

IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
IN THE COURT OF APPEAL

S EAPCI 2021 0051

BETWEEN

**Rebecca Falkingham (in her capacity as Secretary  
to the Department of Justice and Community Safety)**

**First Applicant**

**Tracey Tosh (in her capacity as Governor of Barwon Prison)**

**Second Applicant**

and

**Craig Minogue**

**Respondent**

AND BETWEEN

**Colin Thompson (in his capacity as Governor of Barwon Prison)**

**Applicant**

and

**Craig Minogue**

**Respondent**

**SUBMISSIONS OF THE VICTORIAN ABORIGINAL LEGAL SERVICE IN  
SUPPORT OF APPLICATION FOR LEAVE TO INTERVENE AS AMICUS CURIAE**

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Victorian Aboriginal Legal Service

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1. The Victorian Aboriginal Legal Service (**VALS**) seeks leave of the Court to intervene as amicus curiae in the in the application of Rebecca Falkingham (in her capacity as Secretary to the Department of Justice and Community Safety), Tracey Tosh (in her capacity as Governor of Barwon Prison) and Colin Thompson (in his capacity as Governor of Barwon Prison) (**Applicants**) for leave to appeal against the orders of the primary court in *Minogue v Thompson* S ECI 2019 04631 and *Minogue v Falkingham and Tosh* S ECI 2020 00798.
  2. In support of its application, VALS relies on the affidavit of Sarah Rae Schwartz affirmed on 11 October 2021 and seeks leave as amicus to rely on the proposed written submissions marked as exhibit “**SRS-1**” at pages 101 to 110 and to supplement these written submissions orally at the hearing of the application for leave to appeal (and appeal if leave is granted).

3. VALS seeks leave to appear as amicus curiae so it may make submissions in respect of the interpretation of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**) in the context of decisions made in regard to strip-searches and urine tests in prison in Victoria.
4. The submissions of VALS are relevant to Grounds 1, 3, 4 and 5 of the proposed appeal.

### **The legal test for leave to intervene as amicus**

5. The Court of Appeal has power to grant leave to a person to appear as amicus curiae by virtue of its status as a superior court of record and a court of law and equity.<sup>1</sup> The Court has a broad discretion to allow a person to appear as amicus curiae.<sup>2</sup>
6. The relevant principles are set out in *Priest v West* (2011) 35 VR 225 at [29]-[35] (*Priest*). An amicus curiae may be heard when the Court is satisfied “that it will be significantly assisted by the submissions of the amicus and that any costs to the parties or any delay consequent on agreeing to hear the amicus is not disproportionate to the expected assistance.”<sup>3</sup>
7. Leave may be granted for an applicant to appear as amicus where an applicant is “willing to offer the Court a submission on law or relevant fact which will assist the Court in a way in which the Court would not otherwise have been assisted”.<sup>4</sup> Courts may be more willing to hear from amicus curiae where judgments may affect the community generally or persons other than the parties before the Court.<sup>5</sup> The submissions of amici curiae may “help the Court to see a problem in a context larger than that which the parties are willing, or able, to offer.”<sup>6</sup>
8. In contradistinction to the position of a person seeking leave to intervene, a person seeking leave to appear as amicus curiae does not need to demonstrate that their material interests will be affected by the outcome of the proceeding. While typically a party granted leave to appear as amicus will be independent of the parties and neutral, neither independence nor neutrality is a pre-requisite to the grant of leave.<sup>7</sup>
9. In considering applications for leave to intervene as amicus curiae the Courts have been concerned that:
  - a) there not be undue interference with the ability of the parties to carry on their litigation free from the intervention of strangers;<sup>8</sup>
  - b) any costs to the parties or any delay as a result of agreeing to hear the amicus curiae be not disproportionate to the assistance that the Court expects to receive;<sup>9</sup> and
  - c) there not be a prejudicial effect upon the efficient operation of the Court.<sup>10</sup>

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<sup>1</sup> *United States Tobacco Company v Minister for Consumer Affairs* (1988) 20 FCR 520 at 534 (*United States Tobacco*).

<sup>2</sup> *Levy v Victoria* (1997) 189 CLR 579 at 604 (*Levy*); *Karam v Palmone Shoes Pty Ltd* [2010] VSCA 252 at [3].

<sup>3</sup> *Roadshow Films Pty Ltd v iiNet Limited* (2011) 284 ALR 222 at [4]; *Levy* at 600-605 (*Levy*); *Priest* at [33].

<sup>4</sup> *Levy* at 604; *Priest* at [29].

<sup>5</sup> *United States Tobacco* at 534.

<sup>6</sup> *Levy* at 651.

<sup>7</sup> *National Australia Bank Ltd v Hokit Pty Ltd* (1996) 39 NSWLR 377, 381-382 (*Hokit*); *Priest* at [29].

<sup>8</sup> *United States Tobacco* at 536.

<sup>9</sup> *Levy* at 605.

<sup>10</sup> *Id* at 604.

10. The Court can, in the interests of justice, allow a party applying for leave to appear as amicus to make oral submissions or to file written submissions, or to do both.<sup>11</sup>
11. There is no limitation on the types of individuals or organisations which can be granted leave to appear as amicus,<sup>12</sup> and they can include public interest bodies or professional organisations.<sup>13</sup>

### **The Victorian Aboriginal Legal Service**

12. VALS is an Aboriginal community-controlled organisation which has been representing and advocating for Aboriginal and Torres Strait Islander people in Victoria since its inception in 1973. The focus of VALS is on ensuring Victorian Aboriginal and Torres Strait Islander people enjoy and exercise their legal rights, are aware of their responsibilities under the law, and have access to appropriate legal representation in the legal system.
13. Upon the basis of the facts set out in the affidavit of Ms Schwartz, including VALS longstanding work with Aboriginal and Torres Strait Islander people in prison, VALS is able to offer insight to the Court as to the unique experiences of Aboriginal and Torres Strait Islander people in prison in Victoria who may be affected by the determination of this appeal. By virtue of its long history of human rights work on behalf of people in prison, VALS also has the expertise required to provide assistance to the Court on points of domestic and international human rights law that is useful and different from the contribution of the parties.

### **The interest of the Victorian Aboriginal Legal Service in this appeal**

#### The disproportionate impact of decisions regarding the human rights of persons in prison on Aboriginal and Torres Strait Islander people

14. In 1991, the Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**) highlighted the overrepresentation of Aboriginal and Torres Strait Islander Australians in the criminal justice system.
15. The RCIADIC highlighted the following:

Aboriginal people are in gross disproportionate numbers, compared with non-Aboriginal people, in both police and prison custody and it is this fact that provides the immediate explanation for the disturbing number of Aboriginal deaths in custody.<sup>14</sup>
16. It is well documented that this overrepresentation occurred against a backdrop of dispossession and brutality towards Aboriginal and Torres Strait Islander people in modern Australian history.<sup>15</sup>

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<sup>11</sup> *United States Tobacco* at 534; *Levy* at 604-605; *Priest* at [31].

<sup>12</sup> *United States Tobacco* at 535.

<sup>13</sup> *Priest* at [32].

<sup>14</sup> Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 1, [9.4.1].

<sup>15</sup> *Id.*, vol 1, [1.4.2 – 1.4.3].

17. Since the RCIADIC, overrepresentation in prison has worsened. From 2010 to 2020, the number of Aboriginal and Torres Strait Islander people in prison in Victoria increased by 148 per cent.<sup>16</sup> As at 31 July 2021, over 10% of all persons in prison in Victoria are Aboriginal and Torres Strait Islander peoples.<sup>17</sup>
18. In Victoria, Aboriginal and Torres Strait Islander adults are 13.9 times more likely to be imprisoned than non-Indigenous adults.<sup>18</sup> For women, this disproportion is even more extreme. Aboriginal women are 21 times more likely to be imprisoned than non-Aboriginal women in Australia.<sup>19</sup>

### Significance of the matters raised in the appeal to the Victorian Aboriginal Legal Service

19. There are a number of novel questions of law raised by the appeal which will have wide-ranging consequences for Aboriginal and Torres Strait Islander people in Victoria, who are disproportionately impacted by decisions as to the conditions of incarceration.

20. As stated by the Applicants' in their Amended Application for Leave to Appeal:

The questions of law raised by the appeal have not yet been considered by the Court of Appeal and a decision by the Court on these questions would provide important guidance to the executive about how to comply with the obligations in s 38(1) of the *Charter of Human Rights and Responsibilities Act 2006* (the Charter).

The questions of law raised by this appeal are relevant to a broad range of executive action by Victorian public authorities and to all proceedings in which s 38(1) of the Charter is relied upon.

21. In addition to novel questions regarding the proper application of s 38(1), the content of the rights to privacy and humane treatment, under ss 13 and 22(1) of the Charter, have not been comprehensively analysed by a superior court in Victoria.

### **The useful and unique contribution of VALS**

22. Specific aspects of the appeal that are matters of significance for VALS include:

- The standard of human rights scrutiny under ss 38(1), 13(a) and 22(1) applicable to decisions made regarding persons in prison in Victoria;<sup>20</sup>

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<sup>16</sup> Corrections Victoria, *Profile of Aboriginal People in Prison*, 30 June 2021 <<https://files.corrections.vic.gov.au/2021-07/CV%20Prison%20Aboriginal%20Persons%202021%20Jul%20update.pdf>>.

<sup>17</sup> Ibid.

<sup>18</sup> Australian Bureau of Statistics, Corrective Services Australia, *National and state information about adult prisoners and community based corrections, including legal status, custody type, Indigenous status, sex*, 16 September 2021 <<https://www.abs.gov.au/statistics/people/crime-and-justice/corrective-services-australia/latest-release>>.

<sup>19</sup> Human Rights Law Centre and Change the Record Coalition, *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment*, May 2017 <[https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/59378aa91e5b6cbaaa281d22/1496812234196/OverRepresented\\_online.pdf](https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/59378aa91e5b6cbaaa281d22/1496812234196/OverRepresented_online.pdf)>.

<sup>20</sup> Grounds 1, 3 and 4 of the Appeal.

- The degree of weight and latitude to be given to prison administrators in making decisions affecting the human rights of persons in prison in Victoria;<sup>21</sup>
  - The content of the right to privacy under s 13(a) of the Charter and its application to strip-searching and urine testing in prison;<sup>22</sup>
  - The content of the right to humane treatment under s 22(1) of the Charter and its application to strip-searching and urine testing in prison;<sup>23</sup>
23. VALS’ proposed written submissions on the above points do not repeat the submissions raised by the Applicant or Respondent. Rather, the focus of VALS submissions is on providing important context, founded in the Charter and case law in Victoria, on the impact of these matters on people in prison in Victoria.
24. The matters which VALS seeks to address in its submissions are, of themselves, issues of public importance. Given that the decision is one which will impact all adults in prison in Victoria, including the people who VALS works with on an everyday basis, VALS submits that its proposed written submissions will “help the Court to see a problem in a context larger than that which the parties are willing, or able, to offer.”<sup>24</sup>
25. VALS, by virtue of its work in the field of human rights law and in working to protect and promote the rights of Aboriginal and Torres Strait Islander people in prison in Victoria, is well placed to provide assistance to the Court in relation to the application of the Charter to persons in prison in Victoria.
26. The matters addressed in VALS proposed written submissions relate directly to grounds 1, 3, 4 and 5 of the Appeal. VALS is not seeking to raise fundamental new issues or to “shift the litigious goal posts” in the manner which the High Court found unacceptable in respect of the intervention of the Australian Competition and Consumer Commission in *News Ltd v South Sydney District Rugby League Football Club Ltd*.<sup>25</sup>
27. In relation to the question of delay and costs, it is submitted that the written submissions proposed to be made by VALS, and the more limited oral submissions which VALS would seek to make should leave be granted, would not add materially to the duration of the hearing of the application (or any appeal) or cause the costs of the parties to be disproportionately affected; nor would they prejudice the efficient operation of the Court. VALS consider that, having regard to the material filed by the parties and VALS, that the day set aside for the hearing of the application for leave to appeal, and appeal itself, remains sufficient.

**TIMOTHY GOODWIN**

Counsel for the Victorian Aboriginal Legal Service



**Signed by SARAH SCHWARTZ**

Solicitor for the Victorian Aboriginal Legal Service

<sup>21</sup> Grounds 1, 3, 4 and 5 of the Appeal.

<sup>22</sup> Ground 3 of Appeal.

<sup>23</sup> Ground 4 of Appeal.

<sup>24</sup> *Levy* at 651 (Kirby J).

<sup>25</sup> (2003) 200 ALR 157 at [9], [84]-[88], [135], [232]-[233].