IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S314 of 2010

BETWEEN:

LEX PATRICK WOTTON
Plaintiff

and

STATE OF QUEENSLAND
First Defendant

CENTRAL AND NORTHERN QUEENSLAND REGIONAL PAROLE BOARD
Second Defendant

SUBMISSIONS ON BEHALF OF THE ATTORNEY-GENERAL FOR NEW SOUTH WALES (INTERVENING)

Part I:

1. The Attorney-General for the State of New South Wales (the **NSW Attorney**) certifies that these submissions are in a form suitable for publication on the Internet.

Part II:

2. The NSW Attorney intervenes pursuant to s 78A of the Judiciary Act 1903 (Cth).

Part III:

Why leave to intervene should be granted.

3. Not applicable.

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Part IV:

4. The NSW Attorney accepts the plaintiff's statement of applicable constitutional provisions, statutes and regulations.

Part V:

Overview

5. In these submissions, the NSW Attorney submits that:

(a) in relation to s 132 of the Corrective Services Act 2006 (Qld) (the **CS Act**), the law is reasonably appropriate and adapted within the second limb of the Lange/Coleman test;

(b) in relation to s 200(2) of the CS Act:

(i) because s 200(2) of the CS Act only allows for such conditions to be imposed by the Central and Northern Queensland Regional Parole Board (the **Parole Board**) if they are "necessary" to ensure the prisoner's good conduct or to stop the prisoner committing an offence, the provision is reasonably appropriate and adapted within the second limb of the Lange/Coleman test;

(ii) in any event, on no view is s 200(2) invalid in its entirety as it provides for the imposition of a wide range of parole conditions which could have no effect on the constitutional freedom of political communication;

(c) in relation to the impugned conditions (t) and (v):

(i) because the impugned conditions were imposed by the Parole Board as being necessary to ensure the plaintiff's good conduct or to stop him committing an offence, the impugned conditions fall within the terms of s 200(2) and are reasonably appropriate and adapted within the second limb of the Lange/Coleman test;

(ii) as the Parole Board considered the impugned conditions were necessary, it must be assumed that the Parole Board would not have ordered the plaintiff's conditional release from detention on parole without the imposition of, inter alia, those conditions.

Argument

6. The first question is whether the "law effectively burdens freedom of communication about government or political matters either in its terms, operation or effect": Lange v Australian Broadcasting Corporation (1997) 189 CLR 520 at 567 per curiam.

10 7. In deciding whether the freedom has been infringed, the central question is what the impugned law does, not how an individual might want to construct a particular communication: APLA Ltd v Legal Services Commissioner (NSW) (2005) 224 CLR 322 at 451 [381]; Hogan v Hinch (2011) 275 ALR 408; (2011) 85 ALJR 398 at [50] per French CJ.

8. While the range of matters that may be characterised as "governmental and political matters" for the purpose of the constitutional freedom is broad (Hogan v Hinch at [49] per French CJ), the freedom does not extend to discussions that cannot illuminate the choice for electors at federal elections or in amending the Constitution or cannot throw light on the administration of federal government:
20 Lange at 571 per curiam. Because the freedom of political communication is an implication drawn from ss 7, 24, 64, 128 and related sections of the Constitution, the implication can only extend so far as is necessary to give effect those sections: Lange at 567 per curiam.

9. The second question is whether the law is reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government: Coleman v Power (2004) 220 CLR 1 at 51 [93]-[96] per McHugh J; see also Gummow and Hayne JJ at 78 [196] and Kirby J at 82 [211]; see also APLA (2005) 224 CLR 322 per Gleeson CJ and Heydon J at [26]-[29], McHugh J at [56]ff,
30 Gummow J at [213]ff, Hayne J at [376]ff and Callinan J at [446]ff.

10. The question for the Court is not whether some choice other than Parliament's choice was preferable but whether the choice was a reasonable one in light of the burden which it places on the constitutional freedom of political communication: Lange at 561 – 562, 567; see also Levy v State of Victoria (1997) 189 CLR 579 at 598 per Brennan CJ, 608 per Dawson J, 614 – 615 per Toohey and Gummow JJ, 618 – 620 per Gaudron J, 627 – 628 per McHugh J, 647 – 648 per Kirby J; Coleman at [31] per Gleeson CJ, [100] per McHugh J, [292] per Callinan J, [328] per Heydon J; cf. [235] per Kirby J; Mulholland v Australian Electoral Commission (2004) 220 CLR 181 at [32] – [33] per Gleeson CJ, [248] – [249] and [256] – [267] per Kirby J, [360] per Heydon J.

11. There is an important distinction between laws that have the purpose of restricting discussion of government or political matters and those that merely affect it incidentally: see generally Hogan v Hinch at [95] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; Levy at 611 and 614 per Toohey and Gummow JJ, 618 – 619 per Gaudron J, 645 per Kirby J; see also Coleman at [326] per Heydon J; cf. [30] – [31] and [33] per Gleeson CJ; Mulholland at [40] per Gleeson CJ; APLA at [28] per Gleeson CJ and Heydon J; NSW Council for Civil Liberties Inc v Classification Review Board (No. 2) (2007) FCR 108 at [192].

12. None of the challenged provisions can be characterised as a law that has the purpose of restricting discussion of government or political matters. The burdening effect of the challenged provisions on such communications, if any, is incidental and unrelated to their nature as political communications: Mulholland at [32] – [33] per Gleeson CJ; Hogan v Hinch at [95] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

Section 132

13. The plaintiff has not identified an interview or recorded statement that he wishes to give which he alleges is prohibited by s 132 and which effectively burdens the constitutional freedom of political communication. It is not apparent that the matters the plaintiff wishes to discuss are within the implied freedom. This can be contrasted with Coleman where the Appellant had made a public statement which was the subject of a charge and the Queensland Attorney General had conceded

that the relevant provision was capable of burdening communications about government or political matters in some circumstances.

14. Section 132 is contained within Part 3 of the CS Act, entitled "Breaches of Discipline and Offences". Section 132, in combination with s 7 of the Criminal Code (Qld), relevantly prevents a prisoner, including a person while released from prison on parole such as the plaintiff, from participating in an interview or supplying a written or recorded statement with certain persons without prior authorisation.

15. The plaintiff's challenge to s 132 is not limited to its application to him as a prisoner on parole. Thus, if successful the challenge would invalidate s 132 in its entirety; including as it extends to all prisoners, whether they are in detention or on parole.

16. Section 132 operates in aid of the broader scheme of prisoner legislation embodied in the CS Act. It is true, as the plaintiff points out, that the CS Act makes extensive other provision for the maintenance of order and security in relation to prisoners. It is submitted this Court should be reluctant to take up the invitation of the plaintiff to substitute its own judgement as to whether the other provisions in the statutory scheme are sufficient to maintain that order and security: cf. plaintiff's submissions at [60].

17. The ability of prisoners to communicate with others has been the subject of extensive restriction since colonial times, as the submissions for the first defendant demonstrate. Further, courts in Australia have tended to interpret prison legislation so as to give full scope to the power of correctional authorities to carry out the tasks of prison administration and management without undue interference from the courts: see Kelleher v Commissioner, Department of Corrective Services [1999] NSWSC 86 per McInerney J; Nicolopoulos v Commissioner for Corrective Services [2004] NSWSC 562; 148 A Crim R 74; Herald Weekly Times Ltd v Correctional Services Commissioner [2001] VSC 329; Anderson v Pavic [2005] VSCA 244; Haque v Commissioner of Corrective Services [2008] NSWSC 253; see also, Turner v Safley 482 US 78 (1987).

18. The five objectives served by s 132 of the CS Act are set out at SCB 30. The plaintiff accepts that the first four of those objectives are legitimate ends for the purposes of the second Lange/Coleman question: see plaintiff's submissions at [51].

19. Section 132 is reasonably appropriate and adapted to serve those legitimate ends in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.

20. First, s 132 only limits the unapproved access of the media and certain other persons to current prisoners. Its operation only extends until a prisoner is "discharged" from custody (that is, unconditionally released from lawful custody) and accordingly does not affect a prisoner after the expiration of his/her parole. It is of some significance that parole is the period where a prisoner is still subject to a term of imprisonment but has been conditionally released from detention subject to conditions.

21. Secondly, the plaintiff's argument that the restriction in s 132 imposes a blanket ban regardless of the content of the interview/statement and regardless of the length or purpose of particular prisoner's imprisonment is unfounded: see plaintiff's submissions at [52]. By s 132(2)(d), the legislature has conferred a discretion on the chief executive of the prison to give approval for the interview of, or obtaining of a statement from, a prisoner. That discretion must be exercised on a case-by-case basis. Factors such as the proposed content of the interview/statement and the particular circumstances of the prisoner (including the length or purpose of his/her imprisonment) would be relevant to the exercise of that discretion by the chief executive.

22. Because of the approval mechanism, the purported "incongruities" the plaintiff identifies do not arise. Each of the prisoners listed in the plaintiff's submissions at [53] would be entitled, for example, to give interviews/statements to the media with prior approval. In this respect, for example, the fact that a particular prisoner is a member of Parliament or is standing for election/re-election to Parliament would be a factor relevant to the exercise of discretion by the chief executive under s 132(2)(d): see plaintiff's submissions at [53.1].

23. Because s 132(2)(d) confers a case-by-case discretion, it is to be distinguished from provisions which impose a general prohibition or legislature rule: cf. Nationwide News v Wills (1992) 177 CLR 1; Fairfax Publications v Attorney-General (NSW) (2000) 158 FLR 81; (2000) 181 ALR 694.

24. In Wainohu v New South Wales [2011] HCA 24, Gummow, Hayne, Crennan and Bell JJ concluded that the Crimes (Criminal Organisations Control) Act 2009 (NSW) did not infringe the constitutional freedom of political communication, observing at [113] that s 19(7) of the Act permitted the modification of a control order to exempt a person if in the opinion of the Court the circumstances of the case so required so as not unreasonably to burden freedom of political communication.

25. The plaintiff's reliance on the first instance decision of Bennett v Human Rights and Equal Opportunity Commission (2003) 134 FCR 334 is inapposite. That case involved a provision banning disclosures by public servants in relation to government programs and policies the ambit of which was such that "even the most scrupulous public servant would find it imposes 'an almost impossible demand' in domestic, social and work-related settings": at [98]. The same cannot be said of s 132, a provision which, in any event, only applies to prisoners.

26. Thirdly, it is not the case that the exercise of the discretion to give approval under s 132(2)(d) is largely unreviewable: cf. plaintiff's submissions at [55]. The discretion conferred by s 132(2)(d) would be construed conformably with the implied freedom so as to render reviewable for error any particular refusal to grant consent which exceeded the limit of the implied freedom: see Wainohu at [113] per Gummow, Hayne, Crennan and Bell JJ. A relevant factor in the exercise of the discretion under s 132(2)(d) would accordingly include the extent of the burden on the freedom as balanced against the legitimate ends sought to be achieved by the provision.

27. Fourthly, contrary to the plaintiff's submission, s 132 does not unduly restrict the flow of information relevant to allowing voters to make an informed vote in an election of members of the Parliament.

28. In terms of information flowing in the direction from prisoners to the media, there is a large group of recently-discharged prisoners who are available to both the media and the general public as a source of information about the conditions in prisons and other issues affecting prisoners. It follows that access to information pertinent to debate on topics such as prison conditions, prison reform and the rehabilitation of prisoners is not unduly restricted: cf. plaintiff's submissions at [50]. Voters accordingly have the ability to acquire relevant information in order to make an informed vote in an election of members of the parliament: see generally Roach v Electoral Commission (2007) 233 CLR 162 at [86] per Gummow, Kirby and Crennan JJ.

29. In this respect, cases considering different statutory schemes in the United States and elsewhere are of limited assistance in the Australian constitutional setting in the absence of an equivalent of the 1st Amendment: see generally Lange at 561, 566, 567-568; Levy at 625-626 per McHugh J; Roach at [86] per Gummow, Kirby and Crennan JJ. In any event, those cases establish that there is no right of general access of the media to prisoners: see generally Saxbe v Washington Post 417 US 843 (1974).

Section 200(2)

30. The plaintiff seeks an order that s 200(2) is invalid in its entirety.

31. Section 200(2) is contained within Part 5 of the CS Act – entitled "Parole" – and operates in aid of the broader scheme embodied in the Act providing for the early conditional release of prisoners on parole.

32. A prisoner may make an application under s 180 of the CS Act seeking release from detention on parole. Section 187(2) authorises the relevant regional parole board to hear such an application.

33. Section 200(1) provides that a parole order *must* include certain nominated conditions. Section 200(2) provides that a parole order *may* also contain conditions "the board reasonably considers necessary" to ensure the prisoner's good conduct or to stop the prisoner committing an offence.

34. Section 200(2) cannot be characterised as a law with respect to communication about matters of government and politics. In any event, a legislative provision that embodies an administrative power to condition release from detention on parole subject to conditions places no burden on the constitutional freedom of political communication, provided the criteria on which the discretion is to be exercised are not inconsistent with that freedom.

35. Section 227(2) provides for the making of guidelines by the State Parole Board regarding the policy to be followed by the regional Parole Board in performing its functions. The relevant Board Guidelines provided, inter alia, that:

10 (a) when considering whether a prisoner should be granted a parole order, the highest priority should always be the safety of the community;

(b) before making a decision to grant any prisoner a parole order the Board should always consider the level of risk that the prisoner may pose to the community; and

(c) in following the Guidelines, care should be taken to ensure that decisions are made with regard to the merits of the particular prisoner's case (Guidelines cl 1.1, 1.2, 2.3; SCB 73).

36. Section 200(2) only allows for conditions to be imposed if they are "necessary" to ensure the prisoner's good conduct or to stop the prisoner committing an offence.

20 37. As s 200(2) does not require the making of any particular parole conditions, it is not to be applied in an absolute way: see Hogan v Hinch at [50] per French CJ.

38. The burden upon political communication, if any, in any particular case will vary and depend upon the scope of the conditions which the Parole Board makes under s 200(2), having regard to what is necessary in the particular circumstances of the prisoner: see Hogan v Hinch at [98] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

39. Even if a material burden was placed upon the constitutional freedom of political communication, any such burden would be incidental to the achievement of

legitimate objects; namely, that the conditions are necessary to ensure the prisoner's good conduct or to stop the prisoner committing an offence.

40. Because of the "necessity" requirement and the fact that the discretion must be exercised on a case-by-case basis, s 200(2) is reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government: Coleman at 51 [93]-[96] per McHugh J; see also Gummow and Hayne JJ at 78 [196] and Kirby J at 82 [211].

Impugned conditions

41. When the plaintiff was sentenced to six year's imprisonment, the sentencing judge set a parole eligibility date of 18 July 2010 which had the effect that, if the Parole Board granted parole commencing on that date, the plaintiff would only serve two years of that six year sentence: Special Case at [17], [20] SCB 49; see sentencing remarks at SCB 98.

42. The plaintiff made an application on 17 February 2010 under s 180 of the CS Act for parole seeking release on the earliest parole eligibility date of 18 July 2010: Special Case at [18]-[19] SCB 51, 102. Section 187(2) of the CS Act authorised the Parole Board to hear and decide that application: Special Case at [18]; SCB 51.

43. Consistently with the terms of s 200(2), in deciding the plaintiff's application for parole, the Parole Board took into account a broad range of evidence and submissions in relation to the particular circumstances of his case: Special Case at [19]; SCB 51. The Parole Board also had regard to Guidelines made by the Queensland Board about the policy to be followed when performing its functions: see Special Case at [14], [19(f)]; SCB 48, 51, 72-81.

44. By seeking early release from his six-year term of imprisonment in the application for parole, it was the plaintiff who initiated a process the end result of which was that the Parole Board in its discretion determined that:

(a) the plaintiff be granted early release from detention on parole commencing 19 July 2010 under a parole order subject to a series of conditions which

operate for the remaining four years of his sentence (ie. until 19 July 2014): Special Case at [20] SCB 51, 146:

(b) inter alia, the impugned conditions were "necessary" under s 200(2) for his early release from detention on parole to ensure his good conduct or to stop him committing an offence.

45. Given the power to impose conditions under s 200(2) was, from enactment, subject to the constitutional freedom of political communication (including any freedom of association implied by the Constitution as a corollary to the implied freedom of political communication: see Wainohu at [112] per Gummow, Hayne, Crennan and Bell JJ), it ought be assumed that the Parole Board took the freedom into account when exercising its discretion.

46. Even if such an assumption is not made, the fact that the Parole Board concluded that the conditions are necessary to ensure the plaintiff's good conduct or to stop him committing an offence while on parole, of itself, demonstrates that the impugned conditions are reasonably appropriate and adapted within the second limb of the Lange/Coleman test: Coleman at 51 [93]-[96] per McHugh J; see also Gummow and Hayne JJ at 78 [196] and Kirby J at 82 [211].

47. In relation to condition (t), the plaintiff's position is that he wished to speak at a meeting on issues of youth alcohol and drug use: Special Case at [12]; SCB 47. It is not evident that speaking at a public meeting on issues of youth alcohol and drug use burdens the constitutional freedom of political communication. Further, a condition directed at attendance at public meetings without prior approval while on parole is obviously reasonably appropriate and adapted, given the nature of the offences committed by the plaintiff.

48. In relation to the challenge to condition (v), it is not alleged that the plaintiff has received a benefit in breach of the condition (nor has the plaintiff identified any benefit that he wishes to receive) which he alleges effectively burdens the constitutional freedom of political communication. In any event, it is not a burden on communication of any kind but only on receiving payment for such.

48. The course proposed by the plaintiff, of invalidating the impugned conditions but leaving the current parole order on foot, would mean the plaintiff would be on parole subject to a different and lesser set of conditions in circumstances where the Parole Board in its discretion determined that the full set were necessary.

Dated: 25 July 2011

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