

Police

- v -

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Constitutional Issue

Submission – Prosecution

1. Jurisdiction

At the outset, the jurisdiction for determination of a constitutional matter is held inherently with the appellate and original jurisdiction of the High Court¹ or State Courts and Federal Courts vested with constitutional jurisdiction by Federal Parliament², most significantly with the cross-vesting scheme.

In essence, in addition to the High Court, each State Supreme Court or Territory Supreme Court and Federal Courts, may hear a constitutional matter, provided they are vested with Federal jurisdiction.

2. Background

The *Commonwealth of Australia Constitution Act* (the “Constitution”), contains limited express rights or freedoms, however, a number of *implied* freedoms are recognised by the High Court in the interpretation of the Constitution, and this includes an implied freedom of communication, only with regards to government or political matters which flows from ss7³, 24⁴ and 128⁵ of the Constitution

A diversity of views were posited by the High Court, until the unanimous and settled decision of *Lange v Australian Broadcasting Corporation*⁶ (*Lange*) which found a ‘two-limbed’ test to determine constitutional validity of a law, which is supported in the High Court decision of *Coleman v Power*⁷.

3. The ‘two-limbed’ test⁸

“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 s128 for submitting a proposed amendment of the Constitution to the informed decision of the people.

If the first question is answered ‘yes’ and the second is answered ‘no’ the law is invalid.”

¹ ss73- 76 of the Constitution

² s77(iii) of the Constitution

³ Election of the Senate

⁴ Election of the House of Representatives

⁵ Referendum by electors to alter the Constitution

⁶ (1997) 189 CLR 520

⁷ [2004] HCA 39

⁸ *Lange* at 567-568

4. Relevant Legislation, policy and Procedure

Legislation

The relevant legislation is found in the provisions of s100 *Corrective Services Act 2000* (Qld) (“CSA”):

(1) A person must not—

- (a) interview a prisoner, or get a written or recorded statement from a prisoner, whether the prisoner is inside or outside a corrective services facility; or
- (b) photograph or attempt to photograph—
 - (i) a prisoner inside a corrective services facility; or
 - (ii) a part of a corrective services facility.

Maximum penalty—100 penalty units or 2 years imprisonment.

(2) A person does not commit an offence if the person is—

- (a) for subsection (1)(a) or (b)(i)—the prisoner’s lawyer; or
- (b) an employee of a law enforcement agency; or
- (c) the ombudsman; or
- (d) a person who has the chief executive’s approval.

(3) In this section—

photograph includes record a visual image by another apparatus.

prisoner includes a person released under a post-prison community based release order.

The Explanatory notes of the Corrective Services Bill 2000⁹ provides an example of an action that Parliament considers would amount to an offence against s100(1) CSA, namely:

Example—

A journalist visits a prisoner claiming to be a friend of the prisoner and, without the chief executive's approval, conducts an interview.

Further, the Objective of the Legislation includes as a major priority¹⁰, ‘*the safety of the community, the safety of staff and visitors and the safety of offenders*’ and ‘*The Bill proposes to provide that offenders’ entitlements, other than those entitlements or rights which can not be reasonably provided because of the limitations of imprisonment or the sentence of the court, are safeguarded*’.

Policy and Procedure

The relevant Procedures governing the provisions of s100 CSA are found in:

- (1) Department of Corrective Services Procedure- Communications- Media Access (attached); and
- (2) Department of Corrective Services Procedure- Offender Management- Interviewing Offenders (Versions 00 and 01 attached)

5. Government or Political matters

Before the first limb of the test of constitutional validity cited in *Lange* can be satisfied, a clear nexus needs to be established between s100 CSA and whether that law is relevant to electors making a voting choice at a federal election or by referendum.

⁹ Corrective Services Bill 2000, Expl. No. 23 of 2000 at p 109

¹⁰ *supra* at p 1

Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ held in *Lange*¹¹:

“..., ss 7 and 24 and the related sections of *the Constitution* necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors. Those sections do not confer personal rights on individuals.”

There is no definition of what constitutes ‘government or political matters’, and as such, is open to interpretation, however, the ‘broad-brush’ approach adopted in the joint judgment of Mason CJ, Toohey and Gaudron JJ in the case of *Theophanous v Herald & Weekly Times Ltd*¹² that:

“political communication ... refers to all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about”

was reigned in by the decision in *Lange* to limit speech to that which is intrinsically linked with federal voting choices.

Gleeson CJ held in *Coleman v Power*¹³:

“...the constitutional freedom identified in *Lange* does not extend to speech generally, but is limited to speech of a certain kind”

Australian electors are able to vote separately and independently at State elections and Federal elections, which is apparent by Queensland having a State Labour Party elect, and a Liberal- Coalition Party governing at federal level. This allows a narrowing of the ‘defining’ of what government and political matters are, to a federal level, in keeping with the *Lange* decision.

An *implied* right of freedom of communication, derived from the High Court interpretation of the Constitution is distinguishable from a constitutional guarantee, found for example, at s117¹⁴ of the Constitution, which protects individuals from discrimination on the basis of residence and is heralded in the leading case of *Street v Queensland Bar Association*¹⁵, where admission to the Queensland Bar previously required a Barrister from interstate to reside in Queensland for one year, and principally practise in Queensland, effectively restricting any established practice that Barrister may have interstate

Section 100 CSA, of itself, does not purport to have a direct effect on the mechanisms of the Federal Government, however, 6 e) of the associated Department of Corrective Services Procedure- Communications- Media Access provides that media access will not be granted where ‘*the person is being detained for immigration purposes*’, and this provision, may place the restrictions on interviewing a prisoner / inmate under s100 CSA within the realms of ‘government or political matters’, as the area of immigration is a federal one.

¹¹ at 560

¹² (1994) 182 CLR 104 at 124

¹³ at para 28

¹⁴ ‘A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State’

¹⁵ (1989) 168 CLR 461

Media access will also not be granted under the aforementioned Procedure guidelines 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
- (f) the purpose of the media access is to investigate issues related to the offender's alleged innocence.

The Queensland Department of Corrective Services is a State statutory body, and the above procedural guidelines fall within the ambit of state, rather than federal politics, however, in addressing procedural guideline 6(f), there is a clear Doctrine of Separation of Powers, and a person's 'alleged innocence' / or not, is governed by the Judicature.

Brennan, Deane and Toohey JJ held in the High Court case of *Chu Kheng Lim v Minister for Immigration*¹⁶:

“it is one thing for Parliament, within the limits of the legislative power conferred upon it by the Constitution, to grant or withhold jurisdiction. It is quite a different thing for Parliament to purport to direct the courts as to the manner and outcome of the exercise of their jurisdiction”

The principle that the judgment of criminal guilt is a judicial function was also expressed by Jacobs J in *R v Quinn; Ex parte Consolidated Foods Corporation*¹⁷

Issues of embarrassment to departmental *employees*, raised at 6(d)(iii), do not reflect on the Department as a whole, and information may be obtained by persons regarding the Queensland Department of Corrective Services through provisions of the *Freedom of Information Act 1992* (Qld), which allows for transparency of statutory bodies, such as the Corrective Services Department.

6. Does the law serve a legitimate end that is compatible with a representative and responsible Government

This limb is the essence of determining the constitutional validity of s100 CSA.

Does the limitations placed on the interviewing of inmates / prisoners result in a government that is not representative of the electors or a responsible government?

As cited in the High Court decision of *APLA Limited v Legal Services Commissioner (NSW)*¹⁸:

“we are concerned with a freedom that arises by necessary implication from the system of responsible and representative government set up by the

¹⁶ (1992) 176 CLR 1 at 36-37

¹⁷ (1977) 138 CLR 1

¹⁸ [2005] HCA 44 (1 September 2005) at para 27

Constitution, not a general freedom of communication of the kind protected by the First Amendment to the United States Constitution”

The legitimate or otherwise end served by the law is found within the object of the statute from which it arises.

The object of the Corrective Services Bill is to provide for *‘the safe and humane containment, supervision and rehabilitation of sentenced offenders and persons detained in custody on remand’*¹⁹

Concern for the rights of inmates / prisoners was addressed in the formulation of the Bill in that²⁰:

‘In the past there have been calls for “prisoner’s rights” to be enshrined in the legislation. The 1988 Commission of Review into Corrective Services in Queensland considered this issue at some length. Kennedy received submissions from some community groups that suggested rights for prisoners that Kennedy found to be hardly compatible with security operations in prisons. Kennedy considered that, to issue an official statement of prisoners rights, would result in an overly legalistic environment for the resolution of grievances.

The Public sector Management Commission’s (PSMC) review of the Queensland Corrective services commission in 1993 also considered the issue. The PSMC noted the argument that “prisoners would not derive any greater protection from a codification of rights than exists under current legislation as any rights would have to be heavily qualified to enable proper administration of offenders and meet the requirements or order and discipline”.

...basic entitlements may include being treated fairly by public officials, being permitted to maintain family ties and being accorded appropriate recognition in terms of special needs. Again the Bill seeks to safeguard such matters (refer for example to clauses 3(3), 39, 50, 79, 89, 91(2), 122, 189(2) and 190 of the Bill).

Subclause (3) states that the Bill also recognises the need to respect an offender’s dignity; and the special needs of some offenders by taking into account an offender’s age, gender or race and any disability an offender has.

Section 100 CSA does not operate as a blanket prohibition, denying the media access to interview inmates / prisoners.

Provisions are found, for example, at s100(2)(d) CSA, to allow a person to interview inmates / prisoners with the approval of the chief executive.

Ancillary to that statute, Department of Corrective Services – Procedure – Offender Management – version 00 provides at 3.2, that the only the Director-General may grant approval for media access to inmates / prisoners.

¹⁹ Corrective Services Bill 2000, Expl. No. 23 of 2000 at p 1

²⁰ at pp31-32

Again, whilst restrictions are in place, approval may be granted if an application is made, with the chief executive giving consideration to the following:

- The purpose of interview is considered reasonable;
- Security and/or privacy of any person or of any corrective services facility will not be breached as a result of interview; and
- The interview, or any portion of the interview, will not be published or made public except with permission of the Director General

Approval to conduct research is granted by the Manager, strategic Planning and Policy Co-ordination²¹.

Any person may visit an inmate / prisoner, however, one proviso is the nature of the relationship to the inmate / prisoner must be disclosed, and, as there is no 'multiple choice' or pro-forma relationship listed on the relevant form, the person must actively, rather than passively, determine for themselves the nature of the relationship they disclose on the form, and it is expected that disclosure is an honest one.

Prisoners / inmates at a Corrective Service facility have access to legal representatives and are not impeded by the legislation to raise any concerns about their treatment or conditions at a Correctional Services facility. This is supported by, for example, the fact a prisoner was able to take his concerns about being denied a vegetarian diet to the Federal Court in the matter of *Minogue v Williams*²².

S100 allows the interviewing of a prisoner by the prisoner's lawyer, or the ombudsman, which provides an in-built mechanism to safeguard against the mistreatment of prisoners.

The well entrenched appellate processes that are an integral part of the criminal justice system, provide an avenue for prisoners to raise concerns on matters of law about any sentence they have received, and there is a plethora of cases that are heard by the Queensland Court of Appeal.

In addition, s100(2)(b) CSA allows for officers of the Crimes Misconduct Commission to interview inmates / prisoners if they have any concerns regarding police treatment or investigation processes.

It is clear, that a number of avenues are open to inmates / prisoners to guard against their mistreatment and whilst not infallible, as expounded upon by Defence witnesses, a balance must be struck to ensure the 'peace and good order' required in the operation of a Corrective Services facility is not compromised, and to this legitimate end, rules and guidelines are a necessity.

In the finding of s 7(1)(d) of the (now repealed) *Vagrants, Gaming and Other Offences Act 1931* (Qld) to be constitutionally valid, Gleeson CJ comments *Coleman v Power*²³:

“the answer necessarily involves striking a balance between competing interests, both of which may be described as rights or freedoms. As the Solicitor-General of Queensland pointed out in the course of argument, it is

²¹ Department of Corrective Services – Procedure – Offender Management – version 00 at 3.4

²² [1999] FCA 1585

²³ at para 32

often the case that one person's freedom ends where another person's right begins"

Section 100 CSA does not serve to impede discussion and communication that would allow electors to make informed decisions about who they may vote for at federal (or State) elections.

7. Summary

The nexus between s100 CSA and government and political matters may most correctly be established through the Department of Corrective Services procedural guideline 6(e), ancillary to s100 CSA.

Any burden found by the Court, however, is countered by the legitimate end served by s100 CSA, namely the requirement for rules and regulations governing the safe and humane containment, supervision and rehabilitation of sentenced offenders, which is compatible with a representative and responsible government, by not impeding discussion and communication amongst electors. Information about the plight of inmates / prisoners is able to be obtained through media access allowed under the approval of the Director-General and through other avenues open to the inmates / offenders.

8. Order sought

On the basis of the reasons outlined above, Prosecutions respectfully submit that Section 100 *Corrective Services Act 2000* (Qld) is constitutionally valid and should be upheld.