

SUFFERING IN SILENCE: PROHIBITIONS ON INTERVIEWING PRISONERS IN AUSTRALIA, THE US AND THE UK

TAMARA WALSH*

In all Australian States and Territories, journalists and researchers can be charged with a criminal offence if they interview a prisoner without government permission. The dangers of such laws, both in terms of free speech and preventing miscarriages of justice, have been recognised in both the US and the UK. Yet in 2005, an Australian investigative journalist was charged with unlawfully interviewing a prisoner in Queensland. This article contrasts the Australian position with that of the US and the UK and examines the constitutional, administrative and human rights law arguments against these oppressive Australian laws.

I INTRODUCTION

In April 2005, an Australian investigative journalist, Anne Delaney, was arrested for unlawfully interviewing a prisoner under s 100 of the *Corrective Services Act 2000* (Qld).¹ This Act has recently been repealed and replaced by the *Corrective Services Act 2006* (Qld), yet this offence remains unchanged, and is now at s 132. Under this section, it is illegal for any person to interview a prisoner or obtain a statement from a prisoner, without the permission of the chief executive.²

Delaney was visiting a woman accused of the manslaughter of one of her three newborn triplets; her intention was to investigate the possibility of filming a documentary questioning the safety of this woman's conviction. She advanced a two-fold argument against the charge. First, she asserted that she was not conducting an interview with the prisoner, but rather engaging in preliminary discussions with a view to determining whether to pursue the possibility of conducting a formal interview with her. Second, she argued that the relevant provision was unconstitutional for infringing the implied constitutional freedom of political communication.³

* Lecturer and Fellow of the Centre for Public, International and Comparative Law, TC Beirne School of Law, University of Queensland.

1 *Police v Anne Catherine Delaney* (2005) Richland Magistrates' Court (unreported, Magistrate Wessling, 22 December 2005) ('*Delaney*').

2 That is, the Director-General.

3 The existence of this implied constitutional right was confirmed by the High Court in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 ('*Lange*').

Although prosecutions for this and like offences are relatively rare in Australia,⁴ they are a legal possibility in all Australian States and Territories; in each Australian jurisdiction, neither journalists nor researchers can interview a prisoner without permission from the relevant government department.⁵ Until the *Delaney* case, the constitutionality of provisions of this nature had not been tested in Australia. This contrasts with the situation in the United States and the United Kingdom, where similar provisions have been tested by the US Supreme Court⁶ and the UK House of Lords.⁷ The findings of the courts in these cases provide some support for the argument that the equivalent Australian provisions are overly broad and encroach on the common law and constitutional rights of prisoners, journalists and the community.

Since Australia lacks a bill of rights, or indeed a human rights Act, the means of enforcing these rights is not straightforward. However, there are some avenues for contesting these laws, and the policies behind them, upon legal and practical grounds. First, it may be argued that access to prisoners by journalists and researchers is necessary to ensure corrective services' accountability, and to protect the prisoners in their care. Such considerations may be relevant from an administrative law perspective to establish the reasonableness of departmental decisions made regarding prisoner interviews. Second, the implied constitutional freedom of political communication may be relied on to contest the validity of these provisions and the policies underlying them (as was argued in the *Delaney* case). Third, the common law right of free speech, and the associated right to freedom of the press, may be relied upon in any legal argument being made against a conviction under these sections. This article will explore each of these arguments, and ultimately make some recommendations for reform.

II INTERVIEWING PRISONERS IN AUSTRALIA

Restrictions exist on interviewing prisoners in all Australian States and Territories. In Queensland, it is an offence to interview a prisoner or obtain a statement from a prisoner without the permission of the Director-General.⁸ While on its face this law does not seem particularly burdensome on fundamental rights, the policies underpinning the law, and the way in which the law is enforced, amount to an effective ban being imposed on prisoner interviews.

4 In Queensland, one other journalist was prosecuted for contravening the equivalent provision prohibiting interviews with prisoners in the superseded *Corrective Service Act 1988* (Qld) s 104(10)(f) in 2001. In that case, the defendant was convicted and fined \$500 for the first count, and \$300 for a second count; see *Renwick v Bell* [2001] QDC 006.

5 See *Crimes (Administration of Sentences) Act 1999* (NSW) s 267; *Corrections Act 1986* (Vic) ss 32, 37, 39; *Correctional Services Act 1982* (SA) s 51(1); *Prisons Act 1981* (WA) ss 52, 65, 66; *Corrections Act 1997* (Tas) ss 12, 18; *Prisons (Correctional Services) Act* (NT) ss 39, 40, 94.

6 See especially *Pell v Procunier* 417 US 817 (1974) ('*Pell*'). See also *Saxbe v Washington Post* 417 US 843 (1974) ('*Saxbe*'), decided on the same day.

7 *Re Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115 ('*Simms*').

8 *Corrective Services Act 2006* s 132; previously *Corrective Services Act 2000* (Qld) s 100.

The Queensland Department of Corrective Services' media access policy states that decisions regarding media access should be directed towards 'maximising positive media coverage and outcomes for the Department's activities' and 'enhancing public confidence in the corrections system in Queensland'.⁹ The policy states that media access 'will not be granted' where it 'could embarrass' the Department, or where its purpose is to 'investigate issues related to the offender's alleged innocence'.¹⁰

Approval for interviews by researchers may only be granted where the purpose of the interview 'is considered reasonable' by the Director-General, and no portion of the interview may be published or otherwise made public without the Director-General's consent.¹¹ In addition to this, Departmental staff members are prohibited from being interviewed by the media and researchers without the permission of the Director-General under their Code of Ethics¹² and Departmental procedures.¹³ In practice, the Queensland Department of Corrective Services has permitted only two media outlets to interview staff or offenders in recent history;¹⁴ predictably, access to interviewees was strictly controlled, and limited to specific subjects.¹⁵ Further, only those researchers who have been commissioned by the Department to undertake research (and whose findings will ultimately be made cabinet-in-confidence) have been granted access to Queensland prisoners in recent years.¹⁶ Thus, these policies operate to impose a blanket ban on the free and informed public discussion of most correctional subjects, including the safety of offenders' convictions and prison conditions, unless that discussion reflects positively on the Department.

The New South Wales *Crimes (Administration of Sentences) Act 1999* contains a provision which has the same effect in practice, but is slightly more sophisticated. Under s 267 of that Act, a person who wishes to carry out 'research' (that is research in connection with the management of correctional centres, services provided to prisoners, circumstances of prisoners or 'some other aspect of penology'), may apply to the Commissioner for approval. The section states that the Commissioner may have regard to recommendations made by ethics committees in making his/

9 Queensland Department of Corrective Services, *Operations and Procedures: Media Access* (2005).

10 Ibid.

11 Queensland Department of Corrective Services, *Operations and Procedures: Interviewing Offenders* (2004).

12 Queensland Department of Corrective Services, *Code of Conduct* (2000).

13 Queensland Department of Corrective Services, above n 9.

14 Queensland Department of Corrective Services, *Response to the Incorrections Report* (2005).

15 Sex offender programs in one, and mothers and children in custody in another: see *ibid*.

16 Indeed, the author experienced this first hand during a recent research project which culminated in the release of the *Incorrections Report: Tamara Walsh, Incorrections: Investigating Prison Release Practice and Policy in Queensland and its Impact on Community Safety* (2004). The researcher was denied the opportunity to interview current prisoners (which, under the Queensland definition, includes those subject to post-prison community-based release orders (see the then *Corrective Services Act 2000* (Qld) s 153, now at *Corrective Services Act 2006* (Qld) s 214)), so the analysis was restricted to information gathered from interviews with ex-prisoners and their service providers. See also Tamara Walsh, 'Is corrections correcting? An examination of prisoner rehabilitation policy and practice in Queensland' (2006) 39(1) *Australian and New Zealand Journal of Criminology* 109.

her decision, and if the Commissioner decides not to grant approval, he/she must provide reasons. By explicitly recognising the expertise of ethics committees and requiring reasons for an adverse decision to be given, the New South Wales section contains some safeguards against arbitrary decision-making; both of these elements provide ammunition for unsuccessful applicants to pursue administrative law remedies. However, the possibility of a blanket ban on media and researcher access is not eliminated completely. The section confers a great deal of discretion on the Commissioner; indeed, it explicitly states that the Commissioner may approve a researcher's application in any manner and subject to any conditions he/she considers appropriate.

The remaining Australian States and Territories are able to restrict media and researchers' access to prisoners through their general visiting provisions. In all other States and Territories, legislation states that only authorised people may visit or communicate with prisoners, and penalties for contravention range from \$100 to two years imprisonment.¹⁷ In addition to this, in Victoria, Western Australia and Tasmania, the legislation states that details of each visit, including the visitor's identity, relationship to the prisoner and the purpose of the visit, must be collected, whilst the provision of misleading information can result in penalties ranging from \$100 to 18 months imprisonment.¹⁸

A The Law in the US and the UK

Thus, in practice, the provisions in all Australian jurisdictions relating to media and researcher interviews of prisoners allow for (effective) blanket bans on media and researcher access to prisoners. Yet, the validity of provisions of this nature, and the policies behind them, had (prior to the *Delaney* matter) never been contested in Australia before.¹⁹ This provides a strong contrast to the situation in both the US and the UK where the legality of such bans has been challenged.

1 Interviewing Prisoners in the US

In the US, it has been held that bans on interviews with prisoners are only permissible if there can be said to be sufficient alternative avenues for communication between prisoners and journalists/researchers, and other means by which adverse prison conditions may be uncovered.²⁰ That is, incoming and outgoing mail must remain unlimited, uncensored and preferably uninspected; telephone contact must be

17 *Corrections Act 1986* (Vic) ss 32, 39, 43; *Correctional Services Act 1982* (SA) ss 34, 51(1), 85A; *Correctional Services Regulations 2001* (SA) s 12; *Prisons Act 1981* (WA) ss 52(1), 65, 66; *Prisons (Correctional Services) Act* (NT) ss 39(h), 40, 94; *Corrections Act 1997* (Tas) s 12.

18 *Corrections Act 1986* (Vic) s 42; *Prisons Act 1981* (WA) s 60(1); *Corrections Act 1997* (Tas) s 18.

19 Prior to the *Delaney* matter, the only other case in which a provision regarding prisoner interviews was discussed in depth was in *Herald and Weekly Times v Correctional Services Commissioner* [2001] VSC 329 ('*Herald and Weekly Times*') (discussed below). In that case, an administrative decision preventing a journalist from accessing a prisoner for an interview was challenged, but the validity of the relevant provision was not considered.

20 *Pell* 417 US 817 (1974).

freely available, and other possibilities for interactions between the prison system and journalists must exist, for example, through prison tours, dialogue with prison staff and interviews with recently released ex-prisoners.²¹

A number of cases have been brought before the Supreme Court in the United States regarding journalists' access to prisoners. In the landmark cases of *Pell*²² and *Saxbe*²³ (which were decided on the same day), a five to four majority of the Court held that regulations prohibiting interviews between prisoners and journalists were not unconstitutional, considering that a number of alternative avenues of communication were open to them. The majority emphasised the fact that journalists' access to prisoners via written mail was virtually unimpeded, following the decision of the Court in *Procunier v Martinez*.²⁴ Indeed, the court noted in *Saxbe* that federal prisoners' mail to media personnel was neither inspected nor censored.²⁵ Further, the Court noted that journalists could freely interview those who have access to prisoners, including their family members and lawyers, and members of the clergy.²⁶ On this basis, the majority concluded that prisoners' constitutional right to free speech was not infringed by the regulations.

In addition, the majority held that journalists' right to freedom of the press remained unimpeded by the regulations since the prohibition against media interviews with prisoners was not an attempt by the State to conceal information.²⁷ Public tours of prisons were held, during which members of the press were free to engage in discussions with random prisoners they encountered, and the press was permitted to attend prisoners' group meetings.²⁸ Thus, the court upheld the constitutional validity of the regulations.

The approach of the court in *Pell* was solidified in *Houchins v KQED Inc.*²⁹ In that case, a radio and television broadcaster had requested, and was denied, permission to access a certain portion of a prison that had been the site of alleged beatings, rapes and adverse physical conditions, as well as a prisoner's suicide. A four to three majority of the Supreme Court held, consistent with the decisions in *Pell* and *Saxbe*, that since other unmonitored and uncensored means of communication with prisoners were available to the media (including telephone calls and letter writing), the prohibition on media interviews was not unconstitutional.³⁰ Further, the court remarked that there were many other opportunities for adverse prison

21 *Pell* 417 US 817 (1974); *Saxbe* 417 US 843 (1974); *Guajardo v Estelle* 580 F 2d 748 (5th Cir 1978).

22 417 US 817 (1974).

23 417 US 843 (1974).

24 416 US 396 (1974) (*Procunier*). In that case, the court held that prisoners' incoming and outgoing mail should remain substantially uncensored and that any decision to censor prisoners' mail should be accompanied by procedural safeguards: see especially 416 US 396, 417 (1974).

25 417 US 843, 847-8 (1974).

26 417 US 817, 824-5 (1974).

27 417 US 817, 830, 848 (1974).

28 417 US 817, 830 (1974).

29 438 US 1 (1978) (*Houchins*).

30 438 US 1, 6, 15 (1978).

conditions to be exposed (for example, through citizen taskforces, grand juries, prosecutors and judges who were free to visit jails at any time).³¹ In addition to this, prison staff members were free to approach the media to report their concerns.³²

Unlike the jurisdictions at issue in these US cases, in Queensland, there are virtually no alternative avenues for free communication between prisoners and potential interviewers. Mail is routinely inspected and censored.³³ Indeed, even 'privileged mail' (defined in the regulations as mail sent to approved persons including prisoners' lawyers, the Ombudsman and the Human Rights and Equal Opportunity Commission, but not media personnel or researchers) can now be opened and inspected.³⁴ Prisoners are only able to make phone calls to approved numbers,³⁵ and only 10 numbers are made available to a prisoner at any one time.³⁶ Telephone calls are recorded and monitored³⁷ and access to the telephone system may be denied as a form of discipline.³⁸ Further, prison tours involving contact with inmates are not offered.³⁹ In addition to all this, the number of persons other than prisoners from whom media and researchers can obtain information is more limited in Queensland compared with the US jurisdictions at issue in these cases. For example, prison staff cannot be interviewed without departmental permission,⁴⁰ nor can newly released prisoners subject to a parole order.⁴¹ Thus, the situation as it stands in Queensland would not be permitted in the US.

31 438 US 1, 12-13 (1978).

32 438 US 1, 15 (1978).

33 *Corrective Services Act 2006* (Qld), Part 2 Division 4 Sub-Division 1.

34 *Corrective Services Act 2006* (Qld) s 45. This contrasts with the situation in California as outlined in the case of *Pell* 417 US 817 (1974). Based on the finding of the Supreme Court in *Procunier* 416 US 396 (1974), prisoner correspondence remained uncensored. Indeed the court said (at 824) that written mail afforded prisoners 'with an open and substantially unimpeded channel for communication' with the media. That cannot be said of the situation in Queensland.

35 See *Corrective Services Act 2006* (Qld) ss 50, 52, previously the *Corrective Services Act 2000* (Qld) ss 36, 37.

36 Queensland Department of Corrective Services, *Safety and Security Procedures: Prisoner Telephone System*(2005).

37 Unless the call is to the ombudsman, the prisoner's lawyer or a law enforcement officer, see *Corrective Services Act 2006* (Qld) s 52.

38 Queensland Department of Corrective Services, above n 36.

39 In January 2006, the Minister for Corrective Services permitted the media to tour a jail, however it was vacant at the time for redesigning: see The Hon Judy Spence MP, 'Behind the bars tour before jail redevelopment', Media Statement, 17 January 2006.

40 Queensland Department of Corrective Services, above n 12.

41 Under s 214 of the *Corrective Services Act 2006* (Qld), 'prisoner' is defined to include released prisoners subject to parole orders.

2 Interviewing Prisoners in the UK

The legislative provisions regulating prisoner interviews in Australia closely reflect those of the UK. Under ss 34 and 35 of the *Prison Rules 1999* (UK),⁴² prisoners are not permitted to communicate with other persons, or receive visits from other persons, without the leave of the Secretary of State. Likewise under s 73(1), outside persons may be prohibited from visiting prisons by the Secretary of State in the interests of securing discipline, good order and prevention of crime. Indeed, complete discretion is conferred upon the Secretary of State to impose restrictions upon prisoner communications both generally and with regard to specific individuals.

Standing orders made pursuant to these statutory instruments, and the policies underpinning them, were contested in *Simms*.⁴³ The standing orders stated that visits to prisoners by journalists should not ordinarily be allowed, unless the journalist signed a written undertaking not to publish any information he/she obtained. The standing orders went on to say that if, in exceptional circumstances, a journalist is permitted to interview a prisoner, they must sign an undertaking that they will only publish the material obtained with the permission of the Governor. In the case of *Simms*,⁴⁴ two prisoners had been denied visits from journalists; they brought an action contesting the validity of the relevant laws, and the blanket ban policy underpinning them. They argued that their common law right to free speech extended to their being permitted to access the services of investigative journalists where the safety of their conviction was being questioned, in order that they might gain access to justice.

The House of Lords held that the standing orders were not ultra vires, but that the manner in which they were applied in this case was unlawful. The court stated that, in view of the fact that investigative media had caused substantial injustices to be remedied in the past, prisoners should be permitted to be orally interviewed by journalists on the subject of the safety of their conviction. As Lord Steyn remarked, 'In principle it is not easy to conceive of a more important function which free speech might fulfill'.⁴⁵ Lord Millett added that the refusal of an interview for this purpose 'would strike at the administration of justice itself'.⁴⁶

Thus, under UK law, Ms Delaney could not have been prosecuted for unlawfully interviewing a prisoner because bans on interviews with prisoners have been held not to extend to circumstances where the purpose of the interview is to discuss a possible miscarriage of justice in the prisoner's case.

Based on this analysis of the law in the US and the UK, it must be concluded that Queensland (and Australian) law lags behind international developments.

42 Made under s 47 of the *Prison Act 1952* (UK).

43 [2000] 2 AC 115.

44 *Ibid.*

45 *Ibid* 409.

46 *Ibid* 425.

B Administrative Law Arguments Against a Blanket Ban on Prisoner Interviews

The imposition of (effective) blanket bans on interviews with prisoners seriously compromises the transparency, accountability and integrity of corrective services. It has been stated in the literature that well-run corrective services must be committed to democratic values including transparency, accountability and evidence-based practice.⁴⁷ Indeed, the *Standard Guidelines for Corrections in Australia*,⁴⁸ which represents a ‘statement of intent’ by all correctional services departments in Australia, states that corrections should be ‘informed by research and reflect sound evidence-based practice’ and that operations should be open and transparent.⁴⁹ Internationally, these values are recognised in the United Nations *Standard Minimum Rules for the Treatment of Prisoners*.⁵⁰

None of these goals can possibly be achieved unless independent researchers and journalists are permitted to interview prisoners. There are two main reasons for this. First, alternative means of communication that are available for obtaining information relating to prisoners are no substitute for personal interviews. It is axiomatic that research is most reliable when obtained straight from the source; the people who are the subject of the research are those who can most accurately portray their experiences and perspective. Journalists have testified in court, both in Australia⁵¹ and overseas,⁵² that interviewing prisoners’ family and friends, or their service providers (such as counsellors, lawyers and members of the clergy) is not as valid or reliable a source of data as an interview with the prisoner would be.⁵³ Also, written correspondence is an inadequate substitute for an interview with any population group; credibility is much more easily assessed in a face-to-face interview.⁵⁴ Since many prisoners are undereducated or illiterate,⁵⁵ it is very difficult to get a sense of prisoners’ experiences through the written word; and any investigation based on written correspondence would necessarily be limited to the experiences of the least disadvantaged of prisoners. Further, as long as prisoners’

47 Walter J Dickey, ‘A future for research on prisons’ (1991) 16 *Law and Social Inquiry* 101.

48 Western Australia Department of Justice et al, *Standard Guidelines for Corrections in Australia* (2004).

49 See Guiding Principle 9, pt 5.12.

50 *Standard Minimum Rules for the Treatment of Prisoners*, ESC Res 2076/62, UN ESCOR, UN Doc E/5988 (1977) arts 36, 55.

51 See, eg, *Delaney* (2005) Richland Magistrates’ Court (unreported, Magistrate Wessling, 22 December 2005).

52 *Saxbe* 417 US 843, 854 (1974). See also Daniel Bernstein, ‘Slamming the Prison Doors on Media Interviews: California’s New Regulations Demonstrate the Need for a First Amendment Right of Access to Inmates’ (1998) 30 *McGeorge Law Review* 125, 150.

53 *Ibid.*

54 Bernstein, above n 52, 150; *Saxbe* 417 US 843, 854 (1974).

55 New South Wales Select Committee on the Increase in Prisoner Population, *Final Report*, New South Wales Parliament, Sydney, November 2001; Becky Hamlyn and Darren Lewis, *Women Prisoners: A Survey of Their Work and Training Experiences in Custody and on Release* (2000); Walsh, above n 16. See also *Saxbe* 417 US 843, 854 (1974).

mail is routinely inspected and censored,⁵⁶ prisoners will be reluctant to disclose personal information, complain, or register dissent.⁵⁷ As the Court said in *Burton v Foltz*, '[a]llowing inspection of mail will chill open communication by these residents with the media since it allows critics to be identified creating fear of reprisals'.⁵⁸

Second, if prisoners currently within the system cannot be interviewed, there is no way of obtaining up to date information regarding the management and operation of corrective services. If researchers can only interview ex-prisoners, it is always open to the relevant Department to claim that the information reported on is 'old news' and that the situation has changed since those prisoners were within the system.⁵⁹

Considerations of this nature are relevant to the question of whether any administrative law remedies are available to contest adverse decisions made under prisoner interview laws and policies. Prima facie, it seems that a number of bases of judicial review may be available to challenge such decisions including taking an irrelevant consideration into account, failing to take a relevant consideration into account, 'no evidence' (that is, there is no evidence or other material to justify the making of the decision), and unreasonableness.⁶⁰

However, the case of *Herald and Weekly Times*⁶¹ demonstrates just how difficult it is to successfully raise these arguments in cases regarding prisoner interviews. In that case, the Victorian Supreme Court concluded that in determining whether a journalist should be given access to a prisoner, relevant public interests need to be balanced against one another. It was sufficient for the decision-maker in that case to testify that 'a number' of public interests were balanced in the making of the decision. In this case, merely noting that 'good order' and 'security' considerations applied was sufficient to ensure the Department's decision was upheld.

Restrictions on prisoner interviews that cannot reasonably be justified by security, good order, or other legitimate considerations must lead the community to draw an adverse inference against government; the question is necessarily begged 'what has the government to hide?' If corrective services departments are indeed

56 *Crimes (Administration of Sentences) Regulation 2001* (NSW) ch 2 pt 4 div 6; *Corrections Act 1986* (Vic) ss 47B, 47C, 47D; *Correctional Services Act 1982* (SA) s 33; *Prisons (Correctional Services) Act* (NT) s 47; *Prisons Act 1981* (WA) s 67. In Tasmania, non-privileged mail can be inspected but not censored, see *Corrections Act 1997* (Tas) ss 29(1)(l), 29(1)(m).

57 *Burton v Foltz* 599 F Supp 114, 177 (ED Mich 1984); Daniel M Donovan Jr, 'Constitutionality of Regulations Restricting Prisoner Correspondence with the Media' (1987/88) 56 *Fordham Law Review* 115, 166. See also Walsh, above n 16, 98.

58 599 F Supp 114, 177 (ED Mich 1984).

59 For example, in its response to the *Incorrections* Report, the Queensland Department of Corrective Services criticized the methodology employed by the researcher, stating that it contained 'old, recycled and unsubstantiated claims... which have already been investigated'; see Queensland Department of Corrective Services, above n 14. The irony of this kind of attack when the limitations of the methodology were imposed by the Department itself is clear.

60 In Queensland, see *Judicial Review Act 1991* (Qld) ss 20, 21. See also *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 690.

61 [2001] VSC 329.

committed to principles such as transparency, accountability and evidence-based practice, there is no apparent justification for limiting reasonable interviews with prisoners. Indeed, it has been suggested that silencing prisoners may even hinder rehabilitative goals.⁶²

It seems therefore, that even though an administrative law remedy might be difficult to come by in cases regarding prisoner interviews, there are a number of policy reasons why an effective blanket ban should be considered bad executive practice.

C Constitutional Arguments Against a Blanket Ban on Prisoner Interviews

In addition to the practical and policy reasons against imposing blanket bans on prisoner interviews outlined above, policies and the practical effect of the laws in Australia restricting prisoner interviews may be unconstitutional.

The Australian Constitution impliedly recognises the importance of free speech albeit in a limited sense. The High Court has held that, while a general right to free speech cannot be extracted from the Constitution, a freedom of political communication is capable of implication. In *Lange*,⁶³ the Court unanimously held that, owing to the explicit commitment to representative and responsible government in the Australian Constitution,⁶⁴ communication on matters of government or politics (that is matters that might influence the way in which electors vote at elections) must remain free. The Court laid down a two stage test for determining whether a law infringes the freedom of political communication. First, it must be asked whether the law effectively burdens the freedom in its terms, operation or effect. Second, if the law does effectively burden the freedom, it must be asked 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.⁶⁵ If the first is answered 'yes' and the second 'no', the law is invalid.⁶⁶

62 Seth L Cooper, 'The Impact of *Thornburgh v Abbott* on Prisoners' Access to the Media, and on the Media's Access to Prisoners' (1990) 16 *New England Journal on Criminal and Civil Confinement* 271, 272, 292; Bernstein above n 52, 164.

63 (1997) 189 CLR 520.

64 See especially ss 7, 24, 64, 128.

65 (1997) 189 CLR 520, 567-8. Note also that the test was altered slightly by the High Court in *Coleman v Power* (2004) 209 ALR 182. In that case, the Court agreed that 'in a manner' should replace the phrase 'in fulfillment of' in the second limb of the test.

66 In the recent case of *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 a majority of the High Court seemed to support the introduction of a possible third limb to the *Lange* test: a requirement that the law burden a pre-existing right. The Court did not state a clear intention to alter the test in this manner, but the law may develop along this line in the future. In the context of laws prohibiting interviews with prisoners, the pre-existing (common law) rights to free speech and a free press could be cited in fulfillment of this requirement (discussed further below).

1 *First Limb*

Applying the test to laws and policies prohibiting interviews with prisoners in Queensland, the first limb of the *Lange* test must be answered ‘yes’. The prohibition of interviews by journalists and researchers with prisoners does, in *effect*, prevent information regarding prison conditions and the circumstances of individual prisoners from being discussed. This is because, as noted above, the credibility of a news story or a piece of academic research is severely compromised if data cannot be obtained directly from the subject. Journalists may choose not to run a story if they are unable to secure a personal interview, and the value of academic research conducted relating to prisoners is less reliable and persuasive if the views of current prisoners cannot be ascertained.

It was held by the High Court in *Nationwide News Ltd v Wills*⁶⁷ that a law whose subject can reasonably said to be ‘communication’ is more likely to be caught by the freedom of political communication than a law that inhibits political communication only incidentally.⁶⁸ In that case, the law in question prohibited the making of comments that brought the Industrial Relations Commission into disrepute. Such a law is clearly comparable to the policies in Queensland that prohibit prisoners from speaking to the media and researchers regarding adverse prison conditions; both target the communication itself, and both are aimed at preventing the public criticism of government institutions.

Of course, the threshold question for the first limb of the *Lange* test is whether the communication in question is political in nature. The High Court has not laid down a clear definition of ‘political communication’, and it has been argued that, based on the case law, either a broad or a narrow view may be adopted. A broad view of the term would characterize political communication as communications on public affairs or any matter of public importance, while a narrow view would confine the definition to communications that enable the people to exercise a free and informed choice as electors.⁶⁹ The majority of the High Court has consistently favoured the broad view,⁷⁰ although it could be argued that these two views

67 (1992) 177 CLR 1, 76-7 (*Nationwide News*).

68 In the words of the court: ‘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. Thus, a law prohibiting conduct that has traditionally been seen as criminal (eg, conspiring to commit, or inciting or procuring the commission of, a serious crime) will readily be seen not to infringe an implication of freedom of political discussion notwithstanding that its effect may be to prohibit a class of communications regardless of whether they do or do not relate to political matters. In contrast, the impugned law in the present case is a law which prohibits the oral or written use of words merely by reason of, and by reference to, the detrimental effect which they will have on the reputation of a particular Commonwealth governmental institution or its members. Plainly, it falls within the category of laws whose character is that of laws with respect to the prohibition or control of communications relating to the government of the Commonwealth’.

69 Michael Chesterman, ‘When is a Communication “Political”?’ (2000) 14(2) *Legislative Studies* 5.

70 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (Mason CJ, Brennan, Deane, Toohey and Gaudron JJ); *Nationwide News* (1992) 177 CLR 1 (Brennan, Deane, Toohey and Gaudron JJ).

intersect, and that most any topic that could fairly be described as a public affair or matter of public importance has the potential to impact on the voting decisions of electors.

There are two main subjects related to prisoners that journalists and researchers have a professional interest in: miscarriages of justice and prison conditions.⁷¹ The public interest in safe convictions is obvious; in order for the public to have confidence in the justice system (an arm of government), justice must be done, and be seen to be done.⁷² With regard to prison conditions, many judges and commentators have classified this topic as a matter of public interest. Many have commented that prisons are public institutions, and thus are ultimately the public's responsibility;⁷³ indeed, in *Houchins*, Burger CJ, White and Rehnquist JJ said that each prisoner is 'in effect, a ward of the state for whom society assumes broad responsibility'.⁷⁴ Prisons also require a substantial commitment of public funds; since additional correctional facilities continue to be built at huge expense to governments despite a falling crime rate, this must amount to a matter of political concern.⁷⁵ Further, prisons are institutions into which persons who have allegedly offended against a society's laws are placed; since the vast majority of these people will eventually be released, the conditions in which they live and the extent to which they are rehabilitated is a topic of significant public interest.⁷⁶

The question in the first limb of the *Lange* test must, therefore, be answered in the affirmative. However, in the *Delaney* case, the magistrate held otherwise. He said that since the law on its face did not impose a total ban on prisoner interviews, it could not be considered burdensome with respect to the freedom of political communication. Clearly, the magistrate has misunderstood the *Lange* test. The test explicitly states that the 'burden' need not appear on the face of the law, but it may instead be apparent in 'operation or effect'; that is, the test recognises burdens that are a matter of substance as well as those of form. On a proper application of the test, both the policies underpinning the law and various case examples demonstrate that in practice the law does burden the freedom.

71 This fact is reflected in the US and UK case law: the communication between prisoners and journalists in *Pell*, *Saxbe*, *Houchins*, *Burton* and *Simms* all involved one of these two subjects.

72 See, eg, *Simms* [2000] 2 AC 115 (Lord Steyne and Lord Millett).

73 *Pell* 417 US 817, 839-40 (1974).

74 438 US 1, 8 (1978).

75 *Pell* 417 US 817, 839-40 (1974); *Houchins* 438 US 1, 8 (1978). See also Cooper, above n 62, 272; Bernstein, above n 52, 161. Queensland is a classic example of this: in October 2005, the Government announced that a new 4000 bed prison was to be built at a cost of \$2-3 billion, yet in November 2005, it reported that the crime rate had fallen by 7% over 2004/05; see Department of Police and Corrective Services, 'Minister Reveals Search Underway for New Jail Location' Media release, 27 October 2005 and Department of Police and Corrective Services, 'Queensland Crime Rates Down Seven per cent' Media release, 9 November 2005.

76 *Pell* 417 US 817, 839-40 (1974); *Saxbe* 417 US 843, 861 (1974); *Houchins* 438 US 1, 36-7 (1978).

2 Second Limb

Even if a law burdens the freedom of political communication, it will not be considered invalid if it is reasonably appropriate and adapted (or proportionate)⁷⁷ to the achievement of a legitimate governmental end consistent with the constitutional system of representative and responsible government. There are two elements to this limb: a question of means and a question of ends.

As noted above, a variety of ends are cited in the Queensland policy justifying the prohibition on prisoner interviews, including maintaining security and good order, respecting the integrity of the court process, and protecting victims of crime.⁷⁸ All of these have been approved as legitimate governmental ends in Australian, American and European cases regarding prohibitions on prisoner interviews.⁷⁹ Consistent with this, the magistrate in the *Delaney* case held that these were the ends towards which the Queensland law was directed, and that they were indeed legitimate.

However, in addition to these ends, the Queensland policy regarding prisoner interviews explicitly states that media interviews should only be permitted where the coverage will be 'positive', will enhance public confidence in the corrections system, and will not embarrass departmental employees.⁸⁰ The end of maintaining public confidence in the prison system is not a legitimate one. In *Nationwide News*, the High Court held that that the public interest in the reputation of government institutions is outweighed by the public interest in ensuring they remain open to public scrutiny and criticism, and that provisions aimed at preventing the disrepute of public institutions will not be valid if they are so broad that they catch criticisms that are fair, reasonable and true.⁸¹ If the law and related policies ultimately rest on this end alone, and it seems that in reality this may be the case, they lack legitimacy in the relevant sense.

Regardless, even if the ends sought to be achieved by the law and policies are considered legitimate, they may still be challenged on the basis that the means employed to fulfill them are disproportionate. In order for a law to be considered reasonably appropriate and adapted to the end it seeks to achieve, it must not go beyond what is reasonably necessary;⁸² that is, it must not be overbroad. On this basis, a blanket prohibition will be harder to justify as reasonably appropriate and adapted than a law that seeks on its face to strike some balance between relevant competing interests.

77 *Coleman v Power* (2004) 220 CLR 1, 54 (Kirby J).

78 Queensland Department of Corrective Services, above n 9.

79 *Herald and Weekly Times* [2001] VSC 329; *Pell* 417 US 817, 826 (1974); *Kentucky Department of Corrections v Thompson* 490 US 454 (1989); *Silver v The United Kingdom* 3 EHRR 475 (the Commission) and 5 EHRR 347 (the Court).

80 Queensland Department of Corrective Services, above n 9.

81 (1992) 177 CLR 1, per Mason CJ at [20], [23]; Brennan J at [21], [25]; Deane and Toohey JJ at [13]; McHugh J at [18].

82 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 169, 174 (Brennan, Deane and Toohey JJ). This approach was affirmed by the Court in *Cunliffe v Commonwealth* (1994) 182 CLR 272.

The laws at issue here are not overbroad on their face; the Queensland provision (and indeed all the equivalent Australian provisions) provides a nominated public official with the discretion to permit interviews if desired. But, in practice, such interviews are almost never allowed and, as noted above, the policy in Queensland explicitly states that where embarrassment to the Department may result from such an interview, it will not be permitted. Since such prohibitions encroach on citizens' ability to legitimately criticize government, rather than restricting only frivolous or vexatious complaints, the policy must be considered overbroad. Further, the policy states that interviews with prisoners will not be permitted where the purpose of the interview is to 'investigate issues related to the offender's alleged innocence'.⁸³ Such a statement completely ignores the public interest in the integrity of the justice system, which is well-established in Australian case law; the right to criminal justice may even be capable of implication from the Constitution.⁸⁴

Further, no attempt is made to strike a balance between the competing interests at issue here, so the policy could not be considered reasonably appropriate and adapted. Information regarding individual prisoners' experiences is not privileged once the case is no longer before the courts, and there is no penological justification for preventing such information from reaching the public.⁸⁵

The High Court has also said that where a law restricts the content of communications, a 'compelling justification' will be required for it to be considered appropriate and adapted.⁸⁶ There is no compelling justification here; there is no evidence that allowing such interviews would threaten the good order or security of prisons, or indeed that a more permissive policy would result in a flood of requests for prisoner interviews.⁸⁷ The risk of upsetting victims of crime could certainly be managed by a less restrictive policy. Indeed, it must not be forgotten that many prisoners have committed victimless crimes, and history demonstrates that others are in fact innocent of the crimes they have been convicted of.⁸⁸ Thus, in many cases, there are no victims to be considered.

Further, in the Queensland context, an effective ban on prisoner interviews cannot be justified by claiming that other means of communication with the media are available to prisoners. As noted above, Queensland prisoners' have access to neither private written correspondence, nor private telephone contact, with media personnel or researchers. Since reasonable confidential alternatives to face-to-face interviews are not available, blanket restrictions on such interviews cannot be considered appropriate and adapted to the legitimate ends identified above.

83 Queensland Department of Corrective Services, above n 9.

84 From the doctrine of separation of powers, see especially *Dietrich v R* (1992) 177 CLR 292; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

85 See the dissent of Stevens J, with whom Brennan and Powell JJ agreed, in *Houchins* 438 US 1, 36 (1978).

86 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106 (Mason CJ and McHugh J).

87 *Simms* [2000] 2 AC 115 (Lord Millett); *Saxbe* 417 US 843, 874 (1974) (Powell J).

88 See, eg, Lynne Weathered, 'Pardon me: Current avenues for the correction of wrongful conviction in Australia' (2005) 17(2) *Current Issues in Criminal Justice* 203.

Thus, despite the magistrate's finding in the *Delaney* case, it is certainly possible to conclude that the prohibitions on prisoner interviews in Queensland (and possibly the rest of Australia) infringe the implied constitutional freedom of political communication.

D Common Law Rights to Free Speech and Free Press

The right to free speech, and the associated right to a free press, have been recognised in Australia at common law, and have been stated to be fundamentally important in democratic societies.⁸⁹ Australia's commitment to the rights to free speech and a free press is further demonstrated by its ratification of the *International Covenant on Civil and Political Rights*,⁹⁰ article 19 of which states that '[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice'.

In Australia, there is no equivalent to the US constitutional right to freedom of speech or a free press. Common law rights can be overruled by legislation at any time and are always subject to the consideration of other competing public interests,⁹¹ and international treaties are not domestically binding unless they have been incorporated into legislation.⁹² However, the High Court has held that legislation should be interpreted in a manner consistent with international human rights,⁹³ and in order for legislation to be interpreted by the courts in a manner that encroaches on fundamental rights, clear, unambiguous words to this effect are required; the Parliament must then bear the political consequences.⁹⁴

The right to free speech relates to the freedom to express ideas on all subjects, unless there are legitimate public interests, such as threats to security, good order or the rights of others, compelling the prevention of such expression.⁹⁵ It is well-established that prisoners do not forgo all their rights when they enter prison; they retain those rights that are compatible with their confinement.⁹⁶ On this basis, prisoners should be permitted to freely express complaints regarding their

89 See especially *Australian Broadcasting Corporation v Lenah Game Meats* (2002) 208 CLR 199, 276, 284-5 (Kirby J), 308-9 (Callinan J) (*'Lenah Game Meats'*); *Australian Capital Television v Commonwealth* (1992) 177 CLR 106 (Gaudron J). See also *Miller v TCN Channel Nine* (1983) 161 CLR 556 (Murphy J).

90 GA Res 2200A (XXI), 999 United Nations Treaty Series 171, UN Doc A/6316 (1966).

91 *Lenah Game Meats* (2002) 208 CLR 199, 283 (Kirby J).

92 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

93 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 38; *Minister for Indigenous and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287-8; *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 637.

94 *Bropho v Western Australia* (1990) 171 CLR 1.

95 See ICCPR art 19(2).

96 In Europe, see *Campbell and Fell v United Kingdom* (1984) 7 EHRR 165. In England, see *R v Hull Visitor; Ex parte St Germain* [1979] QB 425; *Leech v Deputy Governor of Parkhurst Prison* [1988] AC 533. In the US, see *Pell* 417 US 817, 822 (1974).

treatment in prison, any concerns they have regarding the criminal justice system, and any sense of injustice they feel regarding their own conviction. There is no apparent governmental interest in suppressing such communications. Prisoners' right to free speech includes the right to communicate their views to any willing listener, including the media and researchers, particularly since only they are in a position to provide prisoners with a voice that may be heard beyond the prison walls.⁹⁷ Thus, associated with prisoners' right to free speech is the public's right to a free press.

It is not suggested that the right to a free press imposes a positive duty on governments to make all privileged information available to the media;⁹⁸ nor that it amounts to an unrestrained right to gather information.⁹⁹ However, it must restrict the government from denying the media reasonable access to non-privileged information in reasonable circumstances; it must carry with it some right to *gather* news in the public interest.¹⁰⁰ This is particularly the case in circumstances where any government restriction on the media's access to such information is aimed at concealment for fear that such revelations might embarrass public officials.¹⁰¹

The right to a free press recognises the important social function that the media holds in informing the public and facilitating open debate of social issues.¹⁰² As Powell J said in *Saxbe*:

An informed public depends on accurate and effective reporting by the news media... In seeking out the news, the press therefore acts as an agent of the public at large. It is the means by which the people receive that free flow of information and ideas essential to intelligent self-government.¹⁰³

The important role of the media in facilitating the exchange of political information has also been explicitly recognized in a number of Australian cases. In *Australian Capital Television v Commonwealth*, Mason CJ said:

Individual judgement, whether that of the elector, the [government] representative or [political] candidate, on so many issues turns upon free public discussion in the media of the views of all interested persons, groups and bodies and on public participation in, and access to, that discussion.¹⁰⁴

In the same case, Gaudron J cited with approval Blackstone's statement that liberty of the press is essential to a free state.¹⁰⁵

97 *Pell* 417 US 817, 822 (1974).

98 *McClure v Australian Electoral Commission* (1999) 163 ALR 734, 738-9. See also *Pell* 417 US 817, 835 (1974); *Houchins* 438 US 1, 11 (1978).

99 *Zemel v Rusk* 381 US 1, 16-17 (1965).

100 *Branzburg v Hayes* 408 US 665, 681 (1972); *Saxbe* 417 US 843, 859-63 (1974) (Powell J); *Houchins* 438 US 1, 16-7, 31-2 (1978); *Simms* [2000] 2 AC 115 (Lord Millett). See also Cooper, above n 62, 279-80.

101 Cooper, above n 62, 290-1; Bernstein, above n 52, 157-9.

102 *Saxbe* 417 US 843, 862 (1974).

103 *Ibid* 863.

104 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 139.

105 *Ibid*.

In *Lenah Game Meats*, Callinan J said:

No one seriously doubts the importance of the media's role in [promoting discussion of political and public affairs], and the great contribution to the improvement in public affairs that, from time to time, the media make.¹⁰⁶

In both *Australian Capital Television* and *Lenah Game Meats*, the British case of *Attorney-General v Times Newspapers Ltd*¹⁰⁷ was cited with approval, in particular Lord Simon of Glaisdale's remark that:

People cannot adequately influence the decisions which affect their lives unless they can be adequately informed on facts and arguments relevant to the decisions. Much of such fact-finding and argumentation has to be conducted vicariously, the public press being a principal instrument.¹⁰⁸

Since laws regarding prisoner interviews in Queensland (and throughout Australia) are not accompanied by a statement which clearly repudiates these rights, it must be assumed that the Parliaments intended to legislate consistently with these rights. Therefore, these laws should not be applied in such a way that the rights to free speech and the free press are compromised.

III CONCLUSION

Anne Delaney was ultimately found guilty and received a 12 month good behaviour bond. Yet, there seems to be no legitimate reason for banning media and researcher interviews with prisoners in practice. Such prohibitions, or the policies underpinning them, are overbroad and may unlawfully encroach on prisoners' freedom of political communication and common law right to free speech, and the public's right to freedom of the press. Australia lags behind developments in other jurisdictions such as the US and the UK in these areas.

In order to promote the principles of transparency and accountability which they publicly ascribe to, s 132 of the *Queensland Corrective Services Act 2006* and like provisions throughout Australia, should be repealed, or at least specify that interviews of prisoners by media personnel and bona fide researchers should ordinarily be permitted unless, in the circumstances of the case, there is some compelling public interest in preventing this. Since the High Court has held that protecting the reputation of public institutions is not a legitimate governmental interest, an interview should not be capable of refusal on these grounds.

In the event that this is considered unacceptable an (albeit inferior)¹⁰⁹ alternative would be to classify prisoners' mail to media personnel and bona fide researchers as privileged. This would provide literate prisoners at least with some protection of

¹⁰⁶ *Lenah Game Meats Pty Ltd* (2002) 208 CLR 199, 307-8.

¹⁰⁷ [1974] AC 273, 315.

¹⁰⁸ See *Australian Capital Television* (1992) 177 CLR 106, 139.

¹⁰⁹ Particularly in Queensland where, as noted above, even privileged mail can be opened and inspected by corrective services officers under certain circumstances.

their communication with media or researchers. In the US case of *Burton v Foltz*¹¹⁰ the court held that written mail exchanged between prisoners and the media should be considered privileged and thus immune from inspection and censorship. As the court said, the usual penological justifications for inspecting and censoring mail do not apply in this context; the risk of contraband entering or leaving the prison via media personnel is remote, it is unlikely that the media would be assisting prisoners to escape, and there is no greater reason to inspect mail being sent to media personnel for the purpose of identifying prisoners at risk of suicide or self-harm than other privileged mail such as that being sent to lawyers or government officials.¹¹¹ It is submitted that this applies in the Australian context.

¹¹⁰ *Burton v Foltz* 599 F Supp 114 (ED Mich 1984).

¹¹¹ *Ibid* 116.