along very similar lines to the public policy discretion in Australia.

64. The *Rules of Procedure and Evidence* of the ICTY state, in Rule 95:

> No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage the integrity of proceedings.

65. Rule 95 of the ICTY Rules, as originally adopted, read:

> Evidence obtained directly or indirectly by means which constitute a serious violation of internationally protected human rights shall not be admissible.

66. The change to the wording of that rule was intended to ensure that the Trial Chambers of the Tribunal would not admit evidence which was obtained by improper methods generally.[43]

67. The Rome Statute of the International Criminal Court states in Article 69 (7) and (8):

> (7) Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:
> (a) The violation casts substantial doubt on the reliability of the evidence; or
> (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.
>
> (8) When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law.

68. Evidence of statements by an accused made during an investigative interview during which access to legal counsel was denied has been excluded by a Trial Chamber of the ICTY pursuant to Rule 95. In *Prosecutor v Delali & ors*,[44] the accused argued that transcripts of interviews with members of the Austrian Police Force and with members of the Office of the Prosecutor of the ICTY should be excluded on various grounds, principally that he was not advised of or accorded with his right to counsel before questioning. Unlike

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[43] See the Second Annual Report of the ICTY, UN Doc a/50/365, par 26, note 9, which refers to proposals from the United Kingdom and the United States to amend the rule in order to ensure that the parties are put "on notice that although a Trial Chamber is not bound by national rules of evidence, it will refuse to admit evidence – no matter how probative – if it was obtained by improper methods."

[44] (UN ICTY Trial Chamber, IT-96-21-T), "Decision on Zdravko Muci 's Motion for the Exclusion of Evidence", 2 September 1997 ("Muci Decision").

the rights conferred by the ICTY Statute and Rules of Procedure and Evidence, Austrian rules of procedure permitted an accused person to speak to his lawyer only after being questioned and if it has been determined that the accused person would be transferred to the Court prison.[45] The Trial Chamber held:

> [48] …any evidence to be admissible in proceedings before [the Tribunal] must satisfy the law as provided in the Statute and the Rules. The Tribunal is established for the trial of criminal offences of the most serious kind. Hence nothing less than the most exacting standard of proof is required.
> ….
> [50] The Austrian procedure rules do not recognize the right of the suspect to counsel during questioning. The provisions of paragraph 4 actually precludes such right. It states "if you want your legal Counsel to come and see you as soon as possible, make it known…. You may not have legal Counsel present when you are questioned for a criminal offence." This is in direct contradiction to the provisions of Article 18 of the Statute and Rule 42 of the Rules of Procedure and Evidence which provide for counsel prior to questioning. Indeed the European Court of Human Rights decided in *Imbriosca v Switzerland* (1993) 17 EHRR 441 that Article 6(3)(c), which is equivalent to Article 18 of the Statute, applies to pre-trial proceedings. In this case, during the stage of the proceedings before it, the European Commission of Human Rights stated that
>
> > Article 6(3)(c) gives the Accused the right to assistance and support by a lawyer throughout the proceedings. To curtail this right during investigation proceedings may influence the material position of the defence at the trial and therefore also the outcome of the proceedings.
>
> …..
> [52] ….The Trial Chamber is satisfied that the Austrian rights of the suspect are so fundamentally different from the rights under the International Tribunal's Statute and Rules as to render the statement made under it inadmissible.

69. The Trial Chamber therefore excluded the statements made to Austrian police when the accused did not have access to a lawyer.[46]

F RELEVANCE OF INTERNATIONAL STANDARDS TO THE EXERCISE OF THE PUBLIC POLICY DISCRETION

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[45] Muci Decision, par 9.
[46] *Muci* Decision, par [55].

70. AIA submits that the international human rights norms and jurisprudence referred to above are relevant considerations that ought to be considered in relation to the exercise of the public policy discretion in the present case which, relevantly, involves the discretion being exercised in relation to an interview for the purposes of Australian law of an accused held in detention in Pakistan.

71. Section 23G should be construed by a court in a way to ensure, so far as appropriate, that it carries into effect Australia's obligations under international law: *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 ("Teoh"); *Royal Women's Hospital v Medical Practitioners Board of Victoria* [2006] VSCA 85, [67]-[70]. The interpretation of the rights conferred by s 23G(1) of the *Crimes Act 1914* (Cth), and the consequence of non-compliance with that provision, which is raised by the first instance decision, will be assisted by consideration of minimum guarantees in art 14(3) of the ICCPR which includes the right to communicate with counsel.

72. In the specific context of Part 1C of the *Crimes Act 1914*, of which s 23G is part, the Australian Law Reform Commission report No 2 of 1975, "Criminal Investigation" was drawn on in developing the protections on questioning of suspects in the *Crimes (Investigation of Commonwealth Offences) Amendment Act* 1991. The ALRC Report expressly recognised (at par 105) the near universal nature of the right to a lawyer during pre-trial investigations:

> The right to consult with a lawyer during the course of pre-trial police investigations is one of those traditionally claimed civil rights to which almost universal obeisance is paid in principle, but which is greeted with very great circumspection in practice by law enforcement authorities.

73. The present case directly raises the question of the extent to which the courts in Australia should condone that 'great circumspection in practice' by admitting evidence obtained in clear breach of the Australian statutory protection of the right of access to counsel.

74. Secondly, the terms of an international convention to which Australia is a party are a relevant consideration to be taken into account in discretionary

decision making,[47] including the exercise of judicial discretion. The specific relevance of international human rights standards, including those in the ICCPR, to the exercise of the judicial discretion to exclude evidence, has been recognised in Australia: *McKellar v Smith* [1982] 2 NSWLR 950.

75. Finally, in the particular context of the public policy discretion, the international obligations which Australia has voluntarily undertaken by ratifying international human rights conventions, and basic principles of customary international human rights law, are appropriately regarded as indicating the standards to which the Australian community aspires. Ratification of a Convention such as the ICCPR is "a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention", and so will be relevant to Australian contemporary values and expectations.[48] Community standards, and community expectations of the conduct of law enforcement officials have a particular importance in the context of the public policy discretion.[49]

G APPLICATION OF THE PUBLIC POLICY DISCRETION IN THE PRESENT CASE

76. In the present case, the learned trial judge accepted that normally, the failure to avail an interviewee of the right to the advice of a legal practitioner would be "fatal to the admission of a subsequent interview", as the requirement is of "central importance".[50] However, his Honour observed that "the effective choice was between no interview in Pakistan and an interview there and then" without access to legal counsel. It is not apparent from his Honour's ruling why that was necessarily the case. There does not appear to have

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[47] *Teoh,* at 315.

[48] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 291 per Mason CJ and Deane J. See also *Royal Women's Hospital v Medical Practitioners Board of Victoria* [2006] VSCA 85 at [75].

[49] *R v Heaney and Welsh* [1998] 4 VR 636, 644, per Coldrey J: "The discretion to exclude evidence on the grounds of public policy may be enlivened where no unfairness to an accused is occasioned, but nonetheless, the method by which the confessional evidence has been elicited is unacceptable in light of prevailing community standards. This broad discretion will involve a balancing exercise."

[50] *DPP v Thomas* [2006] VSC 243 at [19].

been evidence as to the legal basis upon which access to legal advice may not be permitted in the interview. It may be the case that the officers simply accepted a mere assertion from Pakistani officials that no access would be provided by them. In AIA's respectful submission, if that were the case, it would be an insufficient basis on which to deny the important procedural rights quite clearly conferred by Australian law on persons being interviewed in relation to a Commonwealth offence.

77. In the present case, it is submitted that the following considerations can be properly regarded as relevant to the exercise of the public policy discretion in relation to the record of interview.

78. The first consideration is that Mr Thomas was denied the right to legal advice before the first, and probably the most important, of his interviews in contravention of s 23G(1) of the *Crimes Act*. Although the AFP officers may have believed that there was some justification for their denial to Mr Thomas of the right to communicate with a legal practitioner and to have a legal practitioner attend questioning – that is, they had been told that, for unidentified reasons, access to legal advice would not be permitted -that belief does not alter the fact that the denial of the s 23G rights may reasonably be seen as deliberate or, at the very least, reckless. Significantly, AIA is not aware of any basis upon which the AFP officers' acceptance of the denial of access was reasonable or justifiable. In such circumstances, the present case falls within the spectrum of cases of unlawful conduct which will usually warrant exclusion of evidence [51]

79. A second powerful public policy consideration involves the conditions in which Mr Thomas had been detained, and the treatment to which he had

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[51] See *Pollard v R* (1992) 176 CLR 177, at 203-204; 208. At 204 Deane J referred to incriminating statements "procured by a course of conduct on the part of law enforcement officers which involved deliberate or reckless breach of a statutory requirement imposed by the legislature to regulate police conduct in the interests of the protection of the individual and the advancement of the due administration of justice. Such cases manifest 'the real evil' at which the discretion to exclude unlawfully obtained evidence is directed, namely, "deliberate or reckless disregard of the law by those whose duty it is to enforce it.' In such cases, the principal considerations of public policy favouring exclusion are at their strongest and will ordinarily dictate that the judicial discretion be exercised to exclude the evidence".

been subjected, prior to the AFP interview. The prolonged, and mainly solitary, detention of Mr Thomas, and the serious mistreatment, amounting at least to inhuman and degrading treatment at international law, was not imposed by Australian authorities. However, it is part of the factual matrix in which the AFP interview occurred. In particular, the mistreatment is an unacceptable process by which an accused is encouraged to co-operate in order to bring the treatment to an end. The isolated, uninformed and vulnerable legal position of Mr Thomas when the AFP sought to conduct an interview with him meant that access to legal advice took on an even more crucial importance than in the usual case, where it is recognised to be a fundamentally important procedural safeguard of the right to a fair trial.

80. It appears to be implicit in the reasoning of the learned trial judge that the fact that the interview was taking place in Pakistan was a factor which reduced the gravity of the denial of the s 23G right of communication with a legal practitioner, and therefore favoured the admission of the record of interview. AIA contends that in the present case that was not so.

81. It was accepted by the learned trial judge that the *Crimes Act* has extraterritorial application. However the apparent assertion by Pakistani authorities that, for unidentified reasons, no access to a lawyer would be granted was, in effect, accepted by his Honour as overriding the *Crimes Act* rights. Cases in other jurisdictions which have involved law enforcement officers of the relevant state interviewing accused persons in a foreign country have accepted that the protections in the applicable legislation (*ie* in the 'home' state) will apply to those interviews, particularly if they are being conducted for the purposes of a prosecution under the 'home' state's laws and in its courts. The decision of the ICTY in the *Delali* case (referred to above at paragraphs 68-69) is an example of this.

82. That situation was also considered by the Supreme Court of Canada in *R v Cook* [1998] 2 SCR 597.

83. In that case, the accused was arrested in the United States by US authorities pursuant to a warrant issued in connection with a Canadian extradition

request following a murder committed in Canada. The *Canadian Charter of Rights and Freedoms* provides, in section 10(b), that:

> Everyone has the right on arrest or detention
> ….
> (b) to retain and instruct counsel without delay and to be informed of that right;…

84. Section 24(2) of the *Charter* provides:

> Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

85. The Charter does not have an express extraterritorial operation provision, but also does not contain any express territorial limitation.

86. The accused was read *Miranda* rights in accordance with US principles,[52] but the Canadian detectives who then interviewed the accused did not ask the US authorities if the accused had requested a lawyer, and informed the accused of his right to a lawyer under the *Charter* in a "confusing and defective manner" after questioning had already commenced. Cory and Iacobucci JJ (in whose reasons Lamer CJ, and Major and Binnie JJ joined) summarised the questions arising in the case as follows:

> The present appeal brings two basic questions before the Court. First, does the *Canadian Charter of Rights and Freedoms* apply to the taking of the appellant's statement by Canadian police in the United States in connection with their investigation of an offence committed in Canada for a criminal prosecution to take place in Canada, and if the *Charter* applies, was it breached in the circumstances? Second, if the Charter applies and was contravened, should the statement be excluded under s24(2) of the Charter under the circumstances?

87. The majority (Lamer CJ, Cory, Iacobucci, Gonthier, Bastarache, Major, and Binnie JJ; L'Heureux-Dube and McLachlin JJ dissenting) held that the *Charter* did apply to the actions of the Canadian detectives in the United States, and that there was no international law principle which would prevent the

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[52] *Miranda v Arizona* 384 US 436 (1966) – ie the warnings of the right to silence, that any statements may be used against him in a court of law, and that the accused has the right to the presence of an attorney prior to questioning.

Charter applying in those circumstances on foreign territory, given that it is recognised that domestic laws can apply by reference to the nationality of the subjects.[53] Cory and Iacobucci JJ held (at [48]) that the Charter would apply on foreign territory where the impugned act falls within the Charter on the basis of the nationality of the state law enforcement authorities engaged in governmental action, and where the application of *Charter* standards will not conflict with the concurrent territorial jurisdiction of the foreign state. Their Honours concluded that in the circumstances of the case, where the interrogation was carried out by Canadian law enforcement officials, in the exercise of their powers derived from Canadian law, for an offence committed in Canada and to be prosecuted in Canada, there was no risk that Canadian criminal law standards were being imposed on foreign officials.[54]

> In this context, it is reasonable to expect the Canadian officers to comply with the *Charter* standards. Furthermore, it is reasonable to permit the appellant, who is being made to adhere to Canadian criminal law and procedure, to claim Canadian constitutional rights relating to the interview conducted by the Canadian detectives in New Orleans.[55]

88. The majority also held that the appellant's right to counsel was breached, and that it was a "serious if not flagrant" breach, noting that:

> … for police to lie or mislead individuals with regard to their *Charter* rights is fundamentally unfair and demeaning of those *Charter* rights. Indeed to countenance it would bring the administration of justice into disrepute.[56]

89. It was held that the evidence from the interview should have been excluded pursuant to section 24(2).[57]

90. In the United States, it has been held that, although admissions made in interviews conducted solely by foreign officials may be admissible, if voluntary, even if due process rights under United States law are not complied with, such evidence will be inadmissible if:

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53 Cory and Iacobucci JJ at pars [28-29]; [42]; [51-54];
54 Paragraphs [49-50].
55 Paragraph [51].
56 Paragraph [60].
57 Cory and Iacobucci JJ at[78];

(a) United States officials actively participate in the questioning with the foreign authorities, including where US officials use foreign officials as their interrogation agents in order to circumvent the *Miranda* requirements;[58] or

(b) Even if there is no involvement of United States officials, evidence obtained by foreign authorities will be inadmissible if the conduct of the foreign officials in obtaining the statements "shocks the conscience" of the US Court.[59]

91. Similarly, in the United Kingdom the House of Lords has recently been required to consider whether evidence "which has or may have been procured by torture inflicted, in order to obtain evidence, by officials of a foreign state without the complicity of the British authorities" can be admitted by British courts and, in particular, by the Special Immigration Appeals Commission (SIAC), a superior court of record established by statute: *A v Secretary of State for the Home Department* [2005] UKHL 71. SIAC had held that the fact that evidence had been, or might have been, procured by torture inflicted by foreign officials without the complicity of British authorities, was relevant to the weight of evidence but did not render it legally admissible, and the Court of Appeal by majority had upheld that view. While there was a difference within the House of Lords as to the degree to which torture must have occurred and the burden of proof on that issue, the House of Lords unanimously allowed the appeals, holding that statements obtained by torture is absolutely precluded in any proceedings as evidence.[60] Lord Bingham, having extensively reviewed both UK common law authorities, cases on

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[58] *United States of America v Yousef* 327 F 3d 56 at 93 (2003) (United States Court of Appeals for the Second Circuit); *United States v Marzook* 2006 U.S. Dist. Lexis 158823 (4 April 2006) at 100. In that case, statements made to an Israeli police officer were excluded as there was insufficient evidence that the statements were voluntary – the statements were in Hebrew, which the defendant did not speak or read.

[59] *US v Yousef* at 94; *US v Marzook* at 102.

[60] eg. per Lord Hoffman at [97]; per Lord Hope of Craighead at [113]

exclusion of evidence from other common law jurisdictions, and international authorities and instruments, summarized his conclusion as follows:[61]

> The principles of the common law, standing alone, in my opinion compel the exclusion of third party torture evidence as unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice. But the principles of the common law do not stand alone. Effect must be given to the European Convention, which itself takes account of the all but universal consensus embodied in the Torture Convention.

92. Relevantly for present purposes, Lord Bingham also noted (at [45]) that:

> The House has not been referred to any decision, resolution agreement or advisory opinion suggesting that a confession or statement obtained by torture is admissible in legal proceedings if the torture was inflicted without the participation of the state in whose jurisdiction the proceedings are held, or that such evidence is admissible in proceedings related to terrorism.

93. While it is not asserted that this case involves evidence obtained directly by torture, or cruel, inhuman or degrading treatment, the fact that Mr Thomas was subjected to treatment that was at least cruel, inhuman and degrading prior to the interview, remains a consideration to be weighed in the exercise of the public policy discretion, notwithstanding that this treatment was imposed by officials of a foreign state.

94. A further public policy consideration in the present case, which touches on the conduct of other arms of Australian executive government, relates to the extent to which efforts were made by Australian consular officials to permit Mr Thomas to have access to a lawyer. Both Australia and Pakistan are parties to the *Vienna Convention on Consular Relations*,[62] which provides by Article 36 (1)(c) that "consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation". However, AIA does not understand there to have been any evidence before the Court that Australian consular officers procured legal representation for Mr Thomas

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[61] *A v Secretary of State for the Home Department* [2005] UKHL 71 at [52].

[62] (Vienna, 24 April 1963), ratified by Australia with effect 14 March 1973 and by Pakistan

during the questioning processes to which he was subjected.[63] The approach taken in the present case – where both the police officers and the trial judge appear simply to have accepted that access to legal advice "would not be available" in Pakistan – without appropriate enquiry as to whether the consular representatives of the Australian government had sought to exercise their powers under the Vienna Convention, would appear to condone the executive arm failing to ensure that reasonable protections are extended to Australian nationals detained by foreign authorities.

95. The Vienna Convention also states in article 36 (2) that "The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended". However, as stated above AIA is not aware of any evidence of a Pakistani law which prevented access to legal counsel, even if art 36(2) as properly construed would have the result of overriding the right to arrange legal representation. Indeed, it would be very surprising if there was any law which would prevent a person suspected of contraventions of laws of Australia, who is being interviewed by Australian authorities, for the purposes of potential proceedings in Australia, from having access to legal counsel. This is particularly so in circumstances where the Pakistani Inter Services Intelligence Directorate (ISID) had already, by the time of the AFP interview, had a prolonged opportunity to question the accused for their own purposes.

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[63] The Convention also states in article 36 (2) that "The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended". However, AIA does not understand there to have been any evidence of a Pakistani law which prevented access to legal counsel. Indeed it would be very surprising if there was any law which would prevent a person suspected of contraventions of laws of Australia, who is being interviewed by Australian authorities, for the purposes of potential proceedings in Australia, from having access to legal counsel, particularly in circumstances where the Pakistani Inter Services Intelligence Directorate (ISID) had already, by the time of the AFP interview, had a prolonged opportunity to question the accused for their own purposes.

The potential for dangerous precedents

96. Finally, the potential for judicial acquiescence in, or encouragement of, unlawful conduct by police to be conveyed when courts permit reliance on evidence obtained in violation of procedural rights of an accused is a further important consideration in the exercise of the public policy discretion. His Honour Deane J observed in *Pollard v R* (1992) 176 CLR 177, 202-3:

> It is the duty of the courts to be vigilant to ensure that unlawful conduct on the part of the police is not encouraged by an appearance of judicial acquiescence. In some circumstances, the discharge of that duty requires the discretionary exclusion, in the public interest, of evidence obtained by such unlawful conduct. In part, this is necessary to prevent statements of judicial disapproval appearing hollow and insincere in a context where curial advantage is seen to be obtained from the unlawful conduct. In part it is necessary to ensure that the courts are not themselves demeaned by the uncontrolled use of the fruits of illegality in the judicial process.[64]

97. There is potential for a dangerous precedent to be set by an Australian court being perceived to have condoned the deliberate conduct of interviews in conditions where it is known that the right of access to legal counsel required by Australian law is being denied. Admission of evidence obtained in such circumstances may be perceived as judicially condoning a practice of conducting interviews where it is known that the right of access to legal advice has been curtailed. And, importantly, the Australian courts should not accept a breach of s23G in the circumstances of the present case.

98. The apprehension that such practices may be encouraged if the decision of the trial judge on admissibility is upheld is not unrealistic or unduly alarmist. Case law in the United Kingdom and United States demonstrates the nature of the problems which may arise in the contemporary investigation and prosecution of terrorism related offences and, in particular, indicates the very

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[64] See also the observations of Stephen and Aickin JJ (with the concurrence of Barwick CJ) in *Bunning v Cross* (1978) 141 CLR 54 at 74., that the public policy discretion involves "the weighing against each other of two competing requirements of public policy, thereby seeking to resolve the apparent conflict between the desirable goal of bringing to conviction the wrongdoer and the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law."

real incidence of maltreatment of suspects in states such as the state in the present case.[65]

99. Further, Amnesty International has documented the increasing use of the practice of "rendition". That term is used by Amnesty International to describe

> the transfer of individuals from one country to another, by means that bypass all judicial and administrative due process. [66]

100. The present case does not involve any such process. However, the fact that such processes are being used in the context of the investigation of suspected terrorist offences, which involve denials of important procedural rights of persons suspected of crime, is a practical indication of the very serious problems which could be created if courts take the view that it is not necessary to enforce fundamental procedural safeguards in domestic law when suspects are interrogated in other countries. Australian courts should be vigilant to ensure that there is no possible perception of judicial acquiescence in any practices which impair individuals' mandatory procedural safeguards by reason that investigations are conducted overseas.

101. In summary, AIA submits that the following matters were relevant to the exercise of the public policy discretion in relation to the record of interview:

- the denial of the right to communicate with a legal practitioner conferred by s 23G of the *Crimes Act*, which is not, relevantly to the present case, absolute and which is intended to operate extraterritorially;
- the right to access to legal advice is an internationally recognized human right, which the Australian government has accepted (by ratification of the ICCPR) and has undertaken to protect by effective

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[65] See the cases referred to at paragraphs 90 to 93 above.

[66] Amnesty International report "USA: Below the Radar: Secret Flights to Torture and Disappearance" AI Index AMR 51.105/0511/2006 (5 April 2006). See affidavit of Nicole Bieske, affirmed 29 June 2006, par 21(c). See also "Partners in Crime – Europe's role in US Renditions"AI Index EUR 01/008/2006 (14 June 2006) (Bieske affidavit, par 21(d))

remedies. The fact that the interview took place in a foreign country cannot, therefore, operate as a justification for denial of that right;

- The fact that denial of access to legal advice for Mr Thomas was particularly significant given the likely effect on him of having been held in solitary confinement in Pakistan and being subjected to ill treatment prior to the relevant interview; and
- the potential for the admission of the evidence received in these circumstances to be perceived by law enforcement officers as a judicial indication that the conduct of interviews, such as occurred in the circumstances of the present case, can occur with impunity and with little risk of inadmissibility.

RON MERKEL

CLAIRE HARRIS