

Redacted Final Report
Full investigation - *Ombudsman Act 1972*

Complainant	[The complainant]
Department	Department for Correctional Services
Ombudsman reference	2017/01854
Department reference	SEC/17/0053
Date complaint received	20 February 2017
Issues	<ol style="list-style-type: none">1. Whether the department's failure to document confidential intelligence information and an operational risk assessment was unreasonable2. Whether the department's direction that a prisoner be kept separately and apart from all other prisoners was unjust3. Whether the department's failure to provide the Minister with a report as soon as reasonably practicable after giving a direction that a prisoner be kept separately and apart from all other prisoners was contrary to law4. Whether the department failed to comply with clause 3.7.A of SOP 012 in reviewing the appropriateness of a prisoner's continued separation from all other prisoners5. Whether the department's failure to revoke a direction that a prisoner be kept separately and apart from all other prisoners for a period of 66 days was oppressive6. Whether the prolonged separation of a prisoner from all other prisoners was in accordance with a rule of law that is oppressive

Jurisdiction

The investigation arises from a complaint from a prisoner, [the complainant].

The complaint is within the jurisdiction of the Ombudsman under the *Ombudsman Act 1972*.

The complaint concerns, generally, the determination of the Department for Correctional Services (**the department**) to transfer the complainant from the general population of Port Augusta Prison to G Division of Yatala Labour Prison. The complainant alleges that the department acted unreasonably in directing his transfer and separation from all other prisoners and that the duration of his stay in G Division was unreasonable in all the circumstances.

Investigation

My investigation has involved:

- assessing the information provided by the complainant
- seeking and assessing a response from the department
- seeking further information from the department
- seeking more particulars from the complainant
- considering:
 - the *Correctional Services Act 1982*
 - the *State Records Act 1997*
 - the *Administrative Decisions (Effect of International Instruments) Act 1995*
 - the department's *Standard Operating Procedure 12 – Separation of Prisoners*
 - State Records' *Adequate Records Management Standard*
 - the International Covenant on Civil and Political Rights
 - the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
 - the *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*
- preparing a provisional report and seeking the views of the complainant and the department
- considering further information provided by the department
- preparing this final report.

Response to my provisional report

1. I provided my tentative views to the parties by way of my provisional report dated 24 August 2017.
2. The complainant did not provide a response to my provisional report.
3. By letter dated 12 September 2017, the department disagreed with the views expressed in my provisional report, submitting (emphasis in original):

I [...] draw your attention to the Hon. Koutsantonis' words in the House of Assembly in 2009 where he affirmed "*The government... will not include torture in any form, nor will it include the use of solitary confinement. Our prisons are humane...*" and further clarified that "*it is quite wrong to suggest that the separation of prisoners constitutes solitary confinement... this does not happen in South Australia*" This statement is supported by Martin J in *Fyfe v The State of South Australia* who stated "*I am not to be taken as suggesting that the conditions in G division are inhumane*" and also Kelly J in *Fyfe v The State of South Australia* "*there is nothing I saw or heard in the evidence to suggest that the applicant has not been treated in as humane a manner as possible given the necessary restrictions*".

I further find it necessary to draw your attention to the fact that separations of prisoners under s.36 of the *Correctional Services Act 1982* have been tested by Judicial Review on more than one occasion and the Courts' decisions have consistently recognised and supported the Department's exercise of discretion in applying the law and acknowledged

the Department's considerations of complex security and operational matters when making these decisions.

4. Responding to each of my provisional views in turn, the department submitted, *inter alia*:
 - it 'does not consider that there was a failure to document confidential intelligence as the General Manager received verbal information that he promptly acted upon to ensure the security and good order of the institution'
 - it 'maintains that it was appropriate in the delegate's opinion to separate [the complainant] based on information that indicated [the complainant] was a threat to the institution's security'
 - it maintains that the report to the Minister was 'provided to the Minister as soon as was reasonably practicable and within the Department's resources at the time'
 - the complainant's continued separation from other prisoners was reviewed on seven, rather than three, occasions
 - it disagrees that the circumstances of the complainant's separation from all other prisoners was oppressive
 - with regard to my provisional views on the operation of section 36 of the Correctional Services Act, 'these powers are conferred by Parliament, by way of an Act of Parliament and it is therefore a matter for a Minister and the Parliament to amend legislation.'
5. Concerning my foreshadowed recommendations, the department submitted:
 - it agrees to 'issue a reminder to staff to document key information where appropriate'
 - it disagrees with my recommendation that it issue a formal apology to the complainant
 - it agrees to 'remind staff of the importance of providing prompt reports to the Minister'
 - it 'will not consider making an ex-gratia payment to [the complainant].'
6. I have considered the views expressed by the department and responded to them, where necessary, in the body of this report.
7. Owing to additional information provided by the department, I have modified my findings in relation to the frequency and appropriateness of the department's review of the complainant's separation.
8. My views otherwise remain as expressed in my provisional report.

Background

9. On 27 December 2016 the complainant was one of four prisoners transferred from Port Augusta Prison (**PAP**) to G Division of Yatala Labour Prison (**YLP**) following an incident involving the department's Emergency Response Group.
10. The precise basis for the complainant's transfer to YLP G Division is a matter of dispute between the parties.
11. The department in its correspondence with my Office submitted that prior to the complainant's transfer, the PAP General Manager received 'confidential intelligence information' to suggest that 'a number of prisoners were attempting to incite other prisoners to cause a disturbance.' The department submitted that this intelligence 'suggested the disturbance [might] become violent.'

12. The department provided the following description of its response to the intelligence received:

It was determined [another prisoner, Prisoner B] was the main instigator. On 26 December 2017, ERG staff were briefed and direction given by the GM PAP to extract [Prisoner B] from his cell. Permission was granted to use Oleoresin Capsicum (OC) Gas if required. [Prisoner B] did not comply with ERG direction, and refused to leave his cell and the OC Gas was utilised. The cell was entered and [Prisoner B] was restrained and escorted to a PAP management cell where he was decontaminated and assessed by medical staff, he was cleared medically and remained in a management cell separated pursuant to section 36(2)(a) of the *Correctional Services Act 1982* ('the Act'). The second prisoner in the cell received secondary contact with the OC Gas and was decontaminated and assessed and cleared by medical staff. Four other prisoners were escorted out of the Unit to the medical centre and assessed before being cleared to return to the unit. [The complainant] was one of the four prisoners.

Following this incident and after evaluating the intelligence information, balanced with the need to minimise any risks of outbreaks of violence within the unit, consultation was undertaken with YLP's GM, where it was determined that four prisoners were to be removed from the unit and transferred to YLP by the ERG to reduce the possible risk of a potential disturbance in the Unit, as had been suggested in the confidential intelligence information received by the GM PAP.

[The complainant] was identified as one of the prisoners involved and was subsequently transferred to YLP, along with three other prisoners, by ERG on 27 December 2017 [sic].

Upon arrival at YLP, [the complainant] was separated and placed in G Division pursuant to section 36(2)(d) of the *Correctional Services Act 1982* ('the Act') in the interests of security or good order within the correctional institution.

13. The complainant for his part denies any knowledge of the incident referred to by the department. He submitted to my Office that 'whatever they thought was going on had nothing to do with me.' He submitted that to his knowledge his cellmate had no involvement in planning an incident of a kind referred to by the department. He submitted that he did not share a cell with the prisoner alleged by the department to have been the instigator of the planned disturbance.
14. The complainant submitted that his entire unit experienced the effects of the tear gas deployed by the department's Emergency Response Group. He acknowledged 'carrying-on' as a result of the tear gas. He posited that it was this conduct, rather than any alleged involvement in the planned incident referred to by the department, that formed the basis for his transfer to YLP G Division.
15. The complainant submitted that at the time of his transfer he was informed by officers of the department that he was being separated from other prisoners due to 'inciting and disruptive behaviour.'
16. The complainant submitted:

[They] wouldn't say how I was acting so I don't do this again. [...] I was clueless on what was going on. [...] I didn't think carrying-on because I couldn't breathe would end up in me being in G Division for two and a half months. [...] I was left in the dark.
17. The complainant first contacted my Office on 20 February 2017. At this time, he remained within YLP G Division. The complainant submitted that his requests to be transferred out of G Division had been denied. He submitted that the G Division regime was 'playing with his head' and that he had commenced 'talking to myself'.
18. On 24 February 2017, YLP's General Manager submitted in response to preliminary enquiries by my Office:

I have received feedback today from Port Augusta that the investigation is complete and as such he will likely be moved out of G division next week.

19. The complainant was subsequently transferred to YLP B Division on 2 March 2017. I understand that he was not charged with an offence in relation to the incident at PAP.
20. By emails dated 24 February 2017, 28 February 2017 and 2 March 2017 my Office made several unsuccessful attempts to obtain a copy of the department's report concerning its investigation into the incident at PAP.
21. I repeated this request in a letter to the department dated 15 March 2017 and, after receiving no response, reiterated this request to the department on 9 May 2017.
22. On 31 May 2017, approximately one week after the deadline provided in my 9 May 2017 correspondence, the department's Chief Executive submitted:

I am advised that a formal report was not prepared in relation to the transfer of [the complainant] and the three other prisoners from PAP to YLP.

The decision to transfer and accommodate [the complainant] at YLP was made following a careful risk assessment carried out jointly between the PAP GM and YLP GM at the time. As this was an ERG escort and there was no use of force, an Incident Report was not required by Standard Operating Procedure (SOP) 079 – Use of Force; or SOP 004 – Incident Reporting and Recording.

(There was an Incident Report prepared in relation to the removal from the unit of [Prisoner B] by the ERG as required by SOP 079, SOP 004 and SOP 014 – Chemical Agents.)

23. In response to my request for an explanation concerning the duration of the complainant's separation within G Division, the department's Chief Executive submitted:

On 29 December 2016, whilst G Division prisoners were being issued their lunch, [the complainant] stated to staff that he would be refusing to eat. Case notes reflect [The complainant] reportedly presented in a depressed and despondent state and a notice of concern (NOC) was raised. As a result of his presentation, [the complainant] was escorted to the Health Centre for assessment following his threat to go on a hunger strike. Later that day, [the complainant] was cleared by medical staff to return to G Division, and he began consuming food.

[The complainant] was then placed under the monitoring of the prison's High Risk Assessment Team (HRAT) and moved into a camera observation cell within G Division to enable staff to monitor him closely.

On 30 December 2016, due to [the complainant's] HRAT status, a social worker met with him to conduct a Suicide Assessment Manual for Inmates (SAMI). The social worker observed [the complainant's] presentation as appropriate and as not exhibiting any signs of distress. [The complainant] is reported to have disclosed to the social worker that he was informed his transfer was a result of him allegedly "inciting", which [the complainant] denied any involvement in.

[The complainant] remained under the monitoring of HRAT until 12 January 2017, at which time he was deemed to be stable and as not requiring further monitoring. It was determined that [the complainant] would remain in G Division until thorough assessments could be undertaken to identify an appropriate future placement for him.

[The complainant] reported that he had spoken with an officer regarding his safety concerns about being in G Division, and that he was reassured after the procedures for ensuring his safety were explained to him by the officer. [The complainant] further

reported that he was aware he could potentially remain in G Division for 28 days, to which he allegedly stated he would accept this and “do my time”.

[The complainant] continued to be reviewed regularly throughout his placement in G Division. His placement in G Division was reviewed on 20 and 25 January, and 15 February 2017. Further, [the complainant’s] placement on the HRAT list was reviewed on 29 December 2016; on 30 December 2016 by a social worker for a SAMI assessment to be undertaken; on 4 January 2017 by a social worker following a video court appearance, and on 11 January for a HRAT review.

During his placement in G Division, [the complainant] was also seen regularly by the Visiting Inspector (VI) so that he could (and did) raise issues of concern. He saw the VI on 17, 24 and 31 January; and 7, 14, 21 and 28 February 2017.

It is noted that [the complainant] did make enquiries as to the reason for, and expected length of his stay in G Division. A review of [the complainant’s] case notes indicates that he was aware the length of his stay was at the GM’s discretion, as is permitted by section 24(2)(a) of the Act.

Once settled and risk assessed, and following confirmation of no ongoing issues or charges from PAP, [the complainant] was transferred to YLP B Division on 2 March 2017.

24. In response to my request that it identify whether the complainant was medically assessed following my Officer’s preliminary enquiries, the department advised:

Since 20 February 2017, [the complainant] was seen by South Australian Prison Health Service (SAPHS) personnel on the following days:

- 27 and 28 February;
- 7 and 28 March; and
- 2, 4, 5 and 20 April.

[The complainant] was also seen by SAPHS personnel on 2 February and has contact with SAPHS personnel each day on the medical round.

25. The department provided my Office with a copy of the complainant’s case notes, placement history and visitor information pertaining to the period relevant to my investigation. The complainant’s case notes include the following entries relevant to my investigation:

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|------------------|---|
| 29 December 2016 | ‘During lunch feed up. Prisoner stated “I refuse to eat until I see a supervisor” in an aggressive tone. [H]e then made other comments but the trap was secured. He continued to yell while officer completed the feed up. I attended the cell and asked why he was behaving this way. He stated [xxxxxxxxxxxxxxxxxxxxxxxx]. When I attempted to communicate with him he became even more aggressive and refused to engage in a positive manner.’ |
| 30 December 2016 | ‘...[the complainant] stated that he has been advised that he is in G division for allegedly “inciting” however he denies any involvement claiming that he “made a complaint against an officer, I can’t control what others do and if they do the same”. [The complainant] stated that he has been informed that he could potentially remain in G division for 28 days and he stated he will accept this and “do my time”.’ |
| 4 January 2017 | ‘...[the complainant] advised that he is coping in G division however he has requested to speak with Management to enquire the reasons for his transfer and expected length of stay’ |
| 20 January 2017 | ‘Separation Review: No requests or complaints made. Wants to know when he will be looked at to be moved.’ |

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- 7 February 2017 'Prisoner seen by the Visiting Inspector this-morning [sic], wanted to know why he was here and why he's been here so long. He was advised that was the G.M.s discretion due to incident at Pta'
- 14 February 2017 'Pr saw the V.J. this morning, enquired about his continual placement in G Division. [W]as told that it was at the managers discretion [sic] due to recent incident at PTA.'
- 15 February 2017 'Separation Review: No complaints however requested information about how long he will stay in G Division. Advised the GM has not yet made a decision on his placement.'
- 21 February 2017 'Seen by VJ, enquired about placement and what was happening with him. I explained that the Management team are looking at his placement.'
- 24 February 2017 'Prisoner requested a phone call to the OMBUDSMAN this morning, but prior to serving lunch, he mentioned that he wishes to not make that call anymore.'
- 25 February 2017 'During morning unlock, prisoner expressed his unhappiness at his current situation indicating that he was "sick of being ignored" and that "he was going to loose [sic] his shit" before much longer. Prisoner was calm and respectful throughout.'
- 25 February 2017 'Staff in G Division informed the writer that [the complainant] was polite but persistent about speaking to the manager or the supervisor. As supervisor I spoke to [the complainant] who presented calm and rational. He explained that he was beginning to feel like "flipping out" because his placement in G div seemed open-ended with no feedback regarding forward projected placement. [...] He accepted that the supervisor could not provide any more detail but requested that I pass on his desire for management to communicate with him as an imperative.'
- 28 February 2017 'Prisoner spoke to the Visiting Inspector this morning.....as previous, just keeps asking how long he will be here.'
26. The department provided my Office with a copy of the Incident Report prepared in relation to its use of force against the alleged instigator of the planned disturbance at PAP. This document describes the extraction of this prisoner from his cell by the department's Emergency Response Group, relevantly recording:
- 4 x other prisoners were escorted out of Greenbush Unit to to [sic] Medical centre and assessed before being cleared to return to unit after assessment.
27. The department supplied my Office with a copy of its report to the Minister for Correctional Services (**the Minister**) concerning the complainant's separation, prepared pursuant to section 36(9) of the Correctional Services Act.
28. Section 36(9) relevantly provides:
- (9) If, under subsection (2), the CE gives a direction—
- (a) that a prisoner be kept separately and apart for a period exceeding 5 days; or
- (b) that will result in a prisoner being kept separately and apart for a period exceeding 5 consecutive days, or an aggregate of 5 days within any 10 day period,
- the CE must, as soon as reasonably practicable after giving the direction, provide the Minister with a report of the circumstances relating to the direction.
29. The report to the Minister is dated 27 January 2017 and relevantly discloses:

- On 27 December 2016, [the complainant] and three other prisoners were transferred from Port Augusta Prison (PAP) by Yatala Labour Prison's (YLP) Emergency Response Group (ERG) into YLP's G Division.
 - Information had come to the attention of the Acting General Manager of PAP that the prisoners were attempting to incite other prisoners in the Greenbush Unit, in an effort to cause a disturbance/sit-in.
 - These prisoners were removed as a matter of urgency, in consultation with YLP's General Manager, and the transfers were facilitated without further incident.
 - [The complainant] has been separated in accordance with Section 36(2)(d) of the Act, in the interests of security or good order of the correctional institution.
 - While prisoners were being issued their lunch in G Division on 29 December 2016, [the complainant] stated to staff that we [sic] would be refusing to eat and presented in a depressed and despondent state.
 - As a result, he was placed under the monitoring of the prison's HRAT and moved into a camera observation cell in G Division, to enable further close monitoring of the prisoner.
 - [The complainant] recommenced eating on the evening of 29 December 2016 and on 30 December 2016 he was able to progress from camera observation.
 - He remained under the monitoring of HRAT until 12 January 2017, at which time [the complainant] was deemed to be stable and not requiring any further monitoring by this Team.
 - [The complainant] will remain in G Division until thorough assessments have been undertaken to identify an appropriate future placement.
30. The department provided my investigation with a copy of its report to the Minister concerning the separation of the alleged instigator of the planned disturbance at PAP. This report does not refer to the complainant or the two other prisoners transferred to G Division, however it relevantly discloses:
- On 4 January 2017, investigations were completed which ascertained that there was not sufficient evidence to conclude that [Prisoner B] was organising a disturbance.
31. The department subsequently provided my investigation with a copy of the 27 December 2016 direction pertaining to the complainant. This direction relevantly provides:
- The grounds on which this direction is given are as follows:**
YOU HAVE BEEN DISRUPTIVE AND INCITING OTHERS IN PT AUGUSTA
32. On 5 June 2017 I wrote to the department to request, *inter alia*:
- [C]larification of the department's submission that '[the complainant] was identified as one of the prisoners involved' in the incident at Port Augusta Prison, including:
- what [the complainant's] involvement in the incident is alleged to have been
 - how the department came to this view
 - whether the department considers it adequately explained to [the complainant] the reason for his transfer to Yatala Labour Prison and separation within G Division.
33. By letter dated 13 June 2017 the Chief Executive of the department responded:

I can advise that [the complainant] was identified as being involved in a potentially violent incident of incitement at Port Augusta Prison through confidential intelligence information. This type of intelligence information is managed to ensure the anonymity of the source and protection of the information, therefore the detail of [the complainant's] involvement has not been disclosed.

Such risk assessments take into consideration the operational environment, prisoner presentation, current situation and any other available information. General Managers are responsible for the safety and security of their institutions and are actively involved in decision making to ensure potential incidents are prevented; therefore they are empowered to make decisions impacting on prisoner placement and management.

In regards to [the complainant's] understanding of his transfer and separation, the separation order served on [the complainant] on 27 December 2016 describes the grounds for the separation as "You have been disruptive and inciting others at Port Augusta Prison". The separation would also have been explained in person by the officer serving the separation order on [the complainant]. Further, case notes make it clear that [the complainant] was aware of the reason for his separation and placement. On several occasions when [the complainant] made enquiries as to his placement he was reminded of the incitement incident and reason for his separation. I am confident that [the complainant] was suitably advised of, and understood the reason for his separation.

34. I further requested that the department identify whether it considered the report to the Minister concerning the complainant's separation had been provided 'as soon as reasonably practicable' after the direction pertaining to the complainant was made, as required by section 36(9) of the Correctional Services Act.

35. By its letter dated 13 June 2017, the department responded:

The Department makes every effort to ensure it complies with all legislative requirements and keeps the Minister informed on all pertinent matters. While in this case the report to the Minister was provided one month after the incident, it was a period of reduced administration and high staff leave. Unfortunately, over the Christmas and New Year period the Department's priorities must remain flexible depending on operational requirements. In this case I am satisfied that the Minister was kept apprised of the separation of [the complainant] in accordance with section 36(9) the [sic] Act.

36. I further requested that the department clarify whether and how it considered the length of the complainant's separation from other prisoners was reasonable in the circumstances.

37. By its letter dated 13 June 2017, the department responded:

In this matter, I am satisfied that [the complainant] was separated appropriately and in accordance with the Act. Aside from the risk [the complainant] presented to the security and good order of the prison, he also demonstrated concerning behaviours and was considered at risk of self-harm. For these reasons [the complainant] remained under observation and HRAT monitoring until 12 January 2017. [The complainant] was reviewed regularly throughout his placement in G division and once his presentation and behaviour stabilised he was assessed as being suitable for mainstream placement. As [the complainant] was separated in accordance with section 36(2)(d) of the Act, his separation was at the discretion of the Chief Executive. In this case I am satisfied that it was reasonable to manage [the complainant] in accordance with G division regimes for both his own safety and the security of the prison.

38. On 21 June 2017 I again wrote to the department to request that it provide a copy of all information in its possession, 'including relevant notes, briefings and/or otherwise', concerning the 'confidential intelligence' said to have informed its decision to transfer and separate the complainant. In stating this request, I indicated that I was prepared to provide an undertaking to provide the department with a copy of my report for review and comment before distributing a copy to the complainant.

39. By letter dated 7 July 2017 the department's Acting Chief Executive submitted:

As the intelligence information referred to in my [sic] letter was provided to the General Manager verbally there is no written form of this information available. Correctional staff are habitually provided with intelligence and information by other prisoners verbally, as prisoners are often reluctant to disclose such information in any other format.

40. In response to my request that the department provide a copy of 'any document produced' in connection with the 'operational risk assessment' referred to in the department's previous correspondence, the Acting Chief Executive submitted:

The General Manager of Port Augusta Prison was in receipt of verbal intelligence information and consulted with the General Manager of Yatala Labour Prison to evaluate and assess the information and potential risk to operations at both locations. Further discussions were also held with managers and staff to consider the consequences should a possibly violent incident occur. As such, formal written risk assessment documentation was not prepared.

Relevant law/policies

State Records Act and Adequate Records Management Standard

41. Part 5 of the State Records Act provides:

13—Maintenance of official records

Subject to this Act, every agency must ensure that the official records in its custody are maintained in good order and condition.

14—Standards relating to record management practices

- (1) The Manager may, with the approval of the Minister, issue standards relating to the record management practices of agencies.
- (2) Standards relating to record management will be binding only in their application to—
 - (a) administrative units of the Public Service; and
 - (b) agencies or instrumentalities of the Crown (other than an agency or instrumentality excluded by regulation from the application of this subsection).

42. The *Adequate Records Management Standard (ARM Standard)*, issued by the Manager of State Records pursuant to section 14(1) of the State Records Act, establishes that

[o]fficial records must be created, captured and controlled in accordance with legislative and business requirements.

Correctional Services Act and SOP 012

43. Section 24 of the Correctional Services Act provides:

24—CE has custody of prisoners

- (1) The CE has the custody of a prisoner, whether the prisoner is within, or outside, the precincts of the place in which he or she is being detained, or is to be detained.

- (2) Subject to this Act, the CE has an absolute discretion—
 - (a) to place any particular prisoner or prisoner of a particular class in such part of the correctional institution; and
 - (b) to establish in respect of any particular prisoner, or prisoner of a particular class, or in respect of prisoners placed in any particular part of the correctional institution, such a regime for work, recreation, contact with other prisoners or any other aspect of the day-to-day life of prisoners; and
 - (c) to vary any such regime,
 as from time to time seems expedient to the CE.
- (3) A variation of a regime in respect of a particular prisoner under subsection (2) for any purpose does not constitute a penalty for the purposes of this Act.

44. Section 25 of the Correctional Services Act provides:

25—Transfer of prisoners

- (1) The CE may, by written order, direct that a prisoner be transferred from the place in which he or she is being detained to any other correctional institution.
- (2) An order given by the CE under subsection (1) is sufficient authority for the transfer of the prisoner in accordance with the order and the detention of the prisoner in the correctional institution to which he or she is transferred.

45. Section 36 of the Correctional Services Act provides:

36—Power to keep prisoner apart from other prisoners

- (1) A prisoner must not be kept separately and apart from all other prisoners in the correctional institution except in accordance with this section.
- (2) The CE may direct that a prisoner be kept separately and apart from all other prisoners in the correctional institution if the CE is of the opinion that it is desirable to do so—
 - (a) in the interests of the proper administration of justice where an investigation is to be conducted into an offence alleged to have been committed by the prisoner; or
 - (b) in the interests of the safety or welfare of the prisoner; or
 - (c) in the interests of protecting other prisoners; or
 - (d) in the interests of security or good order within the correctional institution.
- (3) A direction given pursuant to subsection (2)(a) has effect for such period, not exceeding 30 days, as may be specified in the direction.
- (4) Any other direction under subsection (2) has effect until revoked by the CE.
- (5) A direction cannot be given more than once pursuant to subsection (2)(a) in respect of the incident giving rise to the alleged offence.
- (6) A direction given under subsection (2)—
 - (a) must be in writing; and
 - (b) may be revoked at any time by the CE.
- (7) A copy of a direction given under subsection (2) must be served personally on the prisoner within 24 hours of being so given.
- (8) Despite the fact that a direction under subsection (2) is in force in respect of a prisoner, the CE may permit the prisoner to have contact with such other prisoners on such occasions as the CE thinks fit.
- (9) If, under subsection (2), the CE gives a direction—

- (a) that a prisoner be kept separately and apart for a period exceeding 5 days;
or
- (b) that will result in a prisoner being kept separately and apart for a period exceeding 5 consecutive days, or an aggregate of 5 days within any 10 day period,

the CE must, as soon as reasonably practicable after giving the direction, provide the Minister with a report of the circumstances relating to the direction.

- (10) On receiving a report under subsection (9), the Minister may review the matter and may confirm or revoke the direction.

46. The department's *Standard Operating Procedure 12 – Separation of Prisoners (SOP 012)* establishes the procedures to be followed in separating prisoners under the Correctional Services Act. Clause 3.1 establishes that a direction that a prisoner be separated pursuant to section 36(2)(d) of the Act 'has effect until revoked by the General Manager/delegate.'

47. Clause 3.5 of SOP 012 provides (emphasis in original):

3.5 Reporting separations of 5 days or greater to Executive Services Unit

3.5.1 The General Manager or delegate must ensure that a covering briefing to the Minister is drafted for all prisoner separations of five (5) consecutive days or an aggregate of five (5) days in a ten (10) day period.

[...]

3.5.3 The covering briefing must be e-mailed by the General Manager or delegate to the Separation Mailbox [...] at the commencement of the 5th day, 5th aggregate day within a 10 day timeframe; or **within three (3) hours** of the commencement of next business day.

48. Clause 3.7.A of SOP 012 establishes that the Unit Manager/delegate must ensure that the circumstances of a prisoner's separation are reviewed each week 'regarding the appropriateness of the separation'.

49. Clause 3.7.B of SOP 012 relevantly provides:

3.7B General Manager's Responsibilities

The General Manager must:

[...]

- c) be able to cite evidence to justify the continued separation of a prisoner within the terms of the direction made;
- d) ensure that where it is recommended that a prisoner remains separated for reasons other than those detailed in the original direction, the original direction is revoked and a new direction is issued

International instruments

50. Australia has signed and ratified a number of international instruments serving to identify and protect the rights of prisoners. These include the International Covenant on Civil and Political Rights (**ICCPR**) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**Convention Against Torture**).

51. Article 10 of the ICCPR relevantly provides:

- 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. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

52. Article 2 of the Convention Against Torture requires State Parties to ‘take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.’

53. Article 16 of the Convention Against Torture further provides:

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture [...] when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

54. Australia is also a signatory to the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (**OPCAT**). While Australia has not yet ratified this Protocol, on 9 February 2017 the Minister for Foreign Affairs and the Attorney-General announced that the Australian Government intends to ratify the OPCAT by December 2017.¹

55. The United Nations (**UN**) General Assembly unanimously adopted the *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)* (**the Mandela Rules**) on 17 December 2015.

56. The Mandela Rules relevantly provide:

Rule 43

1. In no circumstances may restrictions or disciplinary sanctions amount to torture or other cruel, inhuman or degrading treatment or punishment. The following practices, in particular, shall be prohibited:
 - (a) Indefinite solitary confinement;
 - (b) Prolonged solitary confinement[.]

[...]

Rule 44

For the purpose of these rules, solitary confinement shall refer to the confinement of prisoners for 22 hours or more a day without meaningful human contact. Prolonged solitary confinement shall refer to solitary confinement for a time period in excess of 15 consecutive days.

57. An international instrument to which Australia is a party does not form a part of Australian law unless the relevant provisions have been given legislative effect.² The Administrative Decisions (Effect of International Instruments) Act establishes that an international instrument that does not have the force of domestic law cannot give rise to a legitimate expectation that an administrative decision in South Australia will conform to that instrument. Section 3(3) of this Act does, however, permit a decision-maker to have regard to such an international instrument ‘if the instrument is relevant to the decision.’

¹ Media release, ‘Improving oversight and conditions in detention’. 9 February 2017, available at <<https://www.attorneygeneral.gov.au/MediaReleases/Pages/2017/FirstQuarter/Improving-oversight-and-conditions-in-detention.aspx>> last accessed 10 August 2017.

² *Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273 at [22] per Mason CJ and Deane J.

58. The international instruments referred to in this report have not been relevantly incorporated into domestic law in the manner required by section 3 of the Administrative Decisions (Effect of International Instruments) Act. That said, I am of the view that in a community such as South Australia, we should be aiming to exceed these international minimum standards in the humane treatment of prisoners.

Whether the department's failure to document confidential intelligence information and an operational risk assessment was unreasonable

59. Agencies such as the department will inevitably receive a vast amount of information through methods of communication that do not, in and of themselves, create an official record.
60. In my view, an agency should create an official record of information received in circumstances where that information informs, or could reasonably be expected to inform, a decision by the agency to undertake or not to undertake an administrative act with serious consequences.
61. The department has submitted that the 'confidential intelligence information' informing its decision to transfer and separate the complainant was communicated to it verbally and, consequently, 'no written form of this information is available'.
62. A confidential source's reluctance to commit a piece of information to writing is of course no obstacle to the department creating its own contemporaneous record of that information.
63. The department has submitted that 'formal written risk assessment documentation was not prepared' in connection with its assessment of the confidential intelligence received and the potential risk and consequences arising from its decision to transfer and separate the complainant.
64. By the department's submissions to my investigation, it was the confidential intelligence received and the department's assessment of that information that caused it to transfer and separate the complainant.
65. This information similarly resulted in the use of OC Gas and the exercise of force in the extraction of another prisoner.
66. The confidential intelligence and the department's assessment of that information also constituted an integral (if not the only) basis for the department's determination, affirmed at each Separation Review, that the continued separation of the complainant was 'in the interests of security or good order within the correctional institution.' One wonders how an officer of the department at YLP could ever be satisfied of this fact in the absence of any record as to what the complainant was alleged to have done at PAP to justify his initial transfer and separation.
67. The inadequacy of the department's record keeping is evidenced by its response to my investigation. Notwithstanding my direct request that it do so, the department has to date failed to identify precisely what (if any) involvement the complainant is alleged to have had in the planned disturbance at PAP.
68. Beyond the circumstances of my investigation, the department would presumably be unable to meaningfully explain or justify its decision to transfer and separate the complainant in the event of litigation arising from the incident. Should the complainant or another prisoner have been seriously injured in the attempted transfer, the

department would have been unable to produce contemporaneous records justifying or explaining the course adopted.

69. Moreover, in the absence of any written record of the basis for the decision, it is impossible to determine whether the discretion to separate the complainant was exercised on appropriate grounds. Given the serious consequences to the complainant, this is particularly concerning.
70. In my view, no reasonable decision-maker could have neglected to document the information received and relied upon by the department in the circumstances.
71. In response to my provisional report, the department submitted:

The Department receives a vast amount of confidential intelligence information on a daily basis and has systems in place to manage the information that is considered significant or substantial as best as possible. Unfortunately however, much of the information appears trivial at the time, is received verbally, and is acted on immediately for operational or security reasons. In these cases decision making is often immediate and involves practical considerations, therefore while the Department makes every effort to ensure appropriate documentation, it is not always possible to keep detailed records on every matter. Also, at times, information that is initially considered trivial may be utilised for operational security purposes. In this matter, I do not consider that there was a failure to document confidential intelligence as the General Manager received verbal information that he promptly acted upon to ensure the security and good order of the institution. This was an operational decision to manage an incident that had potential to become uncontrolled.

72. These submissions have not persuaded me to change my views. In some circumstances, information received by an agency may merit a rapid response; however this fact should not impede a record being created of that information once the situation has settled.
73. It must be observed that the information received by the department spoke of a *prospective* disruption within the prison. It was a suspicion raised by this information (whether reasonable or not, I cannot say), rather than any direct observation of the complainant's behaviour by staff, that formed the basis for his transfer and separation. The difficulty I have faced in meaningfully assessing the appropriateness of the department's decision to separate the complainant, in circumstances where the complainant himself has denied the behaviour alleged, should underscore the importance of documenting information of this kind.
74. I consider the department's failure to create records concerning the confidential intelligence and operational risk assessment was unreasonable within the meaning of section 25(1)(b) of the Ombudsman Act.
75. Section 13 of the State Records Act requires the department to 'ensure that the official records in its custody are maintained in good order and condition.' Pursuant to section 14(2) of the State Records Act, the department must observe the terms of the ARM Standard in its record management practices.
76. The ARM Standard requires the department to ensure that official records are 'created, captured and controlled in accordance with legislative and business requirements.'
77. Although I do not formally find as such, I am concerned that the department's record-keeping practices in this instance may also have contravened the ARM Standard and, in turn, section 14(2) of the State Records Act.

Opinion

It is my final view that the department's failure to document confidential intelligence and an operational risk assessment was unreasonable within the meaning of section 25(1)(b) of the Ombudsman Act.

I make a recommendation under section 25(2)(f) of the Ombudsman Act that the department issue a reminder to all staff of the requirement to appropriately document information informing key administrative decisions of the department.

Whether the department's direction that a prisoner be kept separately and apart from all other prisoners was unjust

78. A direction that a prisoner be kept separately and apart from all other prisoners is a serious matter, and such a direction should not be made lightly. This much is evidenced by the construction of section 36 of the Correctional Services Act, which limits the department's authority to separate a prisoner to a strict set of circumstances.
79. Prisoners inducted to YLP G Division are initially placed on an extremely restrictive regime that generally forbids the possession of personal items, access to recreational facilities and any association with other prisoners.
80. These conditions may be progressively relaxed over the length of a prisoner's stay within G Division, however the Standard Regime still forbids any association with other prisoners.
81. YLP G Division itself may be a particularly uncomfortable environment for prisoners. Olsson J in *Fyfe v Bordoni and Ors* provided the following description of the G Division environment, which I consider generally holds true today:

Compared with other Divisions of the prison, G Division is very spartan and restrictive. It is an extremely claustrophobic, restricted and oppressive environment which one would expect, normally, to be employed, more often than not, for disciplinary reasons.³
82. The department in its response to my investigation submitted that the complainant was 'identified as being involved in a potentially violent incident of incitement' at PAP. The department has submitted that it was on this basis that it determined to transfer and separate the complainant pursuant to section 36(2)(d) of the Correctional Services Act.
83. Notwithstanding my direct request that it do so, the department has to date failed to identify what the complainant's involvement in the incident is alleged to have been or precisely how the department came to reach this conclusion.
84. There is a complete absence of any evidence before me to corroborate the department's submission that it received information to suggest that the complainant was involved in the planned incident.
85. The complainant is not named in the department's Incident Report concerning the extraction of the alleged instigator.
86. The only record supplied to my investigation to suggest that the department may have been informed that the complainant was involved in the planned incident at PAP was the 27 January 2017 report to the Minister. This document was prepared one month after the complainant's transfer and separation. It does not purport to describe the

³ *Fyfe v Bordoni and Ors* [1998] SASC 6860 at [21].

confidential intelligence assessed by the department or otherwise explain how the department came to conclude that the complainant was specifically implicated by the allegations.

87. As discussed in the preceding section of this report, the department submitted that it has no contemporaneous record of the information or assessment said to have informed its decision to transfer and separate the complainant.
88. The department's submissions to my investigation do not appear to draw a meaningful distinction between the basis for the complainant's transfer and the basis for his separation. That is, there is no evidence before me to suggest that the department considered whether and how the complainant's separation was necessary following (and in light of) his removal from PAP. In my view, this was an essential consideration owing to the construction of section 36(2)(d) of the Correctional Services Act ('in the interests of security or good order *within the correctional institution*').
89. The complainant submitted that he believes his transfer and separation may have come about as a result of his reaction to the OC Gas deployed by the department.
90. In the circumstances, there is simply no evidence before me to suggest that the decision to separate the complainant was made on appropriate grounds. In fact, the decision appears to have been arbitrary and unjustified.
91. Similarly, there is no information before me capable of supporting the department's determination, per section 36(2)(d) of the Correctional Services Act, that the complainant's separation was 'in the interests of security or good order within the correctional institution.'
92. In my view, the lack of any demonstrable basis for the department's direction that the complainant be separated, when viewed in light of the significance of that direction and the consequences upon the complainant, is so grave as to render the department's decision unjust in all the circumstances.
93. In response to my provisional report, the department submitted:

The Department maintains that it was appropriate in the delegate's opinion to separate [the complainant] based on information that indicated [the complainant] was a threat to the institution's security. I consider that in this matter the Department was justified in separating [the complainant] based on the information received and his subsequent poor behaviour. The Department acted within its statutory powers and in accordance with established policy[.]
94. It is unclear to me whether by the complainant's 'subsequent poor behaviour' the department is intending to refer to the complainant's reaction to the OC Gas or his initial reaction to separation within YLP G Division.
95. If the former, this would be the first time that the department has suggested that the complainant's separation was in any way attributable to his behaviour during the attempt to extract the alleged instigator. Such a submission would in fact appear inconsistent with the position previously adopted by the department. Owing to the department's record keeping practices, there is no contemporaneous record capable of lending weight to the suggestion that the prisoner's behaviour during the extraction process somehow justified his separation.
96. If the department is making the latter submission, I am unable to perceive how the complainant's behaviour following his separation could in any way constitute a reason for the decision bringing about that separation.

97. I am of the view that the department's direction that the complainant be kept separately and apart from other prisoners was unjust within the meaning of section 25(1)(b) of the Ombudsman Act.

Opinion

It is my final view that the department's direction that a prisoner be kept separately and apart from other prisoners was unjust within the meaning of section 25(1)(b) of the Ombudsman Act.

To remedy this error, I make a recommendation under section 25(2)(b) that the department issue a formal apology to the complainant.

I make a further recommendation under section 25(2)(b) of the Ombudsman Act that the department place a notation on the complainant's file to appropriately record the findings of my investigation in relation to this matter.

Whether the department's failure to provide the Minister with a report as soon as reasonably practicable after giving a direction that a prisoner be kept separately and apart from all other prisoners was contrary to law

98. Section 36(9) of the Correctional Services Act obliges the department to provide the Minister with a 'report of the circumstances' relating to a direction made under section 36(2) of the Act that results in a prisoner being kept separately and apart for a period exceeding five days 'as soon as reasonably practicable after giving the direction.'
99. This requirement is important owing to the Minister's discretion under section 36(10) of the Correctional Services Act to review the matter with a view to either confirming or revoking the direction.
100. The department has conceded that the report to the Minister concerning the separation of the complainant was issued one month after the relevant direction. The department has attributed this delay to 'reduced administration and high staff leave' coinciding with the Christmas and New Year holiday period. Notwithstanding the delay, the department has submitted that it is 'satisfied that the Minister was kept apprised' of the complainant's separation in accordance with section 36(9) of the Correctional Services Act.
101. The department did not initially engage with my request that it identify whether in the circumstances it considers the report to the Minister was provided 'as soon as reasonably practicable after giving the direction.'
102. I do not consider the department to have complied with this specific requirement of section 36(9) of the Correctional Services Act. In my view, section 36(9) envisages a prompt report to the Minister. This much is evidenced by the five-day period of separation identified as necessitating the provision of a report. Clause 3.5.3 of SOP 012 appears to acknowledge as much.
103. The report concerning the complainant's separation comprises approximately one and a half A4 pages. Even allowing for the reduced capacity of the department during the period in question, I consider that a delay of approximately one month far exceeded what was permissible under section 36(9). This delay in my view undermined the effectiveness and intended operation of section 36(10) in the circumstances.
104. In response to my provisional report, the department submitted (emphasis in original):

The Department has previously sought Crown advice on the timeliness of providing a report to the Minister in accordance with s.36 and that advice in part states, in regard to the phrase “as soon as reasonably practicable” – *“clearly the phrase recognises that the Department will have other priorities which may mean that it is not reasonable for the report to be created and given to the Minister immediately”*. I therefore maintain that the report was provided to the Minister as soon as was reasonably practicable and within the Department’s resources at the time. I have provided an explanation for the delay in this instance and I am satisfied that the Minister was kept apprised of the separation of [the complainant] in accordance with section 36(9) the [sic] Act.

105. In my view there is no contradiction between the interpretation of section 36(9) of the Correctional Services Act adopted by my investigation and the views attributed to the Crown Solicitor.
106. Whether a report to the Minister has been provided ‘as soon as reasonably practicable’ will necessarily depend on the circumstances; however I remain of the view that in the situation of the complainant, a delay of approximately one month far exceeded what was permitted by section 36(9) of the Correctional Services Act.
107. It follows that I am of the view that the department, in failing to provide a report to the Minister as soon as reasonably practicable after the giving of the separation direction concerning the complainant, acted contrary to law for the purposes of section 25(1)(a) of the Ombudsman Act.

Opinion

It is my final view that the department’s failure to provide the Minister with a report as soon as reasonably practicable after giving a direction that a prisoner be kept separately and apart from all other prisoners was contrary to law for the purposes of section 25(1)(a) of the Ombudsman Act.

I make a recommendation under section 25(2)(f) of the Ombudsman Act that the department issue a reminder to all responsible staff of the department’s obligation to ensure that reports under section 39(9) of the Correctional Services Act are issued and provided to the Minister as soon as reasonably practicable.

Whether the department failed to comply with clause 3.7.A of SOP 012 in reviewing the appropriateness of a prisoner’s continued separation from all other prisoners

108. Clause 3.7.A of SOP 012 provides:

The Unit Manager/delegate must ensure [...] that a Review of Separation is completed each week for each prisoner held under a separation direction regarding the appropriateness of the separation.

109. The department’s case notes concerning the complainant’s period of separation suggest that three separation reviews were conducted during the complainant’s time in G Division. These occurred on 20 January 2017, 25 January 2017 and 15 February 2017, respectively.
110. In my provisional report I expressed the view that the department failed to comply with clause 3.7A in this instance.
111. In its response to my provisional report, the department advised that four further separation reviews were conducted during the complainant’s time in G Division. These

appear to have been conducted on 6 January 2017, 13 January 2017, 1 February 2017 and 8 February 2017.

112. These four separation reviews are not identified in the department's case notes concerning the complainant. This may explain why the department did not refer to the fact of these reviews in its initial response to my investigation.
113. The department has now supplied my investigation with a copy of the form completed during each separation review.
114. The form completed on 6 January 2017 provides:

Part A

I recommend that this prisoner remain separate pursuant to Section 36(2)(d) of the *Correctional Services Act 1982* because (include any incidents involving the prisoner since the last review):

[The complainant] was separated on 27/12/2016 due to disruptive and inciting behaviour at PTA. Case notes on 29-12-2016 reflect poor and non-compliant behaviour. Removed from Camera Obs on 30-12-2016. Future placement at the discretion of HRAT and YLP Management Team.

115. Under Part A, the form completed on 13 January 2017 provides:

[The complainant] was separated on 27/12/2016 due to disruptive and inciting behaviour at PTA. Removed from Camera Obs on 30-12-2016. Seen by Social Worker for HRAT purposes. Future placement at the discretion of HRAT and YLP Management Team. Seen by the Visiting Inspector on 10-01-17, no issues or concerns reported. Seen by the Social worker on 11-01-17.

116. Under Part A, the form completed on 18 January 2017⁴ provides:

[The complainant] was separated on 27/12/2016 due to disruptive and inciting behaviour at PTA. Last seen by a Social Worker 12/01/17 for HRAT purposes. Last seen by the Visiting Inspector on 17/01/17.

117. Under Part A, the form completed on 25 January 2017 provides:

[The complainant] was separated on 27/12/2016, Sect 36(2)(d) due to disruptive and inciting behaviour at PTA. Prisoner was progressed to the Standard Regime on the 20/1/17, there have been no negative case notes at this time, he has been polite and co operative. [The complainant] was seen by the Visiting Inspector on 24/01/17 with the prisoner making enquiries about the request he made about having a contact visit with his son, with approval being granted by the Divisional Manager 25/01/17.

118. Under Part A, the form completed on 1 February 2017 provides:

[The complainant] was separated on 27/12/2016, Sect 36(2)(d) due to disruptive and inciting behaviour at PTA. Prisoner remains on Standard Regime, there have been no negative case notes at this time, he has been polite and co operative. [The complainant] was seen by the Visiting Inspector on 31/01/17 and raise no issues or concerns.

119. This form also includes the following remarks, signed by the complainant:

Requests to speak with General Manager with regard to placement.

120. Under Part A, the form completed on 8 February 2017 provides:

⁴ I take this form to concern the separation review elsewhere described as having been conducted on 20 January 2017. I infer the latter date may identify the day on which the General Manager approved the complainant's continued separation.

[The complainant] was separated on 27/12/2016 Sect 36(2)(d) due to disruptive and inciting behaviour at PTA. Prisoner remains on Standard Regime, there have been no negative case notes at this time, he has been polite and co operative. [The complainant] was seen by the Visiting Inspector on 07/02/17 and only raised the issue of how long he may be here.

121. Under Part A, the form completed on 15 February 2017 provides:

[The complainant] was separated on 27/12/2016, Sect 36(2)(d) due to disruptive and inciting behaviour at PTA. Prisoner remains on Standard Regime, there have been no negative case notes at this time, he has been polite and co operative. [The complainant] was seen by the Visiting Inspector on 14/02/17 and only raised the issue of how long he may be here.

122. Each form is signed by the complainant, save for that completed on 8 February 2017, which lacks both the complainant's signature and the signature of the General Manager or delegate.

123. As expressed in my provisional report, I consider it essential that the department regularly reviews the appropriateness of a prisoner's separation from other prisoners. For the separation of a prisoner to be lawful, the Chief Executive must be of the opinion that one of the four grounds identified in section 36(2) of the Correctional Services Act is made out. The Chief Executive must remain satisfied of these grounds for the duration of the prisoner's separation.

124. The Chief Executive's opinion must be reasonably founded on the information before the department at a given time. It must take into account relevant information that has come to the attention of the department following the giving of the direction under section 36(2) of the Act. Clauses 3.7.A and 3.7.B of SOP 012 appear to acknowledge as much.

125. Owing to the additional records supplied to my investigation, I am satisfied that the department regularly reviewed the appropriateness of the complainant's continued separation from other prisoners in accordance with clause 3.7.A of SOP 012. This is not to suggest that the Chief Executive Officer necessarily had reasonable grounds to be satisfied that the complainant's continued separation was appropriate. I consider this separate issue in the section of the report that follows.

Opinion

It is my final view that the department did not fail to comply with clause 3.7.A of SOP 012 in reviewing the appropriateness of a prisoner's continued separation from all other prisoners. On this basis, I do not consider the department acted in a way that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act.

Whether the department's failure to revoke a direction that a prisoner be kept separately and apart from all other prisoners for a period of 66 days was oppressive

126. The department's case notes and the complainant's submissions to my investigation plainly evidence the complainant's distress and frustration with the circumstances and length of his separation from other prisoners.

127. The complainant in his complaint to my Office clearly articulated that the circumstances of his prolonged separation were having an impact on his psychological health.

128. The UN Human Rights Council Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**the Special Rapporteur**) in his 5 August 2011 interim report to the UN General Assembly reviewed the use of solitary confinement by UN member States.⁵
129. The Special Rapporteur, having considered the academic literature on the subject, observed of the psychological and physiological effects of solitary confinement (which for the purposes of his report was defined as ‘the physical and social isolation of individuals who are confined to their cells for 22 to 24 hours a day’):

Negative health effects can occur after only a few days in solitary confinement, and the health risks rise with each additional day spent in such conditions. Experts who have examined the impact of solitary confinement have found three common elements that are inherently present in solitary confinement – social isolation, minimal environmental stimulation and “minimal opportunity for social interaction”. Research further shows that solitary confinement appears to cause “psychotic disturbances,” a syndrome that has been described as “prison psychoses”. Symptoms can include anxiety, depression, anger, cognitive disturbances, perceptual distortions, paranoia and psychosis and self-harm[.]

Some individuals experience discrete symptoms while others experience a “severe exacerbation of a previously existing mental condition or the appearance of a mental illness where none had been observed before”. Still, a significant number of individuals will experience serious health problems regardless of the specific conditions, regardless of time and place, and regardless of pre-existing personal factors.⁶

130. The Special Rapporteur went on to opine:

The use of solitary confinement can be accepted only in exceptional circumstances where its duration must be as short as possible and for a definite term that is properly announced and communicated.⁷

131. The Special Rapporteur observed that a prisoner’s solitary confinement may be described as ‘prolonged’ in circumstances where he or she has been subject to those conditions for a period exceeding 15 days:

15 days is the limit between “solitary confinement” and “prolonged solitary confinement” because at that point, according to the literature surveyed, some of the harmful psychological effects of isolation can become irreversible.⁸

132. The Special Rapporteur referred to the judgment in *A.B v Russia*, where the European Court of Human Rights concluded that the reasons for prolonged solitary confinement should always be explained to a prisoner and that those reasons ‘will need to be increasingly detailed and compelling the more time goes by.’⁹

133. The Special Rapporteur called on the international community to ‘impose an absolute prohibition on solitary confinement exceeding 15 consecutive days’, concluding:

[A]ny imposition of solitary confinement beyond 15 days constitutes torture or cruel, inhuman or degrading treatment or punishment, depending on the circumstances.

134. Olsson J in *Fyfe v Bordonni and Ors* observed in circumstances where a prisoner had been kept separated in YLP G Division for a period of three years and eight months:

⁵ UN Human Rights Council, *Interim report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 5 August 2011, A/66/268.

⁶ *Ibid* at pp. 17-18.

⁷ *Ibid* at p. 20.

⁸ *Ibid* at p. 9.

⁹ *A.B. v Russia*, Application No. 1439/06, European Court of Human Rights, 14 October 2010 at p. 18.

I am particularly mindful of the medical evidence which has been placed before me and the professional opinions expressed that unrespected, long term, continuous exposure to the somewhat stifling environment of G Division could well lead to the development of an adverse psychiatric condition which currently does not exist - even given the presently diagnosed personality disorder and periodic episodes of deep depression which the applicant experiences. Clearly his continued retention in a very restricted regime will tend to inhibit his mental health progress and may precipitate periods of intense frustration resulting in mood swings and very aggressive outbursts. Furthermore, I accept the applicant's contention that the G Division regime does not appear ever to have been designed for very long term inmates and it is, inherently, oppressive, doubly punitive and potentially counter productive to his rehabilitation and return to mainstream prison environments.¹⁰

135. Olsson J, in ultimately concluding that judicial intervention was not justified in that matter, observed that the prison was largely constrained in those circumstances by its duty of care in light of past acts of serious violence perpetrated by the applicant against other prisoners and the lack of any other prison environment that could appropriately house the applicant.¹¹

136. Olsson J observed:

It is, in a very real sense, an abnormally hard, almost a penal, environment (in the disciplinary sense) which has now persisted for a very long time. A stage may well be reached at which it could well be said that it is an abuse of power to continue to subject him to it, provided that he co-operates as reasonably required of him. He is not, in effect, to be punished twice for the one offence.

However, having said that, it is clear that the General Manager is doing her utmost, progressively, to relax the applicant's environment as and when his conduct warrants such action. It is true that, in a practical sense, the future lies very much in the applicant's hands.¹²

137. I do not think a direct parallel can be drawn between the circumstances of the complainant and the applicant in *Fyfe*. The case notes concerning the complainant indicate that, save for his initial protest immediately following separation, his behaviour while in G Division was not inappropriate. The complainant's initial protest is of course understandable if one accepts, as I feel forced to, that his separation was unjust and unwarranted in the circumstances.

138. Even when describing the complainant's stated frustration at his continued separation, the department's officers appear to have been at pains to observe his calm and respectful demeanour.

139. I am troubled by the information recorded in the department's report to the Minister concerning the alleged instigator. This information suggests that this prisoner was initially separated under section 36(2)(a) of the Correctional Services Act in the interests of the department's investigation into alleged offences concerning the planned incident at PAP. The report to the Minister submitted that these investigations concluded on 4 January 2017 when it was 'ascertained that there was not sufficient evidence to conclude that [the prisoner] was organising a disturbance.'

140. The report to the Minister concerning the separation of the complainant does not refer to these investigations or the conclusion reached by the department concerning the alleged instigator. It should have. Although the complainant was not separated to facilitate a separate investigation into his conduct, the conclusions expressed by the

¹⁰ *Fyfe v Bordoni and Ors* [1998] SASC 6860 at [83].

¹¹ *Ibid* at [84]-[85].

¹² *Ibid* at [85]-[86].

department with respect to the alleged instigator were nevertheless of significance to the appropriateness of the direction pertaining to the complainant.

141. There is also no evidence before me to suggest that the department considered this information during its first review of the appropriateness of the complainant's separation on 20 January 2017 or during any of the separation reviews that followed.
142. I am also concerned by the lack of meaningful information provided to the complainant during or following his initial separation. Even if one were to accept that the separation of the complainant was justified by his behaviour (a conclusion I have been unable to accept), the grounds identified to the complainant (essentially, that he had been 'disruptive and inciting others' at PAP) were in my view wholly insufficient to allow him to make any sort of meaningful response. This much is evidenced by the complainant's submissions to my investigation ('[they] wouldn't say how I was acting so I don't do this again').
143. Moreover, notwithstanding the department's invocation of section 36(2)(d) of the Correctional Services Act in its direction to the complainant, the grounds provided could reasonably have led the complainant to believe that his separation was punitive rather than preventative.
144. There is also a certain perversity in the department's submission to my investigation that the complainant's 'concerning behaviours' and 'risk of self-harm' somehow justified the length of his separation from other prisoners. Although section 36(2)(b) of the Correctional Services Act permits the separation of a prisoner for his or her 'safety or welfare', this was never identified as the basis for the complainant's separation in the direction issued by the department. A cursory examination of the complainant's case notes would have confirmed that his 'concerning behaviour' came as a direct result of the fact of his separation.
145. I do not in any case consider the case notes concerning the complainant support the contention that his continued separation was justified under section 36(2)(b). The case notes do not record any specific health or welfare concerns following the complainant's removal from the High Risk Assessment Team monitoring list in early January.
146. Had the department formed the view that its basis for separating the complainant had shifted to the grounds specified under section 36(2)(b) of the Correctional Services Act, clause 3.7.B of SOP 012 would in any case have obliged the department to revoke the existing separation direction and issue a new direction specifying those grounds.
147. The case notes concerning the complainant evidence his continued frustration at the level of information supplied by the department. The information that appears to have been provided by the department – that his continued separation was 'at the discretion of the General Manager' – can hardly have reassured the complainant that his stay in G Division was anything other than open-ended. It is not unreasonable to believe that this may have exacerbated the effects of his isolation.
148. As I have observed earlier in this report, the department's failure to document the intelligence informing its decision to separate the complainant makes it difficult to understand how its officers in YLP G Division could ever have reasonably reviewed the appropriateness of his separation or formed the view that his continued separation was appropriate and lawful.
149. Although I am now satisfied that the department reviewed the appropriateness of the complainant's separation in accordance with SOP 012, the records concerning these reviews do not identify in any meaningful way how the department considered the complainant's continued separation was justified in the circumstances. No attempt

appears to have been made to rationalise why the department considered the complainant's continued separation remained 'in the interests of security or good order within the correctional institution.'

150. As I have observed earlier in this report, the complainant's separation from other prisoners was in my view unjust. This separation lasted for a total of 66 days. It occurred in circumstances where the complainant was denied adequate reasons and, consequently, in circumstances where he was denied the ability to meaningfully challenge its appropriateness. During the course of his separation, the complainant was repeatedly denied information with the potential to meaningfully clarify its basis or duration.

151. In response to my provisional report, the department submitted:

I am confident that the Department abides by the Standard Guidelines for Corrections in Australia and has acted in accordance with its statutory powers. Separations of prisoners under s.36 of the *Correctional Services Act 1982* have been tested by Judicial Review on more than one occasion and the Courts' decisions have consistently recognised and supported the Department's exercise of discretion in applying the law and acknowledged the Department's considerations of complex security and operational matters when making these decisions.

[The complainant] was separated in accordance with SOP 012 and his separation was regularly reviewed. The Department has a responsibility to ensure prisoners are appropriately managed and that their placement is suitable for their security rating, safety, HRAT concerns, attitude, behaviour, enemies and bed availability, among other things. [The complainant] was initially separated to safeguard the good order and security of the prison, and then based on concerns for his safety. Given his previous behaviours and potential HRAT risk, [the complainant]'s placement after G Division was given careful consideration and only affected once a clear placement plan was in place.

152. Elsewhere in its response to my provisional report, the department referred to the remarks of the Hon A. Koutsantonis in the House of Assembly during the second reading of the Correctional Services (Miscellaneous) Amendment Bill 2009, to the effect that the Government of South Australia will not tolerate the use of solitary confinement as a form of punishment.

153. This of course may be the stated policy position of the Government; although it is important to observe the Hon A. Koutsantonis' remarks within their full context:

The Hon. A. KOUTSANTONIS: The member for Bragg has been talking about solitary confinement. I think she has probably watched one too many episodes of Hogan's Heroes.

Ms Chapman interjecting:

The Hon. A. KOUTSANTONIS: It is a great show and one of my favourites.

The Hon. I.F. Evans: Sprechen sie Deutsch?

The Hon. A. KOUTSANTONIS: Nein. I am not sure that she believes this, but she gave the impression that we have solitary confinement cells specially designed to separate prisoners for punishment. I think that the term 'solitary confinement' is not even used any more. We separate prisoners, and we do so for their protection.

What I am confused about is that we are criticised for doubling up, we are criticised for having two people to a cell but, when prisoners request to be separated because they fear for their safety or because they are a protected, it is called solitary confinement and we are condemned for that as well. I am not sure how the member for Bragg can reconcile the attack on a government for doubling up and then talk about her opposition to so called solitary confinement.

The Hon. I.F. Evans: So, it's a bit like a holiday, is it, Tom?

The Hon. A. KOUTSANTONIS: No, it is not a holiday. Prison is not a nice place, but we do this for the protection of the prisoner. We have a duty of care. I am sure that the member for Mitchell would not want us to put somebody in Bevan Spencer von Einem's cell to share with him? So, we do have separations, and those separations—

The Hon. I.F. Evans: Are you sure he has not shared a cell?

The Hon. A. KOUTSANTONIS: Let me be quite clear, the member has made use of the term 'solitary confinement' throughout her contribution; she has used 'solitary confinement', 'isolation' and 'separation'. The government will continue to be tough on crime and ensure that those who break the law are punished, but punishment, however, will not include torture in any form, nor will it include the use of solitary confinement.

Our prisons are humane, and they are safe for both staff and prisoners. It is quite wrong to suggest that the separation of prisoners constitutes solitary confinement, or a cooler, or a dungeon, or any other term you might want to use. Solitary confinement conjures up images of prisons of days gone by, of long-term isolation in dark cells. That does not happen in South Australia.

Most prisons have management cells and they are used to separate prisoners for their own safety and for the safety and good order of the prison. These cells, in the main, are modern, with toilets and showers, and by and large prisoners who are placed in these cells are there for only a few days.

The majority of separations occur because prisoners require protection for their own safety, or because there are those who have placed the good order and security of the prison at risk. Separation is not just limited to the department's management cells. Prisoners who have no contact or who are denied contact with other prisoners are regarded as being separated. There are many instances where prisoners ask to be locked in their own cells during association time because they may feel threatened or just, simply, want time out to escape the attention of other prisoners.

Ms Chapman interjecting:

The Hon. A. KOUTSANTONIS: So, the member for Bragg thinks it is solitary confinement. It is not solitary confinement. The majority of separations rarely exceed four days, I do not think that the Public Service lies to me. Separation is essential for prison authorities to provide effective and safe prisoner management. It has been around for many years, and during the term of the previous Liberal government. This government will not be swayed by those who throw around such terms as 'isolation' and 'solitary confinement' when referring to separations as a means to detract from its real purpose or to gain any political mileage.¹³

154. Throughout my report, I have adopted the definition of 'solitary confinement' settled upon by the Special Rapporteur. Having examined the applicable regime, I am of the view that the term may properly be extended to a prisoner's separation within G Division. The department in its response to my provisional report has not put forward any additional information about the G Division regime with the potential to cause me to reach a different conclusion on this issue.
155. The connotations of the term and the preferred nomenclature are of course irrelevant to the issues under consideration by my investigation, as is, strictly speaking, the policy position of the Government.
156. The department in its response to my provisional report has also referred to specific remarks of Martin J in *Fyfe v The State of South Australia* [2000] SASC 84 and Kelly J in *Fyfe v The State of South Australia* [2007] SASC 272.
157. These remarks need to be viewed in the proper context. As I have observed earlier in this report, I do not think it possible to draw a direct parallel between the circumstances of the applicant in the various *Fyfe* matters (also being the applicant in *Fyfe v Bordonni & Ors* [1998] SASC 6860) and those of the complainant.

¹³ SA, Parliamentary Debates, House of Assembly, 15 October 2009, pp.4373-4374.

158. The applicant in the various *Fyfe* matters was originally imprisoned for a number of serious, violent offences, including attempted murder. In 1992, while in custody, he committed the offence of causing grievous bodily harm by beating another prisoner about the head and body with a cricket bat. He was sentenced to a further five years' imprisonment. In 1994, the applicant stabbed another prisoner in the shoulder with a pick and was subsequently sentenced to a further ten years and 11 months' imprisonment. In 1995, the applicant murdered a fellow prisoner by stabbing him in the back in an apparently premeditated and unprovoked attack. His non-parole period was extended by a further 28 years. It was this incident that led to the applicant's transfer to G Division and the commencement of his separation from all other prisoners.¹⁴

159. A common theme of the applicant's offending while in custody was the apparent lack of motive and the absence of any provocation by the victims. Martin J observed of the 1994 incident:

There was no evidence as to why the prisoner was so assaulted and the applicant proffered none. It simply appeared that the applicant had an aggressive personality, said to have stemmed from childhood experiences of violence and sexual abuse at the hands of his parents, coupled with poor impulse control and difficulty in anger management.¹⁵

160. Following his first unsuccessful action for judicial review of his separation, the applicant made veiled threats to the department as to what he intended to do if eventually removed from G Division.¹⁶ On two separate occasions, while in G Division, he made threats to kill a prison officer.¹⁷

161. The apparently exceptional circumstances of the applicant led the department to commission what another practitioner described as an 'exceptionally scholarly and detailed appraisal' of the applicant, involving 'a ten week period of detailed testing, interviewing and theoretical examination' by two university researchers.¹⁸ The report of these researchers did not recommend that the applicant be removed from G Division.¹⁹ The researchers noted that the applicant 'was assessed as presenting a high probability of acting violently in the future, particularly if moved from G Division into a more mainstream prison environment.'²⁰

162. The applicant in the 2000 action sought judicial review of the decision that he be kept separately and apart from all other prisoners. The applicant contended that the impugned decision was unlawful, or was otherwise such an unreasonable exercise of power as to amount to an abuse of power requiring the intervention of the Supreme Court.

163. The remarks of Martin J that the department seeks to rely upon occur within the context of His Honour's consideration of the concept of unreasonableness as applied to the decision under review:

The formation of the opinion that it is desirable to keep the applicant separately and apart from all other prisoners and the decision to give a direction to that effect are different from the decision to detain the applicant in G Division. The distinction should be borne in mind. The latter decision is a decision as to the means by which effect can be given to the antecedent decision that the applicant be kept separately and apart from all other prisoners. Considerable emphasis has been given to the harshness of the conditions in G Division and of the regime put in place with respect to the applicant. Those matters do not

¹⁴ *Fyfe v The State of South Australia* [2000] SASC 84 at [3].

¹⁵ *Ibid* at [3].

¹⁶ *Ibid* at [10].

¹⁷ *Ibid* at [10].

¹⁸ *Ibid* at [12].

¹⁹ *Ibid* at [13].

²⁰ *Ibid*.

directly impinge upon the issue as to whether it is unreasonable in the legal sense to have arrived at the decision to keep the applicant separately and apart from all other prisoners. That is not to say, however, that in extreme circumstances the practical effect of the antecedent decision might not be such that no reasonable person could arrive at the antecedent decision. For example, if the decision was made in the knowledge that it would have the effect of requiring a prisoner to be kept in inhumane conditions, a court might conclude that the decision was unreasonable in the legal sense. However, such an extreme point has not been reached and I am not to be taken as suggesting that the conditions in G Division are inhumane. My purpose in making reference to that possibility is to demonstrate how, in extreme circumstances, the practical effect of a decision to keep a prisoner separately and apart from all other prisoners might be of relevance in arriving at an opinion as to whether it is desirable that a prisoner be kept separately and apart.²¹

164. His Honour was observing, quite sensibly, that the reasonableness of a decision that a prisoner be kept separately and apart from all other prisoners will ordinarily be assessed by reference to the considerations underpinning that decision, rather than the 'practical effect' of the direction. His Honour observed that one exception to this general observation might be where the impugned decision has been 'made in the knowledge that it would have the effect of requiring a prisoner be kept in inhumane conditions'. His Honour emphasised that in making this observation, he was not suggesting that the conditions in G Division were inhumane.
165. My report in the present matter also should not be mistaken for advancing such a position. The issue under consideration is the reasonableness of the department's failure to revoke the direction that the complainant be kept separately and apart for a period of 66 days. I do not consider the remarks of Martin J to stand for the proposition that the negative health effects that ordinarily manifest from a person's prolonged solitary confinement constitute an irrelevant consideration for a decision-maker contemplating whether or not a prisoner's continued separation is justified, nor for a party reviewing the reasonableness of such a decision.
166. Although I have considered the G Division regime and the consequences of prolonged solitary confinement attested to by the Special Rapporteur, my report recognises that there may be circumstances in which the department will need to keep a prisoner separate and apart from all other prisoners in G Division, even for an extended period of time. The rather exceptional circumstances of the applicant in *Fyfe* serve as an illustrative example of one such situation. That said, I am simply not satisfied that similar or comparable circumstances existed in the case of the complainant, or that once the decision to separate the complainant was made, it was reasonable for the department to fail to revoke the direction for the length of time that it did.
167. I am similarly not persuaded that the remarks of Kelly J in the 2007 matter materially advance the department's position. The relevant passage of Her Honour's judgment provides:

During the course of the hearing I viewed the conditions in G Division and the Adelaide Remand Centre. The description of the conditions as spartan and restrictive is accurate. However, there is nothing I saw or heard in the evidence to suggest that the applicant has not been treated in as humane a manner as possible given the necessary restrictions imposed on him by virtue of his placement in that Division. His limited capacity for movement beyond his cell and his limited contact with other prisoners is necessarily so because of the danger he has presented to others in the past.²²

168. Again, it must be observed that the situation faced by the department when dealing with the applicant in the various *Fyfe* matters substantially differed from that presented by the complainant.

²¹ Ibid at [21].

²² *Fyfe v The State of South Australia* [2007] SASC 272 at [29].

169. Mindful of the factors identified above, I consider that the duration and effect of the complainant's separation from other prisoners was oppressive within the meaning of section 25(1)(b) of the Ombudsman Act.

Opinion

It is my final view that the department's failure to revoke a direction that a prisoner be kept separately and apart from all other prisoners for a period of 66 days was oppressive within the meaning of section 25(1)(b) of the Ombudsman Act.

As I have observed elsewhere in this report, this failure occurred in circumstances where:

- the department failed to maintain proper records as to its basis for separating the complainant
- there is no evidence before me to suggest that the decision to transfer and separate the complainant was made on appropriate grounds
- the department failed to provide a report to the Minister as soon as reasonably practicable
- the department failed to properly identify why the continued separation of the complainant was justified
- the complainant was denied information as to the precise basis for his separation and was therefore not in a position to meaningfully challenge its appropriateness
- the complainant was denied meaningful information as to the expected length of his separation
- the complainant was kept separated from other prisoners for a period well in excess of the maximum period identified by the Special Rapporteur and established by the Mandela Rules.

On this basis, and in light of the overall seriousness of the department's errors, I make a recommendation under section 25(2)(f) of the Ombudsman Act that the department consider the provision of an ex gratia payment to the complainant in accordance with Treasurer's Instruction 14.

Whether the prolonged separation of a prisoner from all other prisoners was in accordance with a rule of law that is oppressive

170. Section 36 of the Correctional Services Act does not regulate or otherwise limit the duration of a direction that a prisoner be kept separately and apart under subsections (2)(b), (c) or (d).
171. Subsections (9) and (10) appear intended to establish a degree of oversight by the Minister in circumstances where a direction under section 36(2) results in a period of separation exceeding 5 days, however there is no requirement that the Minister actually review the direction. There is also no requirement that the department notify the Minister in the event that a prisoner's separation exceeds any further period of time.
172. Assuming that adequate grounds exist under section 36(2) of the Correctional Services Act, and assuming that a report is provided under subsection (9), a prisoner may be indefinitely separated from all other prisoners without the knowledge or approval of the Minister.
173. As I have observed earlier in this report, the relevant international instruments such as the ICCPR, the Convention Against Torture and the Mandela Rules are not legally enforceable within this State. This notwithstanding, I consider the department should be

aiming to exceed these international minimum standards in its treatment of prisoners subject to its care and direction.

174. Mindful of both the conclusions expressed by the Special Rapporteur in his 5 August 2011 interim report with respect to the impact and inappropriateness of prolonged solitary confinement, and in light of the circumstances of the complainant's prolonged separation within G Division and the matters canvassed above, I am of the view that section 36 of the Correctional Services Act has the potential to operate in a manner that is unduly oppressive. As it stands, section 36 permits a prisoner to be kept separately from all other prisoners on an indefinite basis, without any mandated review beyond the five-day period.
175. In my view, section 36 of the Correctional Services Act should be amended to establish a maximum period of separation permissible under all four grounds identified within subsection (2). The separation of a prisoner for a period exceeding this maximum period should only be permitted in exceptional circumstances and should be subject to review by the Minister at regular intervals.
176. Although I do not intend to formally recommend as such, I consider the 15 day period identified by the Special Rapporteur to serve as an appropriate benchmark for any legislative amendment that follows.
177. In response to my provisional report, the department submitted (emphasis in original):

As I have observed already, I do not agree that the separation of [the complainant] was oppressive as it was undertaken in accordance with the Department's statutory powers. Despite this, these powers are conferred by Parliament, by way of an Act of Parliament and it is therefore a matter for a Minister and the Parliament to amend legislation. As referred to above, the Parliament discussed prisoner separations in October 2009 and the former Minister for Correctional Services reported at the time that *"separation is essential for prison authorities to provide effective and safe prisoner management."*

178. The proposed amendment to section 36 would not remove the Chief Executive's discretion to direct that a prisoner be kept separately and apart, nor would it serve to further limit the grounds under which such a direction might be issued. Rather, it would establish what I consider to be necessary and appropriate safeguards on the exercise of the Chief Executive's power.

Opinion

It is my final view that the prolonged separation of a prisoner from all other prisoners was in accordance with a rule of law that is oppressive within the meaning of section 25(1)(c) of the Ombudsman Act.

To remedy this error, I make a recommendation under section 25(2)(d) of the Ombudsman Act that section 36 of the Correctional Services Act be amended to:

- establish a maximum period of separation permissible under all four grounds identified within subsection (2)
- establish that a prisoner's separation from all other prisoners may exceed this maximum period only in exceptional circumstances
- establish that a prisoner's separation exceeding this maximum period must be reviewed at regular intervals by the Minister.

Summary and Recommendations

My final views are as follows:

1. The department's failure to document confidential intelligence and an operational risk assessment was unreasonable within the meaning of section 25(1)(b) of the Ombudsman Act.

To remedy this error, I make a recommendation under section 25(2)(f) of the Ombudsman Act that the department issue a reminder to all staff of the requirement to appropriately document information informing key administrative decisions of the department.

2. The department's direction that a prisoner be kept separately and apart from other prisoners was unjust within the meaning of section 25(1)(b) of the Ombudsman Act.

To remedy this error, I make a recommendation under section 25(2)(b) that the department issue a formal apology to the complainant.

I make a further recommendation under section 25(2)(b) of the Ombudsman Act that the department place a notation on the complainant's file to appropriately record the findings of my investigation in relation to this matter.

3. The department's failure to provide the Minister with a report as soon as reasonably practicable after giving a direction that a prisoner be kept separately and apart from all other prisoners was contrary to law for the purposes of section 25(1)(a) of the Ombudsman Act.

To remedy this error, I make a recommendation under section 25(2)(f) of the Ombudsman Act that the department issue a reminder to all responsible staff of the department's obligation to ensure that reports under section 39(9) of the Correctional Services Act are issued and provided to the Minister as soon as reasonably practicable.

4. The department did not fail to comply with clause 3.7.A of SOP 012 in reviewing the appropriateness of a prisoner's continued separation from all other prisoners. On this basis, I do not consider the department acted in a way that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act.

5. The department's failure to revoke a direction that a prisoner be kept separately and apart from all other prisoners for a period of 66 days was oppressive within the meaning of section 25(1)(b) of the Ombudsman Act.

To remedy this error, I make a recommendation under section 25(2)(f) of the Ombudsman Act that the department consider the provision of an ex gratia payment to the complainant in accordance with Treasurer's Instruction 14.

6. The prolonged separation of a prisoner from all other prisoners was in accordance with a rule of law that is oppressive within the meaning of section 25(1)(c) of the Ombudsman Act.

To remedy this error, I make a recommendation under section 25(2)(d) of the Ombudsman Act that section 36 of the Correctional Services Act be amended to:

- establish a maximum period of separation permissible under all four grounds identified within subsection (2)
- establish that a prisoner's separation from all other prisoners may exceed this maximum period only in exceptional circumstances

- establish that a prisoner's separation exceeding this maximum period must be reviewed at regular intervals by the Minister.

Final comment

I note with concern that the department has indicated that it may not implement certain of the recommendations foreshadowed by my provisional report.

Section 25(5) of the Ombudsman Act empowers me to issue a report to the Premier in circumstances where I am of the view that appropriate steps have not been taken to give effect to a recommendation made under section 25(2) of the Act.

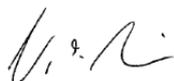
Pursuant to section 25(6) of the Ombudsman Act, where I issue a report to the Premier, I may also forward copies of the report to the Speaker of the House of Assembly and the President of the Legislative Council with a request that they be laid before their respective Houses.

In accordance with section 25(4) of the Ombudsman Act, the principal officer of the department should report to my Office by **1 November 2017** on what steps have been taken to give effect to the recommendations above; including:

- details of the actions that have been commenced or completed
- relevant dates of the actions taken to implement the recommendations.

In the event that no action has been taken, reason(s) for the inaction should be provided to my Office.

I intend to specifically notify the Minister for Correctional Services of my recommendation that section 36 of the Correctional Services Act be amended.



Wayne Lines
SA OMBUDSMAN

20 September 2017