SUPREME COURT OF QUEENSLAND

CITATION:	*Callanan v Attendee Z* [2013] QSC 342
PARTIES:	**JOHN DAVID CALLANAN** (applicant) **v** **ATTENDEE Z** (respondent)
FILE NO:	BS 11512 of 2013
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	12 December 2013
DELIVERED AT:	Brisbane
HEARING DATE:	12 December 2013
JUDGE:	Applegarth J
ORDER:	**1. I am satisfied beyond reasonable doubt that the respondent was in contempt of the presiding officer in that he refused to take an oath in the circumstances stated in the Certificate of Contempt of the applicant dated 28 November 2013;** **2. I order that the respondent be imprisoned for a term of 42 days from 12 December 2013;** **3. I direct that the originating application, the Certificate of Contempt, the affidavits filed herein, the outlines of submissions and any exhibits be placed in an envelope, which is to be sealed and marked not to be opened without an order of the Court.**
CATCHWORDS:	CRIMINAL LAW – FEDERAL AND STATE INVESTIGATIVE AUTHORITIES – QUEENSLAND – where the applicant sought an order that the respondent be committed to prison or otherwise punished for contempt – where the Crime and Misconduct Commission was authorised to hold investigative hearings in relation to criminal activity – where respondent was required to attend hearing – where respondent failed to take the oath – where the applicant issued a certificate of contempt against the respondent pursuant to s 199(2) of the *Crime and Misconduct Act* – where contempt not contested and is proven – where legislation mandates that the Court must punish the person in contempt by imprisonment to be served wholly in a

corrective services facility – assessment of appropriate term of imprisonment - whether the term of imprisonment to be imposed on the respondent will be served in solitary confinement – whether the punishment should take account of the fact that imprisonment will be served in solitary confinement

Crime and Misconduct Act 2001 (Qld), s55A, s176, s198, s199

Allbeury v Corruption and Crime Commission (2012) 220 A Crim R 372, cited
Callanan v Forbes, Byrne SJA, unreported 16 February 2010, considered
Callanan v Witness J, unreported, Dalton J, 19 November 2013, considered
O'Connor v Witness G [2013] QSC 281, considered
R v Abbott unreported, Court of Appeal CA No 344 of 1998, 13 April 1999, cited
R v Brady (2005) 92 SASR 135, cited
R v Guthorie [2002] QCA 509, cited
R v Phillips and Wallgrove [2008] QCA 284, cited
R v Allingham, Landsdowne, Marshall and Booth [1994] QCA 433, cited
R v Pope; ex parte Attorney-General (Qld) [1996] QCA 318, cited
R v RAL [2012] QCA 34, cited
Wood v Staunton (No 5) (1996) 86 A Crim R 183, considered
York v The Queen (2005) 225 CLR 466, considered

COUNSEL: M J Copley QC for the applicant
D H James for the respondent

SOLICITORS: Official Solicitor, Crime and Misconduct Commission for the applicant
Bell Miller Lawyers for the respondent

[1] This is an application to punish the respondent for his contempt of the applicant, who was the presiding officer at a Crime and Misconduct Commission hearing conducted on 28 November 2013 pursuant to s 176 of the *Crime and Misconduct Act* 2001 (Qld) ("the Act"). The Commission has been authorised pursuant to s 55A of the Act to undertake a specific intelligence operation, including holding hearings. The criminal activity that is the subject of the intelligence operation involves serious criminal activity and one of the purposes of the investigation is to identify the persons or entities involved in that criminal activity and to make appropriate recommendations about responses to it.

[2] The respondent was required to attend a hearing on 28 November 2013. He attended the hearing after receiving legal advice. He was informed about the nature of the hearing and the presiding officer required him to take an oath. He failed to do

so. The failure to take an oath when required to do so was certified as constituting the contempt. The certificate is evidence of the matters contained in it.[1]

[3] Counsel for the respondent concedes that the respondent's refusal to take an oath at the Commission hearing on 28 November 2013 amounts to a contempt. Section 199(6) of the Act obliges the Court to inquire into the alleged contempt. The failure to take the oath when required constitutes an offence against s 183 of the Act. A person is in contempt of the presiding officer conducting a Commission hearing if the person, at the hearing, contravenes a provision of the Act relating to the hearing.[2] I am satisfied beyond reasonable doubt that the respondent has committed the contempt.

[4] Because the contempt that was certified was a failure under s 183 to take an oath when required by the presiding officer, and I was satisfied when the matter came before me on 12 December 2013 that the respondent had committed the contempt, I was required by s 199(8A) to punish the respondent by imprisonment to be served wholly in a corrective services facility. Senior Counsel for the applicant contended for a punishment in the range of five to six months' imprisonment, with account being taken of the period that the respondent has been in custody since 28 November 2013, and further account to be taken of the real prospect that the respondent would be held in solitary confinement.

Relevant principles and their application

[5] Factors relevant to the assessment of proper punishment for contempt of this type were considered by Dunford J in *Wood v Staunton (No 5)*[3]. His Honour set out the following not-exhaustive list of relevant factors:

(1) the seriousness of the contempt proved;

(2) whether the contemnor was aware of the consequences to himself of what he did;

(3) the actual consequences of the contempt on the relevant trial or inquiry;

(4) whether the contempt was committed in the context of serious crime;

(5) the reason for the contempt;

(6) whether the contemnor has received any benefit by indicating an intention to give evidence;

(7) whether there has been any apology or public expression of contrition;

(8) the character and antecedents of the contemnor;

(9) general and personal deterrence; and

(10) denunciation of the contempt.

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1 *Crime and Misconduct Act* 2001 (Qld) ("the Act"), s 199(10).
2 The Act, s 198(1)(c).
3 (1996) 86 A Crim R 183 at 185.

These factors have been applied by judges of this Court in cases involving punishment of contempt under s 199 of the Act. A number of cases have involved contempt of hearings concerned with the investigation of a specific, major crime, such as murder. Here, the contempt is of a hearing undertaken in the course of a specific intelligence operation authorised pursuant to s 55A. That section came into operation on 17 October 2013 and, as a result, there have been few comparable cases of contempt of such a hearing. It is appropriate to consider the factors discussed in *Wood v Staunton* in respect of such a hearing. Dalton J adopted this approach in *Callanan v Witness J* on 19 November 2013.

[6] The contempt that has been proved is a serious one.

[7] As in *Callanan v Witness J*, the Court cannot say whether the respondent had crucial information that would have been of assistance to the Commission with its inquiries. However, the seriousness of the contempt must be assessed by reference to the importance of the matters which are the subject of the intelligence operation being undertaken by the Commission. They relate to serious criminal activity undertaken by suspected criminal organisations. Impeding a hearing which seeks to ascertain information about such activities is a serious matter. The intelligence operation seeks to identify persons or entities involved in criminal activities by Criminal Motorcycle Gangs ("CMGs"), to disseminate that information to other bodies engaged in law enforcement and to reduce the incidence and effect of criminal activity by CMGs in a variety of ways. Another purpose of the operation is to gather evidence for the prosecution of persons engaged in such criminal activity. The contempt is therefore a serious one.

[8] The respondent must be taken to have been aware of the consequences to him of refusing to take an oath. He had received legal advice and was aware that he was obliged to take an oath. He did not co-operate even to the extent of taking an oath despite being told that he was required by law to do so.

[9] The actual consequences of the contempt on the intelligence operation cannot be precisely stated. It has impeded the intelligence operation. I cannot say that it has severely impeded it. The evidence before me indicates that the respondent has been identified as a probationary member of a particular CMG, and has been nominated to become a full member. He is alleged to have threatened a business owner as representative of the CMG. He has had possession of keys to its clubhouse. He is alleged to have planned to form a feeder street gang for the purpose of recruiting members of the CMG and to have had the support of the CMG in doing so. His apparent probationary membership of and association with the CMG provide a basis to conclude that he could have provided information about it to the hearing.

[10] The conduct of the respondent in refusing to take an oath is consistent with evidence which suggests that he is a member of the CMG who subscribes to a code which prohibits co-operation with law enforcement authorities in relation to its activities. The specific consequences of the contempt on the intelligence operation cannot be stated because the respondent refused to take even the first step at the hearing which would permit questions to be asked about the state of his knowledge. What can be said is that if all persons in a similar position called to a hearing adopted the same stance then the conduct of the intelligence operation would be severely impeded.

[11] No reason for the contempt was given at the Commission's hearing or in evidence before me. It was not said that the reason for the refusal to take an oath was the respondent's fear of retribution. This is a possible inference. His apparent subscription to a code of silence may not be a simple matter of honour. He may subscribe to that code of silence because of a fear of retribution. To the extent that it is permissible to infer that the respondent's contempt is due to a fear of retribution, and to the extent that any such fear may be well-founded, this would be a matter to be taken into account in mitigation. This is because a refusal to take an oath or otherwise co-operate out of a genuine fear of retribution deserves less punishment than the same conduct by someone who has no such fear. However, the achievement of the public policy objective which underpins the conferral on the Commission of its exceptional powers could be impeded if significant weight was to be given to an assertion (let alone an assumption) of a fear of retribution as a reason for refusing to provide information.[4]

[12] There has been no apology by the respondent for his contempt.

[13] The character and antecedents of the respondent are relevant to punishment. He is aged in his early 30s. He has a lengthy criminal history, including periods of imprisonment for offences involving violence.

[14] General and personal deterrence are important factors. As Byrne SJA observed in *Callanan v Forbes,*[5] if witnesses are unwilling to participate in such investigative hearings in connection with the commission of serious crimes, that is likely to greatly disadvantage the community.

[15] I also take into account the fact that the respondent did not contest that he was in contempt and that the matter proceeded expeditiously at the hearing before me.

[16] An appropriate period of imprisonment should have regard to comparable cases. Some of those cases involved hearings in relation to major crimes, including murder. Some involved contempts by individuals with less serious criminal histories than the respondent, such as the respondents in *Callanan v Attendee X* and *Callanan v Attendee Y*. The facts are comparable to *Callanan v Witness J* in which a term of five months' imprisonment was imposed, for a person who was younger than the respondent and who had a less serious criminal history. Having regard to those comparable cases, the sentencing range of five to six months advanced by senior counsel for the applicant, and not challenged by the respondent, would be appropriate if, as in earlier cases, it was expected that the sentence would be served in normal prison conditions.

[17] There is authority for the proposition that time spent in pre-sentence custody cannot be declared pursuant to s 159A of the *Penalties and Sentences Act* 1992 (Qld).[6] However, as in other cases, it is appropriate to take into account the time the respondent has been held in custody as a result of his contempt awaiting his penalty.

[18] Subject to the issue of solitary confinement, an appropriate sentence would be one of six months' imprisonment, less the time he has spent in custody. I take into account the period of 15 days from 28 November 2013 to 12 December 2013

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4 *Allbeury v Corruption and Crime Commission* (2012) 220 A Crim R 372 at 411 [224], 416 [255].

5 Unreported, Byrne SJA, 16 February 2010.

6 *O'Connor v Witness G* [2013] QSC 281.

inclusive and deduct those 15 days from the notional sentence of six months' imprisonment. This results in a period of five months and 15 days' imprisonment from today, subject to the issue of solitary confinement.

Punishment and solitary confinement

[19] The respondent is to be punished for contempt, not for the commission of a criminal offence. However, in arriving at a just punishment, and subject to the mandatory minimum punishment described by s 199(8B) of the Act, I am guided by similar principles to those which apply in the imposition of punishment for an offence. These include principles of personal and general deterrence and denunciation. Any punishment is subject to the possibility that the respondent may purge their contempt, in which event he might be discharged from prison before the end of the term.[7] The punishment for a serious contempt should not be so moderate as to provide no practical encouragement to purge the contempt.

[20] Any punishment must be just in all the circumstances. As with a sentence for a criminal offence, punishment by imprisonment for contempt pursuant to s 199 of the Act may take account of the circumstances in which the imprisonment will be served. Particular circumstances may make imprisonment more harsh than otherwise would be the case. For example, an invalid might be expected to find a period of imprisonment far more harsh than a person in good health, and account might be taken of this, particularly where there is a serious risk of imprisonment having a gravely adverse effect on the prisoner's health.[8] A pre-existing medical condition may carry little weight as a factor in mitigation when the condition can be adequately treated in prison.[9]

[21] In imposing punishment by imprisonment pursuant to s 199 of the Act, the Court does not dictate the precise circumstances in which the person will be imprisoned. The person's imprisonment is governed by laws and lawful directions by authorities which are in charge of the person's custody.[10] Some information may be available to the Court at the time punishment by way of imprisonment is imposed. For example, it may be apparent that the person will not have ready access to required medical treatment. Any punishment which is imposed leaves open the possibility that the person will be punished for a disciplinary offence committed whilst the person is in custody. Likewise, good behaviour in custody may result in a favourable security classification and the conferral of privileges. A court cannot predict with any precision what the course of custody will be because it is dependent, to some extent, upon the person's behaviour whilst in custody. However, unless there is information before the court, it will normally assume that custody will not be spent in solitary confinement, unless, for example, such an extraordinary measure is justified as a punishment for a disciplinary offence or for the person's protection.

[22] The conditions under which a person will serve a term of imprisonment are relevant matters to be taken into account – at least where those conditions are shown to be different from, and more onerous than the conditions undergone by other

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7 The Act, s 199(8D) - (8F).

8 *R v Pope; ex parte Attorney-General (Qld)* [1996] QCA 318; *R v RAL* [2012] QCA 34.

9 *R v Guthrie* [2002] QCA 509 at [45]; *R v Svensson; ex parte A-G (Qld)* [2002] QCA 472.

10 *York v The Queen* (2005) 225 CLR 466 at 469 [5], 478 [37] – [38].

prisoners.[11] The fact that a term of imprisonment will be served in isolation may be taken into account in fixing a sentence of an appropriate length.[12]

[23] Senior counsel for the applicant fairly acknowledged that in the absence of a statutory provision to the contrary, the Court is permitted, and indeed obliged, to have regard to the expected circumstances of incarceration.

[24] In arriving at an appropriate punishment a court can make allowance for the fact that a person has spent part of their time in custody in unusually harsh circumstances. For example, a person who has consented to extradition to Australia, but spent substantial time in unusually harsh conditions in a foreign jail awaiting extradition might have such circumstances taken into account in reduction of the period of actual custody the person is required to serve.[13] In *R v Allingham, Landsdowne, Marshall and Booth*[14] the learned sentencing judge, Thomas J (as his Honour then was), treated 18 days in pre-sentence custody of an offender as the equivalent of 18 weeks because of the overcrowding and poor conditions spent in the Brisbane Watchhouse.

[25] The prospect that a prisoner will serve some of the period in solitary confinement will not always justify some reduction in sentence. Solitary confinement does not mitigate when it is caused by the offender, for example by attempting to escape.[15] *R v Abbott*[16] is an example of such a case. It involved a violent escape by a high security prisoner in the course of which shots were fired at correctional officers. The applicant was sentenced to six years' imprisonment. He was placed in solitary confinement. The Chief Justice, with whom McPherson and Thomas JJA agreed, accepted a submission that it would militate against the deterrent factor in sentencing if escapees believed that they would serve a shorter time because the Court anticipated that the escapee might serve some of the period in solitary confinement. This authority does not support the proposition that solitary confinement is not a relevant factor in the determination of a just punishment in other situations.

[26] The prospect that a person might spend all or part of a term of imprisonment in unusually harsh conditions should be taken into account in determining an appropriate punishment.

The prospect that the respondent will be placed in solitary confinement

[27] An affidavit made by an Acting Deputy Commissioner of Queensland Corrective Services on 10 December 2013 discloses that a document entitled "Southern Queensland Correction Centre Detention Unit Management" dated 29 October 2013 forms part of a departmental policy, a copy of which is exhibited to the affidavit. This policy applies to persons sentenced to a term of imprisonment as punishment for contempt as well as persons sentenced to terms of imprisonment upon conviction of criminal offences if those persons are found to be "identified

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11 Ibid at 478 [38].

12 Ibid at 469 [5]. For a recent discussion of the question of whether anticipated prison conditions are a relevant consideration for sentencing purposes see *Western Australia v O'Kane* [2011] WASCA 24 at [63] – [69].

13 *R v Phillips and Wallgrove* [2008] QCA 284 at [43] – [46].

14 [1994] QCA 433.

15 *R v Brady* (2005) 92 SASR 135 at [46].

16 Unreported, Court of Appeal CA No 344 of 1998, 13 April 1999.

participants" in a criminal organisation. The relevant policy applies to all correctional centres in Queensland. It is dated November 2013 and is in the form of a Handbook for General Managers. Part of it is described as a Restricted Management Regime. The Queensland Corrective Services Intelligence Group ("QCSIG") is provided with a list of confirmed Criminal Motorcycle Gang members by the Queensland Police Service ("QPS"). A person who is identified as such an individual is described in the policy as a CMG prisoner. The policy states the following in relation to their accommodation:

> "Sentenced and sentenced-remand CMG prisoners, including protection prisoners, are to be placed at Woodford Correctional Centre in the *Restricted Management Unit*, unless there are compelling reasons otherwise. Remand only CMG prisoners will in most instances remain at their centre of origin.
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> CMG prisoners are included in the SOU cohort. Transfer decisions for CMG prisoners will be made by the General Manager, Sentence Management Services, with advice from the Deputy Commissioner, Statewide Operations.
>
> All identified CMG prisoners (remand, sentenced and protection) will be managed in accordance with the following Restricted Management Regime:
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> - Out of cell time restricted to at least two daylight hours a day
> - No visits from other CMG members or affiliates (this also includes family members)
> - CMG prisoners will ONLY be entitled to a 1 hour non-contact personal visit with family members per week
> - The wearing of the CMG prisoner uniform
> - No TVs in cells
> - No access to gymnasium facilities/oval
> - Canteen expenditure strictly limited
> - Restricted minimum prisoner property
> - CMG prisoner phone calls restricted to seven personal calls per week (6 minute duration)
> - All calls, other than to legal representatives, will be monitored by intelligence staff at the time of the call or post the activity
> - CMG prisoners will not be permitted to add CMG members to the PTS
> - No clothing, jewellery, material or items indicative of CMG membership will be permitted in a correctional centre
> - Visitors wearing or in possession of any such clothing or items indicative of CMG membership will not be permitted to enter or visit correctional facilities
> - Prisoner's mail will be opened, searched, censored by intelligence staff (excluding privilege mail)
> - Photographs refreshed every 2 months period to monitor changes in tattoos and markings
> - Frequent, pro-active cell searches (Minimum once per week)

> - Increased drug testing (Substance testing to occur fortnightly or at the direction of the General Manager)
> - Substance testing for specific drug types can occur at the direction of the General Manager
>
> CMG prisoners are eligible and can apply to the General Manager for visits from Chaplaincy services and/or Elders. There are to be no restrictions on access to health and medical services.
>
> All CMG prisoners' requests are to be managed in accordance with current procedures and delegations for approval."

[28] The affidavit clarifies the first dot point which states "Out of cell time restricted to at least two daylight hours a day". The affidavit explains that this means that any prisoner subject to an order containing this condition will receive a total of two daylight hours a day, with the remainder of the time (22 hours a day) spent in solitary confinement. The only exception to this would be if the prisoner had other scheduled appointments to attend, such as visits or medical appointments.

[29] The deponent of the affidavit stated that she was unable to say whether the respondent and others in a similar position will be subject to the policy. This was said to be a matter that would be assessed "once advice had been obtained from the Commissioner of Police regarding their participation in criminal organisations, or if the Department itself had intelligence that led to the Chief Executive forming a reasonable belief that the individual was a participant in such an organisation." The deponent may not have been in a position to state whether the QPS and the Commissioner of Police in particular, would identify the respondent as an identified participant in a CMG.

[30] Senior counsel for the applicant's instructions on 12 December 2013 were that the respondent's name was not presently on the list, but acknowledged that there was a real and substantial risk that it would soon be. Counsel for the respondent submitted that this was highly likely.

[31] I accept that submission based on the evidence before me. It includes an affidavit from a senior officer within the QPS who is attached to a taskforce with respect to Criminal Motorcycle Gangs. The affidavit identifies the respondent as someone who is a probationary member of a particular CMG and is described as being "an 'Omerta' member" who would be bound by a code that prohibits co-operation with State authorities. The respondent, according to the affidavit, is suspected of being involved in the activities of the CMG.

[32] Accordingly, I conclude that the respondent is highly likely to be subject to the policy I have described and will be imprisoned in the manner that I have mentioned. Save for exceptional circumstances, he will spend 22 hours a day in solitary confinement.

Solitary confinement

[33] The harms of solitary confinement are evidenced in a large body of literature, including research dating back to the nineteenth century. It is addressed in international law instruments. Relevant materials in relation to it are collected by

Dr Shalev in her work *A Sourcebook on Solitary Confinement*.[17] Dr Shalev is a leading researcher in the field, who has published widely on the issue of solitary confinement. She holds a research position at the Centre for Criminology at the University of Oxford, is a Research Fellow at the Mannheim Centre for Criminology and an Associate at the International Centre for Prison Studies. The following is drawn substantially from her work and the materials quoted in it.

[34] Solitary confinement has a long history. It was widely and systematically used in the "separate" and "silent" penitentiaries of the nineteenth century with the aim of reforming prisoners. The belief was that left alone with their conscience and the Bible, convicts would see the error of their ways and reform. However, it transpired that many prisoners became mentally ill and there was little evidence that solitary confinement succeeded in reducing offending. In modern times solitary confinement has been deployed in "supermax" and "special security" prisons, particularly in the United States of America.

[35] The adverse health effects of solitary confinement have been well-established. The potentially damaging effects of solitary confinement have been recognised by international instruments and by respectable bodies which view it as "an extreme prison practice which should only be used as a last resort and then only for short periods of time." In 1990 the United Nations went as far as to call for its abolition.

[36] Research findings in relation to the health effects of solitary confinement began in the nineteenth century and by the early twentieth century numerous reports identified solitary confinement as the central factor in the development of psychotic illness among prisoners. More recent studies have reaffirmed that solitary confinement has a profound, adverse impact on the health of prisoners. Research indicates that many who have been subject to solitary confinement are at a risk of long-term psychological damage. The extent of psychological damage varies and will depend on individual factors, such as an individual's background and pre-existing mental state, environmental factors, prison regime (including the time out of cell and degree of human contact), the context of isolation (e.g. punishment, own protection, involuntary) and its duration. The most widely reported effects of solitary confinement are its psychological effects.

[37] According to the research cited by Dr Shalev, all studies of prisoners who have been detained involuntary in solitary confinement in regular prison settings for longer than 10 days have demonstrated some negative health effect. One study in Denmark for prisoners held in solitary confinement compared to those held with other prisoners found that hospitalisation rates diverged significantly after four weeks. The probability of being admitted for psychiatric reasons was about 20 times as high as for a person remanded in non-solitary confinement for the same period of time. An element in the level of endurance of solitary confinement is prior knowledge of its duration.

[38] Because of the extent of psychological and physiological damage of solitary confinement, reputable bodies advocate that its use should be reserved for extreme cases, and for as short a time as possible.

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17 Mannheim Centre for Criminology, London School of Economics and Political Science, London 2008 at< http://solitaryconfinement.org/uploads/sourcebook_web.pdf > at 12 December 2013.

[39] International instruments and bodies which administer them view solitary confinement as an undesirable prison practice which can only be justified in extreme cases and which, in certain circumstances, may be in violation of international law. The United Nations Human Rights Committee stated that:

> "solitary confinement is a harsh penalty with serious psychological consequences and is justifiable only in case of urgent need; the use of solitary confinement other than in exceptional circumstances and for limited periods is inconsistent with article 10, paragraph 1, of the Covenant."

[40] The *International Covenant on Civil and Political Rights* ("*ICCPR*") came into force in 1976. Australia is a signatory to it. Article 7 of the ICCPR states that:

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

Article 10 states:

> "(1) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
>
> ...
>
> (3) The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation."

[41] The UN Standard Minimum Rules, r 32(1) provides that "punishment by close confinement ... shall never be inflicted unless the medical officer has examined the prisoner and certified in writing that he is fit to sustain it."[18]

[42] The Istanbul Statement on the Use and Effects of Solitary Confinement, adopted on 9 December 2007 at the International Psychological Trauma Symposium, addressed the increasing use of solitary confinement as an administrative tool for managing specific groups of prisoners. It reported that it has been "convincingly documented on numerous occasions that solitary confinement may cause serious psychological and sometimes physiological ill effects." Negative ill effects can occur after only a few days in solitary confinement, and the health risks rise with each additional day spent in such conditions. The Statement asserts that when the element of psychological pressure is used on purpose as part of isolation regimes such practices become coercive and can amount to torture in contravention of international law.

[43] The Statement concluded that solitary confinement harms prisoners who were not previously mentally ill and tends to worsen the mental health of those who are. As a result, it recommended that the use of solitary confinement in prisons should be kept to a minimum. Whether solitary confinement is used in connection with disciplinary or administrative segregation, effort was required to raise the level of meaningful social contacts for prisoners. It recommended:

> "This can be done in a number of ways, such as raising the level of prison staff-prisoner contact, allowing access to social activities with other prisoners, allowing more visits, and allowing and arranging in-

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18 Standard Minimum Rules for the Treatment of Prisoners, *First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 22 August – 3 September 1955: report by the Secretariat*, United Nations publication, Sales No.1956.IV.4, annex I.A.

> depth talks with psychologists, psychiatrists, religious prison personnel, and volunteers from the local community. Especially important are the possibilities for both maintaining and developing relations with the outside world, including spouses, partners, children, other family and friends. It is also very important to provide prisoners in solitary confinement with meaningful in cell and out of cell activities."

[44] The Statement concluded:

> "As a general principle solitary confinement should only be used in very exceptional cases, for as short a time as possible and only as a last resort."

What period of imprisonment in solitary confinement is appropriate?

[45] The notional starting point which I arrived at of six months' imprisonment, less the time already spent in custody, had regard to comparable contempt cases in which it was not apparently anticipated that the period of imprisonment would be served in solitary confinement. Had I acceded to a submission that imprisonment for six months was appropriate it would have been in anticipation that the respondent probably would serve that sentence in normal prison conditions. The possibility might exist of his being required to serve some time in solitary confinement if he was at risk of harming someone else or being harmed by someone else, or if he committed a serious breach of prison discipline which justified the extreme measure of solitary confinement as an appropriate punishment.

[46] In imposing a punishment which is just in all the circumstances, I consider that it is appropriate to take into account the fact that any period of imprisonment that I impose is likely to be served in solitary confinement and in the other circumstances dictated by the policy.

[47] A requirement to serve a substantial part of the sentence in solitary confinement and in those conditions would be extremely harsh. There is no arithmetical calculation by which one could convert a period of six months in solitary confinement to a period in normal prison conditions. There is no arithmetical calculation to equate six months in normal prison conditions to a period in solitary confinement.

[48] In any event, my task is not to arrive at an appropriate sentence, assuming it will be served in normal prison conditions, and then apply a conversion rate to account for the fact of solitary confinement. It is to arrive at a just punishment which takes account of a variety of factors, including the fact that the term of imprisonment will be unusually harsh and potentially dangerous to the respondent's health because it is to be served in solitary confinement.

[49] Any substantial period of solitary confinement carries a high risk of causing serious psychological damage to the respondent which will endure after his release. Such enduring consequences carry dangers for members of the community.

[50] No submission is made by the applicant that solitary confinement is appropriate as a device to coerce the respondent into purging his contempt. This is unsurprising since the purposeful infliction of psychological harm by lengthy solitary confinement would be a cruel and degrading punishment.

[51] The respondent's background and other individual factors may make him resilient and limit the extent of psychological damage arising from solitary confinement. However, this cannot be assumed. It is appropriate to proceed on the basis that, notwithstanding differences in individual tolerance, solitary confinement for a prolonged period carries a significant risk of psychological damage, far in excess of the psychological damage that would be caused by imprisonment in normal prison conditions.

[52] Because of the harshness of the regime of solitary confinement to which the respondent will be subjected, I consider that a substantial allowance should be made for it. In some circumstances one day in unusually harsh custody, such as an overcrowded watchhouse, can be roughly equated with a week spent in prison.[19] It would be open to me to conclude that each day of a lengthy period of solitary confinement of the respondent would equate to a week spent in normal prison conditions.

[53] In the end, and recognising the inexact nature of the assessment of an appropriate allowance, I conclude that an appropriate period of imprisonment in circumstances in which the respondent can expect to be held in solitary confinement is a period of six weeks. This takes account of the fact that a period of six weeks in solitary confinement is harsh punishment and carries a substantial risk of psychological harm. The avoidance of such psychological harm might have justified a term far shorter than six weeks. However, a sentence of a few days in solitary confinement would not adequately punish the respondent for his contempt. The risk that the respondent will suffer serious psychological harm by any substantial period in solitary confinement, and thereby receive what many would regard as a cruel and unusual punishment, must be taken into account. However, it does not justify sending him to jail for only a few additional days. Such a period of imprisonment, coupled with the 15 days already spent in custody pursuant to s 198A and on remand, would not be a sufficient punishment for a serious contempt.

[54] The period that the respondent has been held in custody has been spent in the watchhouse in conditions which are more onerous than normal conditions, and which might be roughly equated to a month in normal custody on remand.

[55] A period of imprisonment of six weeks which is expected to be served in solitary confinement, coupled with the period the respondent already has spent in custody as a result of his contempt, is a just punishment in all the circumstances.

[56] A significant additional inducement for the respondent to purge his contempt is that a second contempt relating to a hearing dealing with the same subject matter as that dealt with in the recent hearing carries a minimum punishment of two years and six months imprisonment.[20]

[57] I make the following orders:

1. I am satisfied beyond reasonable doubt that the respondent was in contempt of the presiding officer in that he refused to take an oath in the circumstances stated in the Certificate of Contempt of the applicant dated 28 November 2013;

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[19] *R v Allingham, Landsdowne, Marshall and Booth* (supra).

[20] The Act, s 199(8B)(b).

2. I order that the respondent be imprisoned for a term of 42 days from 12 December 2013;
3. I direct that the originating application, the Certificate of Contempt, the affidavits filed herein, the outlines of submissions and any exhibits be placed in an envelope, which is to be sealed and marked not to be opened without an order of the Court.