

## THE CONSTITUTIONAL ISSUE

1. A series of decisions of the High Court has established a restriction on Commonwealth and State legislative power, based upon an implied freedom to communicate about government or political matters.

### The two limbs of the test for constitutional validity

2. In *Lange v Australian Broadcasting Corporation*,<sup>1</sup> the Court identified the test for determining whether a law infringes the implied freedom of communication as presenting two questions:

“First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s.128 for submitting a proposed amendment of the Constitution to the informed decision of the people.”

If the first is answered “yes” and the second “no”, the law is invalid.

3. In *Coleman v Power*,<sup>2</sup> members of the Court supported a reformulation proposed by McHugh J of the second question so that the phrase “the fulfilment of” should be replaced by “in a manner”.
4. The first limb of the test enunciated in *Lange* requires that the law in question effectively burden freedom of communication about government or political matters either in its terms, operation or effect. A law which effectively inhibits the acquisition by the media of information about government or political matters is as inimical to the implied freedom as a law, such as the law of defamation, which effectively burdens the media from communicating that information. As Lord Denning MR stated:

“The public has a right of access to information which is of public concern and of which the public ought to know. The newspapers are the agents, so to speak, of the public to collect that information and to tell the public of it.”<sup>3</sup>

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<sup>1</sup> supra at 567.

<sup>2</sup> (2004) 209 ALR 182; [2004] HCA 39.

<sup>3</sup> *British Steel Corporation v Granada Television Ltd* (1981) AC 1096 at 1129.

5. The law in this case, both in its terms and in its practical operation or effect, by reason of the manner in which the discretion under s.100(2)(d) is exercised, inhibits the acquisition of information. In practice, filmmakers, freelance journalists, employed journalists, researchers and others are denied access to information that can only be acquired by gaining access to prisons and interviewing prisoners.
6. The relevant policy<sup>4</sup> states that media access is based upon the following principles:
  - (a) maximising positive media coverage and outcomes for the Department's activities, employees and offenders;
  - (b) contributing in an effective and positive manner to media coverage of critical incidents;
  - (c) complying with the Department's statutory obligations regarding confidential information;
  - (d) encouraging, within appropriate guidelines, the generation of local and social interest at the service delivery level; and
  - (e) enhancing public confidence in the corrections system in Queensland.
7. Tellingly, the policy states that media access will not be granted where:
  - (a) it would involve a person who is remanded in custody;
  - (b) access to a person may adversely affect the security or good order of a corrective services facility;
  - (c) a matter is before the courts and may be prejudiced by media exposure (for example, appeals or pending charges);
  - (d) it could embarrass, injure or distress to –
    - (i) the community;
    - (ii) victims or their families;
    - (iii) departmental employees; or
    - (iv) any other relevant person;
  - (e) the person is being detained for immigration purposes; or
  - (f) the purpose of the media access is to investigate issues related to the offender's alleged innocence.

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<sup>4</sup>

Exhibit 4.

8. The media access policy is supplemented by another policy governing the operation of s.100. That policy is a policy relating to the approval process to interview offenders.<sup>5</sup>
9. The fact that government policy is designed to prevent media access (and therefore media interviews of prisoners):
- (a) if such access could embarrass departmental employees; or
  - (b) if the purpose of the media access is to investigate issues related to the offender's alleged innocence,
- is critical. Such a policy is inimical to the freedom of communication guaranteed by the Constitution.
10. The second limb of the *Lange* test asks whether the law is reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s.128 for submitting a proposed amendment of the *Constitution* to the informed decision of the people.
11. In *Coleman v Power* McHugh J,<sup>6</sup> Gummow and Hayne JJ<sup>7</sup> and Kirby J<sup>8</sup> stated that this test should be understood as requiring both that the end and the manner of achieving it be compatible with the maintenance of the prescribed system of government.
12. In *Australian Capital Television Pty Ltd v Commonwealth*<sup>9</sup> and *Nationwide News Ltd v Wills*<sup>10</sup> a distinction was drawn between laws which are directly targeted at governmental communications, and laws which are directed towards other ends and

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<sup>5</sup> Exhibit 5: Relevantly the policy states that only the Director-General may grant approval for media access to offenders. So far as approval to interview offenders is concerned, section 3.2 of the policy says that the approval process by the Chief Executive or delegate is subject to three factors. The third is that the interview, or any portion of the interview, will not be published or made public except with the permission of the Director-General. This is highly relevant since it inhibits not only the media (which the Department interprets to constitute media organisations, freelance journalists, freelance filmmakers and academics who prepare articles for publications in magazines such as Professor Manne's article about Cornelia Rau). The policy extends beyond the media to reputable researchers and bodies who fund them, such as the service providers who funded and supported the Inccorrections Report:

<sup>6</sup> At [92-3].

<sup>7</sup> At [196].

<sup>8</sup> At [211].

<sup>9</sup> (1992) 177 CLR 106 at 143-144, 169, 234-235.

<sup>10</sup> (1992) 177 CLR 1 at 76-77.

affect governmental communications only in an incidental way. Deane and Toohey JJ, in *Nationwide News*,<sup>11</sup> said as follows:-

“In particular, a law whose character is that of a law with respect to the prohibition or control of some or all communications relating to government or governmental instrumentalities will be much more difficult to justify as consistent with the implication than will a law whose character is that of a law with respect to some other subject and whose effect on such communications is unrelated to their nature as communications of the relevant kind.” (emphasis added)

13. Here the policies which govern the s.100 are directly targeted at the content of communications and preclude media access, to and interviewing of prisoners, if an interview will embarrass departmental employees or is for the purpose of investigating issues relating to an offender’s alleged innocence.

### **Miscarriages of justice**

14. Miscarriages of justice are an affront to any civilised community. Particular cases of miscarriages of justice, when exposed, highlight systemic issues in the criminal justice system. They are matters of concern to citizens since the administration of the criminal justice system is an issue about which citizens should be able to communicate amongst themselves and also with those who hold or seek elected office. The fact that the administration of justice is of such a character is reflected in the deeply-entrenched principle of open justice. Public discussion of particular cases is constrained to some extent by the law of contempt, which is a legitimate regulation of public discussion, whilst cases are pending. But once a case has been determined the interest protected by the law of contempt has been served. Following a conviction, the administration of justice in a particular case and in general becomes the proper subject of public discussion. This includes discussion about miscarriages of justice.
15. Dr Ransley’s evidence stated:<sup>12</sup>

“Errors in justice can have devastating effects on individuals, who face the loss of their liberty, jobs, family, reputation and sometimes their life, as the result of unwarranted prosecutions or wrongful convictions. When this occurs, the real perpetrators of crimes remain undetected, and perhaps free to re-offend, so there are consequences in terms of public safety. Additionally, wrongful convictions represent a failure of

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<sup>11</sup> At 76-77.

<sup>12</sup> Exhibit 19 paragraph 7.

justice and of its underlying values of truth and fairness. Repeated failures undermine confidence in the criminal justice system. ...”

16. Dr Ransley gave evidence about how miscarriages of justice are revealed. A crucial point is made by her in paragraph 14 of her statement:

“The costs and resources to investigate an alleged miscarriage of justice are substantial. Rarely can individuals who are the subject of an alleged miscarriage of justice afford these resources. They often depend upon the assistance of lawyers (who may work without fee or with a reduced fee) and investigative journalists to investigate the matters.”

17. Mr Watson also gave evidence about the tradition of investigative journalists in exposing miscarriages of justice.
18. Mr Marr, one of Australia’s leading journalists with a distinguished career spanning 30 years, gave evidence to like effect. As did Mr Warren, who is the President of the International Federation of Journalists.
19. The role of journalists in investigating and rectifying miscarriages of justice and the indispensable function of the interview in that regard, have been recognised by the authorities. In *Regina v Secretary of State for the Home Department; Ex parte Simms*,<sup>13</sup> Lord Steyn stated:

*“Miscarriages of justice identified by investigative journalism*

My Lords, the members of the Court of Appeal were under the impression, and acted on the basis, that it was not necessary for a prisoner to have an oral interview with a journalist since he can correspond with a journalist, and in that way advance his argument for the thorough investigation and possible eventual reopening of his case. As a result of the appeal to the House there is now available material which the Court of Appeal had no opportunity to consider. First, Mr. Woffinden, the journalist in the Simms case, has provided details of some sixty cases over the last ten years where journalists played a substantial role in identifying miscarriages of justice which led to the quashing of the convictions. In the absence of contrary information I regard this document as relevant material tending to establish in a general way the value of investigative journalism in exposing miscarriages of justice. Secondly, and more importantly, an affidavit by Gareth Peirce, an experienced and distinguished practitioner, was placed before the House. Gareth Peirce has acted in more than twenty references to the Court of Appeal in which convictions were eventually quashed. She advised on the setting up of the Criminal Cases Review

<sup>13</sup> [2000] 2 AC 115 at 127 to 128, underlining added.

Commission and subsequently conducted training exercises for the new Commissioners and caseworkers. She was asked to discuss the importance of the role of the press in undoing wrongful convictions and did so. Despite the length of the quotation it is necessary to set out in full the core passages in her affidavit. She listed following factors as ‘important and universal’:

‘a) There is no legal aid for investigations. (On the rare occasions that the Green Form scheme has allowed for extensions, these amount to little more than several hours work by a solicitor.) b) I am informed by the Criminal Cases Review Commission that more than 90% of applicants are not represented by solicitors. c) The criteria for referring cases to the Court of Appeal are interpreted as requiring new evidence or new and important considerations of substance. d) Any commitment to attempting to undo a wrongful conviction is a substantial one; as a solicitor, I am aware that each such commitment will involve me in enormous personal expenditure of time and money, as well as anxiety and responsibility above even the norm in defending cases. No one would contemplate such a commitment unless they had the clearest possible view at the outset of the appropriateness of their efforts. Such a view can only be properly arrived at by meeting the individuals concerned and discussing their predicament with them. e) There is no difference in the approach of members of the Press to that of solicitors; the commitment of an author to writing a book about a case, of a journalist to writing an insightful article, or a television company to the making of a programme involves a major deployment of resources, budgets and time. Each task demands that those making such a decision believe that their choice is an appropriate one. Such a decision is almost impossible if the individual cannot be seen; where it remains impossible, that individual's case is the less likely to be taken up by that section of the Press that might have become interested in the abstract. f) Although the Criminal Cases Review Commission was expected to be able to conduct investigations into cases far more pro-actively than the Home Office had been able, it finds itself seriously under resourced and underfunded. The report of its Chairman this year to the House of Commons Home Affairs Committee spoke of incoming cases being required to wait at least two years before they can be assigned to a case worker. The cases with the best opportunity remain those which have arrived at the Commission fully researched and investigated with new evidence compellingly presented. Resources available to the Press, in particular (but not exclusively) the large budgets available to Television programmes, are clearly

the most significant chance of discovering new evidence, particularly where expensive expert research requires commissioning. As important, however, is the potential interest of smaller, local newspapers and journals, which can provoke interest in the relevant area and prompt fresh evidence.’

Gareth Peirce then described in compelling detail how the above factors have been relevant in five particular cases "as well as in many others of which these are examples". Counsel for the Home Secretary was given leave to challenge this affidavit if it was thought proper to do so. There has been no challenge. I have no hesitation in accepting that the general picture sketched by Gareth Peirce, as well as her discussion of particular cases, is correct. On any view this is powerful evidence.

Two important inferences can and should be drawn. First, until the Home Secretary imposed a blanket ban on oral interviews between prisoners and journalists in or about 1995, such interviews had taken place from time to time and had served to identify and undo a substantial number of miscarriages of justice. There is no evidence that any of these interviews had resulted in any adverse impact on prison discipline. Secondly, the evidence establishes clearly that without oral interviews it is now virtually impossible under the Home Secretary's blanket ban for a journalist to take up the case of a prisoner who alleges a miscarriage of justice. In the process a means of correcting errors in the functioning of the criminal justice system has been lost.”

### **Conditions in prisons and their implications for public safety**

20. The stated purpose of corrective services in the Act is “community safety and crime prevention through the humane containment, supervision and rehabilitation of offenders”.<sup>14</sup>
21. Community safety, crime prevention and the humane treatment of offenders are clearly “government or political matters” for the purpose of the constitutional issue.
22. The authoritative evidence of the Honourable William Carter QC, and the “Incorrections Report” to which he was a special adviser, provide compelling evidence that conditions in prison, and the welfare, health and psychological needs of prisoners are critical issues which impact upon the human rights of prisoners and public safety. Policies and practices affect the interest of prisoners, their families, victims of crime and the community.

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<sup>14</sup> CSA s.3(1).

23. The evidence of Ms Warner amplified upon these issues, as did the documents that were tendered during her evidence.
24. Critically, the method by which s.100 operates in practice is to deny the media access to correctional systems to interview offenders. In practice the broad discretion conferred upon the Chief Executive has been exercised to deny an academic researcher, Dr Walsh, the opportunity to interview prisoners in the course of investigating prison release practice and policy in Queensland and its impact on community safety. This project had the support of reputable community organisations. The exercise of the discretion to deny, not only the media, but researchers such as Dr Walsh, the opportunity to interview prisoners is seemingly part of a policy to deny access where to do so would or even might be to embarrass the government.
25. No attempt was made by the Attorney-General of Queensland or the prosecution to justify denial of access.
26. Mr Carter spoke and wrote about “the violence and dehumanising practices associated with Queensland prisons”. No contest was made to his evidence in this regard.
27. Section 100 operates in effect to deny access to the persons who can inform public debate and media debates about these crucial issues.
28. The Incorrections Report found that media debates and policy discussion should be evidence based rather than grounded in ill-informed, emotional rhetoric.<sup>15</sup> It argued for the repeal of s.100.
29. No contest was made to the information or evidence which supported these conclusions and the proposition that s.100 “prevents members of the community, including researchers, from obtaining statements from prisoners”.<sup>16</sup>

**The conditions of persons held in corrective services facilities, including persons detained for immigration purposes, is a government or political matter**

30. Professor Manne addressed this issue as follows:

“In the politics of all Western nations the question of how prisoners are treated in corrective facilities is a matter of vital importance. The issue

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<sup>15</sup> Incorrections Report p.129.

<sup>16</sup> Ibid.

tends to come to public attention either when there are disturbances in corrective facilities or when there are major reforms of the penal system. In recent Australian political history there have been many cases where disturbance or prison reform have placed corrective facilities at the centre of the political agenda. The privatisation of prisons over the past two decades has, for example, often been a major matter of political discussion and dispute. This is because there is a general recognition that one of the markers of a society which is attentive to human rights is the effort their governments make to respect the dignity of those lawbreakers who are incarcerated.

The question of people who are in corrective facilities for immigration reasons is a special case. According to Australian law in those states where there are no detention centres unauthorized non-citizens can be held in correctional facilities. According, however, to Immigration Department regulations they must be held there only briefly and as a last resort and their conditions must be closely monitored by officials of the Department. There is obviously a great public interest in the availability of information that allows the public to know that the immigration detainees, many of whom have committed no crime, are being treated well and that, while in prison, they are not being placed in physical danger. It is difficult to understand how this can be achieved if there is no right for the journalists or human rights advocates or academics with an interest in detention and human rights to interview immigration detainees in corrective facilities to learn of the conditions under which immigration detainees are being held.

A case in point here is the detention of Cornelia Rau, concerning which I conducted research earlier this year which has been published in the magazine, *The Monthly*, September 2005. Cornelia Rau is an Australian resident suffering a severe mental illness. She was imprisoned as a suspected unlawful non-citizen for six months in the Wacol corrective facility in Brisbane. During that time, as the official report of the former Federal Police chief, Mick Palmer, reveals, the conditions of Ms Rau's detention were not monitored by the Immigration Department in a manner that the Department's own regulations required. In addition, because of behaviour caused by her mental illness, Ms Rau was placed in solitary confinement on a number of occasions, unbeknown to the Immigration Department. She was also physically threatened, on several occasions, by prison inmates due to the oddness of her behaviour which again arose as a result of her mental illness. It is not certain what would have happened if a journalist or a human rights advocate or an academic with relevant expertise had been able to interview her while she was being held in prison, nor even that, if she was interviewed, that she would have agreed to talk of her prison conditions. What can be asserted, however, is that if the Department's neglect of her had been discovered while she was in prison and that if that neglect had come to public attention, there would, most likely, have been general outrage. Even the capacity of the public to have learned that a mentally ill immigration detainee was being held in long-term imprisonment would, most likely, have gravely troubled many Australian citizens.

What conclusions do you draw?

I have visited friends among the long-term detainees held at the Baxter immigration detention centre and have written extensively on the question of the long-term detention of asylum seekers. For many years I have believed the ban on conducting interviews with detainees in these situations has constituted a grave infringement on the kind of free flow of information on which democratic political life is founded. It is self-evident that the asylum seeker issue has been a central political issue in Australia over the past six years. It is clear that the conditions of long-term detention constitute one of the most important reasons this has been an issue which has troubled the consciences of a large number of Australian citizens. Because of the ban on interviewing immigration detainees, the kind of information that the citizens have required, on which to base an assessment of the issues, has been difficult to obtain and has at best been very partial. Some of the information that has emerged has been obtained by clandestine means, something which is common in police states but which in a democracy is unsatisfactory, from every point of view.

Although I have not been personally involved in research into the conditions of prisoners or in cases involving claims to wrongful imprisonment, it seems to me that many of the democratic arguments outlined here in the case of immigration detainees would also apply. Democracies assume the free flow of information consistent with public safety and public order. I am opposed to all unnecessary restrictions on freedom of information on standard democratic grounds. I believe that the restrictions on the free flow of information from prisoners and immigration detainees to be an infringement on one of the essential principles of the liberal-democratic system of government.”

### **The circumstances of persons detained for immigration purposes**

31. In the first part of his statement, which was accepted into evidence without contest, Professor Manne explained why the detention of persons for immigration purposes is a government or political matter. Professor Manne has undertaken research and written extensively on this issue. His recent research and article concerning the detention of Cornelia Rau in the Brisbane Women’s Correctional Centre is significant. He explains how her mental illness went untreated and how, because of behaviour caused by mental illness, she was placed in solitary confinement on a number of occasions.
32. The Queensland Government policy outlined above denies media access for the purpose of inquiring into the condition of an immigration detainee such as Ms Rau or to interview prisoners about Ms Rau’s condition and the impact which her plight had on them.

**Acquisition of information is essential to discussion of government and political matters**

33. This proposition is perhaps self-evident. But it has been the subject of evidence by witnesses of the highest standing such as Mr Marr and Mr Warren. The principle of access to information is particularly important where access is controlled by government. The totality of the evidence including the Incorrections Report explains why access to information in correctional facilities in Queensland is particularly important.

**The function of an interview**

34. A number of witnesses explained why the conduct of an interview is essential to the acquisition of information. This included professional journalists such as Ms Jensen and Mr Watson. Mr Marr gave evidence that there are two basic sources of information: documents and interviews.
35. The role of the interview in ascertaining the condition of prisoners, the state of correctional facilities and possible miscarriages of justice is shown. Information and assertions can be tested by the interview process in a manner which cannot be tested by other means such as correspondence.
36. In the case of prisoners, correspondence is censored and many prisoners may not have the facility to communicate in writing.
37. An ability to interview prisoners is critical to the acquisition of information, by the organs of the media, freelance journalists, freelance filmmakers and researchers.

**The capricious and improper role of the discretion under s.100**

38. Yet, this is denied unless the discretion of the Chief Executive is favourably exercised.
39. The stated policy of the Queensland Government is to deny such an exercise where it might embarrass the Department or relate to the innocence of the prisoner.
40. Mr Marr simply and forcefully expressed the obnoxious way in which such a media policy seeks to only provide positive information about the Department.

41. Preventing embarrassment to government can never be in the public interest. As Mason J observed in *The Defence Papers* case:<sup>17</sup>

“...it can scarcely be a relevant detriment to the government that publication of material concerning its actions will merely expose it to public discussion and criticism. It is unacceptable, in our democratic society, that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticize government action.”

42. The discretion under s.100 is capricious in its nature and facilitates the concealment of facts that might embarrass the government. Also, as Dr Walsh’s experience shows, s.100 has been exercised in a capricious manner to prevent interviews being undertaken by a reputable academic researcher.
43. Many miscarriages of justice are exposed by investigative journalists and filmmakers. The government knows this. But its policies that govern the operation of s.100 prevents media access and interviews that would reveal and undo miscarriages of justice.
44. Lord Steyn’s speech in *Simms* records that interviews have been undertaken without adverse impact upon good order.
45. Ms Jensen’s professional experience involves interviewing hundreds of prisoners. Her evidence is that she and other journalists have been able to interview prisoners as part of their professional duties, without any apparent adverse impact on prison discipline or other adverse consequences.

### **The victims of crime**

46. Concern for the victims of crime is legitimate. But it can be used as an excuse to immunise the criminal justice system and the corrective system from legitimate scrutiny. In any event, concern for the victims of crime does not justify a denial of access or to an unfettered discretion whether to permit interviews. It might permit some other more narrow discretion or some other control over the product of any interview so as to ensure that it does not cause unjustified distress to the victims of crime.

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<sup>17</sup> *Commonwealth v John Fairfax and Sons Ltd* (1980) 147 CLR 39 at 52; (1980) 32 ALR 485 at 492-3.

47. Of course, concern for the victims of crime does not arise for consideration in the case of immigration detainees, who have committed no crime.
48. Some alleged victims of miscarriages of justice will in fact be innocent and the inhibition upon exposing a miscarriage of justice cannot be justified by concern for the victims of a crime that the prisoner did not commit. Moreover, in such a case, the real perpetrator may be at large free to commit more crime and create new victims.

**A policy that operates to conceal the truth**

49. The uncontradicted evidence in the case is that “the violence and dehumanising practices associated with Queensland prisons threaten one of the Government’s primary objectives in its corrections system, namely community safety”.<sup>18</sup>
50. Official policies and practices in relation to s.100 of the Act govern access to interview prisoners by the media, filmmakers, researchers and others. The principle is to maximize positive media coverage for the department and to enhance public confidence in the corrections system in Queensland. The policy is to deny media access to interview prisoners where to do so would be to tell the harmful truth and thereby embarrass departmental employees, including those in senior positions.
51. The corrective services system is supposed to advance “community safety and crime prevention through the humane containment, supervision and rehabilitation of offenders”. The evidence before the Court is that the system involves dehumanising practices that threaten one of the Government’s primary objectives in its corrections system, namely community safety.
52. Dehumanising practices in a corrective system are “government and political matters”. Professor Manne reminds us:
- “In the politics of all Western nations the question of how prisoners are treated in corrective facilities is a matter of vital importance. .... This is because there is a general recognition that one of the markers of a society which is attentive to human rights is the effort their governments make to respect the dignity of those lawbreakers who are incarcerated.”
53. The practical operation and effect of s.100 is to inhibit access to information.

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<sup>18</sup> Ex 12 In Corrections Report, page 2; confirmed by The Hon William Carter QC in his oral evidence.

54. The operation and effect of the law is to conceal from public attention miscarriages of justice and the dehumanising practices associated with prisons.

**Conclusion: the first limb in *Lange***

55. Section 100, in combination with the policies and practices that govern its operation and effect, effectively burden freedom of communication about government or political matters. The operation or effect of the law is to prevent media access where such access may embarrass the government or discuss the alleged innocence of a prisoner. In its operation or effect the law is content based, aimed at communications of a particular kind since the acquisition of information is indispensable to communication. Being able to interview prisoners is an essential part of the acquisition of information about government and political matters, by the media, freelance journalists, filmmakers and researchers.
56. The law in its terms, its operation and effect is capricious and inhibiting. Such an unfettered discretion is problematic in principle and in practice it can be used to deny access and interviews in circumstances where there is no issue about concern for victims, only concern to avoid embarrassment to the government.
57. The uncontested evidence of Mr Carter QC, Ms Warner and the documentary exhibits in the case reveal that the government has much about which it should be embarrassed.

**Conclusion: The second limb in *Lange***

58. Whatever possible legitimate interests might have motivated the enactment of the provision, it is over-broad and confers a discretion upon the chief executive which is able to be used to achieve objectives that are not legitimate. A law which confers such an unfettered discretion upon the chief executive's approval and which, in its practical operation, is guided by the government's media access policy, is not reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of government.
59. There can be no proper argument, and there is no evidence, that the information that can be obtained by way of interview with prisoners can be effectively obtained by some other means, such as correspondence. Interviews in all aspects of life elicit information which written communications cannot. In the context of prisoners,

written communications are censored and, in any event, many prisoners, like other members of the community, find it difficult to express themselves well in a written form.

60. Those who might have been expected to uphold the validity of s.100 and to argue that the law passes the second test in *Lange* have not sought to do so by adducing evidence.
61. In the absence of contest to the evidence placed before the Court by the defendant and in light of the arguments canvassed in connection with the first limb in *Lange* the conclusion can be readily reached that the second limb of the test for constitutional validity should be answered “no”.

### **Constitutional Issue**

62. As a consequence, s.100 is invalid because, in its terms, operation and effect, it impermissibly burdens freedom of communication about government or political matters.
63. If Ms Delaney is found to have engaged in an interview within the meaning of s.100, then the section cannot be validly applied to her. However, Ms Delaney’s constitutional defence does not depend on such a finding. For the reasons canvassed above, the section’s provisions in relation to interviews with prisoners simply are invalid because of their inconsistency with a constitutional freedom to communicate about government and political matters.

### **Conclusion**

64. For these reasons, the interview charge should be dismissed.

17 November 2005

P.D.T. APPLEGARTH SC