

## Police v Delaney

### Submissions in reply by the defendant in relation to the constitutional issue

#### Introduction

1. The prosecution's written submissions on the constitutional issue:
  - (a) misunderstand the scope of "government or political matters", and wrongly assert that the law in question must have "a direct effect on the mechanisms of the Federal Government";
  - (b) misstate the test for constitutional validity under the second limb in *Lange*;
  - (c) fail to identify any legitimate end at which the prohibition on interviews in s 100 is directed (as distinct from the objects of the Act in general);
  - (d) fail to justify that the law is "reasonably appropriate and adapted" to serve any legitimate end
  - (e) in particular, fail to justify a law, which in its operation is explicitly directed against certain publications (eg publications that cause embarrassment to department employees) ie a law that is directed at content rather than a law that regulates some other activity and where any impact on communications is incidental and unintended;
  - (f) simply do not address the "manner" in which the law seeks to serve any legitimate end.
2. It is convenient to reply under the headings contained in sections 5 and 6 of the submissions under reply.

#### Government or Political Matters

3. It is accepted that the freedom of communication identified in *Lange* does not extend to communications in general, and the contrary has not been asserted in the defendant's submissions on the constitutional issue. The protected communications are in relation to "government or political matters". Clearly, certain categories of speech, including commercial speech, fall outside of this category.<sup>1</sup> However, the fact that the constitutional freedom does not extend to speech generally, does not mean that "government or political matters" should be given an excessively narrow interpretation. Further, it would be wrong to substitute for that phrase "federal matters" since this is not the term used by the High Court, and to do so distracts attention from the relevant inquiry

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<sup>1</sup> See *APLA Ltd v Legal Services Commissioner (NSW)* [2005] HCA 44; (2005) 79 ALJR 1620.

4. The relevant inquiry is whether the section in its terms, operation or effect burdens discussion of “government or political matters”. The High Court has stated that:

“..the discussion of matters at State, Territory or local level might bear on the choice that the people have to make in federal elections...”<sup>2</sup>

5. The Court has recognised that “it is difficult to contend that the exercise or failure to exercise public functions or powers at any particular level of government or administration, or any part of the country, is not of relevant interest to the public of Australia generally”.<sup>3</sup>

6. By way of example, “the conduct of State police officers is relevant to the system of representative and responsible government set up by the Constitution” for the reasons explained by McHugh J in *Coleman v Power*.<sup>4</sup>

7. It is clear that s.100, by its terms, operation and effect may burden communication about a range of government or political matters, including:

- (a) the administration of justice in general, including those convicted of offences created under federal statute and who are held in State corrective facilities;
- (b) miscarriages of justice;
- (c) the conditions in which prisoners are detained;
- (d) the conditions in which immigration detainees are held;
- (e) the treatment by authorities of the persons who are detained.

Allegations reflecting upon the administration of justice are apt to “undermine public confidence in the administration of the federal, as well as the State, criminal justice system”<sup>5</sup>. That persons detained in State correctional facilities, including immigration detainees, are held in the conditions disclosed in the evidence of the Honourable William Carter QC and that prisoners are treated in the manner reported in the Incorrections Report is highly relevant to the administration of the federal criminal justice system. Such matters reflect on federal authorities and federal politicians that permit federal prisoners and immigration detainees to be held in such conditions. For example, the failure of the correctional system to attend to the welfare of prisoners and to rehabilitate them prior to release “threatens the human rights of prisoners as

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<sup>2</sup> *Lange* (supra) at 571.

<sup>3</sup> *Ibid* adopting the earlier observations of McHugh in *Stephens’ Case* (1994) 182 CLR 211 at 264. [2004] HCA 39 at [80]; (2004) 78 ALJR 1166 at 1182.

<sup>4</sup> To adopt the words of McHugh J in *Coleman* at para [80] where his Honour referred to allegations that members of the Queensland Police Service are corrupt.

well as victims of crime, (and) contributes to recidivism and undermines community safety”.<sup>6</sup>

8. It is impossible to conclude that such a state of affairs is not a government or political matter. Community safety and respect for the rights of individuals (both offenders and their victims) are clearly matters for communication between the electors and the elected, between the electors and candidates for election, and between the electors themselves so that the people may exercise a free and informed choice as electors. They need not be the only matters that may affect choices, and the freedom of communication that is protected is not confined to election campaigns. On any proper view, these are “government or political matters”.<sup>7</sup>
9. Next, the prosecution submits that communication about the alleged innocence of an individual is governed by the Judicature. This misunderstands the point. Miscarriages of justice occur because of failures in the criminal justice system, including failures in the course of investigation by authorities, and because of the absence of institutional processes to remedy them. These matters, including the limitations on appellate processes, have been addressed by Dr Ransley. One is not concerned here with the performance of a judicial officer<sup>8</sup> but with the administration of justice in general including the acts and omissions of officials and government authorities responsible for investigation, prosecution and incarceration.
10. Next, it is fanciful to submit, as the prosecution does, that publications that embarrass departmental employees do not reflect on the department, and thereby embarrass the government. One needs only to glance at the Morris/Davies inquiries.
11. Finally, on this aspect of the case, the resort to the FOI Act is astounding. In short, events may never be documented, sensitive and informative documents are often exempt, and, more fundamentally, “you cannot FOI a conversation”.

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<sup>6</sup> Foreward to Incorrections Report; affirmed in the oral evidence of The Hon William Carter QC, and not contested by the prosecution.

<sup>7</sup> Professor Manne was not cross examined on the point and the reasons for his conclusion that the detention of persons is a government or political matter.

<sup>8</sup> As to which see *Herald & Weekly Times Ltd v. Popovic* [2003] VSCA 161 paras. [2]-[10]; [495]-[509]; cf [232]-[253]; *O’Shane v. John Fairfax Publication Ltd* (2004) Aust Torts Rep 81-733 at 65,491 para. [189]; [2005] NSWCA 164; (2005) (2005) Aust Torts Rep 81-789 at 65,491

**Legitimate End**

12. The prosecution's submissions misstate the test for constitutional validity under the second limb in *Lange*. The test is not whether the limitations result in a government that is not representative.
13. The prosecution's submissions fail to identify the legitimate end at which the prohibition on interviews in s 100 is directed (as distinct from the objects of the Act in general).
14. The prosecution's submissions fail to establish that the law is "reasonably appropriate and adapted" to serve any legitimate end. It called no evidence in this regard. No nexus is demonstrated between any legitimate end and the law as it operates. The burden on the prosecution here is to show that the law is "reasonably appropriate and adapted" in a case in which, by its operation, the law is directed at certain forms of communication that have constitutional protection. The burden is a hard one in such a case. The prosecution fails to justify a law, which in its operation is explicitly directed against certain publications ( eg publications that cause embarrassment to department employees) ie a law that is directed at content rather than a law regulating some other activity and where any impact on communications is incidental and unintended. The explicit policy of the law is to restrict interviews which will result in publications, and to deny access (and therefore the chance to interview in the first place) if the interview will cause embarrassment to government employees or explore issues of the innocence of the prisoner.
15. The submissions under reply simply do not address the "manner" in which the law seeks to serve any legitimate end. As to the issue of "manner", the law is too broad, capricious and unreasonable for the reasons previously submitted. It confers a discretion that can be used and is used to restrict interviews and publications that do not threaten peace and good order, or some other legitimate end.
16. If the prosecution was to satisfy the second limb in *Lange* then it was incumbent upon it to identify the legitimate end that the law, as it in fact operates, serves. Resort to the general objects of the Act does not do this.

17. In fact, the uncontradicted evidence is that the law is used to capriciously deny, not just the media, but others including reputable researchers,<sup>9</sup> the opportunity to interview prisoners in circumstances in which there is no threat to good order and safety. The government policy says as much. The evidence is that it is possible to interview prisoners without detriment to good order, and this fact was noted by Lord Steyn in *Simms*.
18. The intent and effect of the law is to conceal information that can only be effectively obtained by an interview. This includes information which, if published, might serve to remedy a miscarriage of justice that otherwise might go uncorrected. To countenance such a result is inimical to any legitimate end. It cannot be justified by a policy that seeks to protect officials from embarrassment, or by a policy that imposes a blanket ban on access to interview a prisoner if the purpose of access is to interview the prisoner about an alleged miscarriage of justice.
19. Information about the true state of affairs in correctional facilities is necessary to inform public debate, and to improve the system. The ability of researchers, journalists and others to interview is vital to acquire this information. Without the required information and informed public debate, the system will continue to fail the interests of prisoners, their victims and the community. This is not a matter of submission. The failure of the system to serve interests of prisoners, their victims and the community has been the subject of uncontested evidence.
20. The uncontested evidence is that the corrections system fails to prepare prisoners for release, and thereby threatens the rights of prisoners and victims, contributes to recidivism and undermines community safety.
21. A law which inhibits informed public discussion about such a system fails the second limb in *Lange*. Far from serving a legitimate end, or advancing the stated purpose of the Act, the law is inimical to “community safety and crime prevention through the humane containment, supervision and rehabilitation of offenders”.
22. It operates to conceal information about the respects in which the corrections system fails to achieve its stated purpose.

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<sup>9</sup> e.g. Dr Walsh