IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S196 of 2019**

BETWEEN: **ANNIKA SMETHURST**
First Plaintiff

NATIONWIDE NEWS PTY LTD
Second Plaintiff

and

COMMISSIONER OF POLICE
First Defendant

JAMES LAWTON
Second Defendant

SUBMISSIONS OF THE AUSTRALIAN HUMAN RIGHTS COMMISSION SEEKING LEAVE TO APPEAR AS AMICUS CURIAE

PART I: CERTIFICATION

1. It is certified that this submission is in a form suitable for publication on the internet.

PART II: BASIS OF LEAVE TO APPEAR

2. The Australian Human Rights Commission (**AHRC**) seeks leave to appear as *amicus curiae*. The Court's power to grant leave derives from rule 42.08A of the *High Court Rules 2004* or, alternatively, the inherent or implied jurisdiction given by Ch III of the Constitution and s 30 of the *Judiciary Act 1903* (Cth).

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PART III: REASONS FOR LEAVE

3. Leave should be given to the AHRC for the following reasons.

4. ***First***, the AHRC puts a position as to construction of s 79(3) read together with s 79(1) of the *Crimes Act 1914* (Cth) in the form in which it was as at 29 April 2018 (**s 79(3)**, **s 79(1)** and the ***Crimes Act***, respectively) which is not advanced by the Plaintiffs but which goes to the validity of s 79(3). The AHRC contends that the underlying provisions should be given a reasonably narrow construction on the basis of which s 79(3) would be found to be valid. In contrast, the Plaintiffs advance a reasonably broad construction and assert that the provision is invalid on that basis. The Defendants – consistently with their interests – may contend that the provisions should be given a reasonably broad construction but are nevertheless valid. If the AHRC is not given leave, the Court may be deprived of arguments in favour of a reasonably narrow construction: cf *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 312-3. The Commission's submissions aim to assist the Court in a way that it may not otherwise be assisted: *Levy v State of Victoria* (1997) 189 CLR 579 at 604 (Brennan CJ) (***Levy***).

5. ***Secondly***, the AHRC advances submissions as to effective burden which are not raised by the Plaintiffs.

6. ***Thirdly***, the AHRC's functions include "where the Commission considers it appropriate to do so, with the leave of the court hearing the proceedings and subject to any conditions imposed by the court, to intervene in proceedings that involve human rights issues": *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(o) (AHRC Act). The term 'human rights' is defined[1] to include the rights and freedoms recognised in the *International Covenant on Civil and Political Rights* (**ICCPR**) which include freedom of expression (article 19) and the right to take part in the conduct of public affairs (article 25(a)).[2] In seeking leave to appear as *amicus*, the AHRC is endeavouring to perform this

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1 AHRC Act s 3.

2 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, [1980] ATS 23 (entered into force generally 23 March 1976, except Article 41, which came into force generally on 28 March 1979; entered into force for Australia 13 November 1980, except Article 41, which came into force for Australia on 28 January 1993), arts 19 and 25, which appear in Schedule 2 to the AHRC Act.

function. The performance of this statutory function by the AHRC is in the public interest.

PART IV: SUBMISSIONS

Introduction

7. The AHRC addresses submissions to the following topics.

   (a) ***First***, the proper construction of s 79(3) read with s 79(1).

   (b) ***Secondly***, whether a law may effectively burden the implied freedom of political communication even though the conduct to which it applies is otherwise prohibited.

   (c) ***Thirdly***, brief submissions on validity.

10 8. These submissions are made by the AHRC and are not made on behalf of Commonwealth Government.

The proper construction of ss 79(3) and 79(1)

Introduction

9. The Court is invited to answer whether, as it stood on 29 April 2018, s 79(3) of the *Crimes Act* was invalid: see the Special Case (**SC**) [57(1)(c), (3)]. When it is said that a law is invalid by reason of the implied freedom of political communication, the construction of the law is a precursor to identifying its legal and practical operation, its object and its connection to its object. "The first step in the making of [an] assessment of the validity of any given law is one of statutory construction": *Gypsy Jokers*
20 *Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, 553 [11] (Gummow, Hayne, Heydon and Kiefel JJ). See also, eg, *Brown v Tasmania* (2017) 261 CLR 328 at [487] (Edelman J) (***Brown***).

10. Where (as here) it is said that a provision is *wholly* invalid, it is necessary to construe the *whole* of the provision before its validity can be assessed. While the task of construing the whole of the provision can raise intricate issues in the context of a provision such as s 79(3) which picks up and incorporates a number of other detailed provisions, the task is unavoidable.

11. Section 79(3) reads as follows:

> *If a person communicates a prescribed sketch, plan, photograph, model, cipher, note, document or article, or prescribed information, to a person, other than:*
>
> *(a) a person to whom he or she is authorized to communicate it; or*
>
> *(b) a person to whom it is, in the interest of the Commonwealth or a part of the Queen's dominions, his or her duty to communicate it;*
>
> *or permits a person, other than a person referred to in paragraph (a) or (b), to have access to it, he or she commits an offence.*
>
> *Penalty: Imprisonment for 2 years.*

12. The term "communicates" is given an extended operation by s 77(2)(a) and (c) so that (i) a person communicates information or a thing if the person communicates the information or thing "in whole or in part, and whether the thing or information itself, or only the substance, effect or description of the thing or information, is ... communicated" (s 77(2)(a)), and (ii) communication extends to "the transfer or transmission, or the publishing" of the thing or information (s 77(2)(c)).

13. *"Information"* is inclusively defined in s 77(1) to include information whether or not in a material form and to include an opinion and a report of a conversation.

14. Critically, s 79(3) picks up a range of prescribed things or information, the definitions of which are found in s 79(1). Section 79(1) states:

> *For the purposes of this section, a sketch, plan, photograph, model, cipher, note, document, or article is a prescribed sketch, plan, photograph, model, cipher, note, document or article in relation to a person, and information is prescribed information in relation to a person, if the person has it in his or her possession or control and:*
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> *(a) it has been made or obtained in contravention of this Part or in contravention of section 91.1 of the Criminal Code;*
>
> *(b) it has been entrusted to the person by a Commonwealth officer or a person holding office under the Queen or he or she has made or obtained it owing to his or her position as a person:*
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> *(i) who is or has been a Commonwealth officer;*
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> *(ii) who holds or has held office under the Queen;*

(iii)who holds or has held a contract made on behalf of the Queen or the Commonwealth;

(iv) who is or has been employed by or under a person to whom a preceding sub-paragraph applies; or

(v) acting with the permission of a Minister;

and, by reason of its nature or the circumstances under which it was entrusted to him or her or it was made or obtained by him or her or for any other reason, it is his or her duty to treat it as secret; or

(c) it relates to a prohibited place or anything in a prohibited place and:

(i) he or she knows; or

(ii) by reason of its nature or the circumstances under which it came into his or her possession or control or for any other reason, he or she ought to know;

that it should not be communicated to a person not authorized to receive it.

15. The concept of "obtaining" a thing or information is given an extended meaning by s 77(1)(a) and (b).

16. A number of features of s 79(3) and s 79(1) raise constructional questions.

(a) When is a thing or information "**entrusted**" to a person (s 79(1)(b))?

(b) When is a thing or information made or obtained "**owing to**" a particular position (s 79(1)(b))?

(c) What is an "**other reason**" (s 79(1)(b) and s 79(1)(c)(ii))?

(d) When is there a "**duty**" for the purposes of the chaussette to s 79(1)(b)?

(e) What is a duty "**to treat [a thing or information] as secret**" (s 79(1)(b))?

(f) In what circumstances "**should**" information not be communicated (s 79(1)(c))?

(g) When is a person "**authorized to communicate**" information under s 79(3)(a)?

(h) When is something "**in the interest of the Commonwealth or a part of the Queen's dominions**" (s 79(3)(b))?

(i) When is there a "**duty to communicate**" under s 79(3)(b)?

(j) When does a person "**permit**" a person to have access to a thing or information (s 79(3))?

General principles

17. Before turning to these specific issues of construction, it is convenient to make some general points as to the construction of s 79.

18. ***First***, s 79(3) is in terms directed to communication of things or information. It burdens the fundamental right to freedom of expression. Consistently with the principle of legality, a narrow construction of s 79 must be favoured: see, eg, *Coco v The Queen* (1994) 179 CLR 427, 437; *Cunliffe v The Commonwealth* (1994) 182 CLR 272, 363 (Dawson J); *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 283 (Lord Goff of Chieveley); *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1 at [43] (French CJ), [151]-[152] (Heydon J).

19. ***Secondly***, read in context a primary operation of s 79(3) is to burden communication in relation to public affairs and on topics of public interest. The fundamental right to freedom of expression is at its zenith in that context, and the Court should even more readily favour a narrow construction: see, eg, *Pervan v North Queensland Newspaper Co Ltd* (1993) 178 CLR 309, 328 (Mason CJ, Brennan, Deane, Dawson, Toohey and Gaudron JJ) (referring to the "paramount importance of encouraging and protecting freedom of expression and discussion, especially in relation to matters of public interest"); *Tajjour v State of New South Wales* (2014) 254 CLR 508 at [28] (French CJ) (***Tajjour***); *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680, 690–691 (Gleeson CJ).

20. ***Thirdly***, s 79, being a provision which imposes criminal liability, should be given a construction which ensures that the scope of the prohibition it creates is "certain and its reach ascertainable by those subject to it": *DPP (Cth) v Keating* (2013) 248 CLR 459 at [48] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *CFMEU v Mammoet Australia Pty Ltd* (2013) 248 CLR 619 at [48] (Crennan, Kiefel, Bell, Gageler and Keane JJ).

21. ***Fourthly***, s 79 must (if possible) be given a construction which ensures that it is wholly within Commonwealth legislative power: *Acts Interpretation Act 1901* (Cth) s 15A; *New*

South Wales v Commonwealth (Work Choices Case) (2006) 229 CLR 1 at [355] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). By way of example, the Court should, as a matter of construction, ascribe to s 79 an object which is compatible with the constitutionally-prescribed system of government.

22. ***Fifthly***, in order to be valid s 79 must not only be compatible with the implied freedom of political communication, it must also be supported by a positive head or heads of power. Focusing on the positive heads of power, in turn, helps identify the proper construction of s 79. Section 79(3) does not, on its face, disclose any connection with a positive head or heads of power. If s 79(3) is to have such connection, that must be by reason of the fact that the subject of the proscribed communication must be "a prescribed sketch, plan, photograph, model, cipher, note, document or article, or prescribed information".

23. Section 79(1)(a) prescribes things and information where they have been "made or obtained in contravention of [Part VII of the *Crimes Act*] or in contravention of section 91.1 of the Criminal Code". Section 91.1 is directed to matters of defence and external affairs. If that operation of s 79(3) is valid, it must be because it is incidental to the power supporting the underlying contravention. However, notably, under s 79(1)(a) information also becomes prescribed information in the hands of any person to whom it is communicated in contravention of s 79(3) because the information is then obtained in contravention of Part VII of the *Crimes Act*.

24. Section 79(1)(b) is of central relevance in this matter. It prescribes a thing or information, *inter alia*, if it is made or obtained owing to a person's position (i) as a person who is or has been party to a contract with the Commonwealth (s 79(1)(b)(iii)), or (ii) as a current or former employee of a person who is or has been party to a contract with the Commonwealth (s 79(1)(b)(iv)).

25. Save in limited cases,[3] the Commonwealth has power to contract only if the power is given by a valid statute which is supported by a positive head of power: *Williams v Commonwealth* (2012) 248 CLR 156. It may be doubted[4] – but it is unnecessary to

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[3] As to which, see *Williams v Commonwealth* (2012) 248 CLR 156 at [4] (French CJ).

[4] For example, it may be doubted that any head of legislative power would empower the Commonwealth to enact a general law prohibiting a Commonwealth contractor from disclosing confidential information it

decide – that the underlying positive heads of power which authorise entry into contracts the subject of s 79(1)(b)(iii) extend to authorising the proscription of information obtained by the contractor owing to the person's position as a contractor merely because it is obtained in that capacity.

26. In any event, on no view could the underlying positive heads of power which authorise entry into contracts the subject of s 79(1)(b)(iii) extend to authorising the proscription of information obtained by employees of the contractor merely because they are employees of the contractor in s 79(1)(b)(iv). Suppose a law firm contracts with the Commonwealth. No positive head of power could support a general Commonwealth law prohibiting employed solicitors of that firm from communicating information pertaining to unrelated clients of the firm which the employees have obtained merely because they are employees. Yet on its face that flows from s 79(1)(b) in its operation with s 79(3).

27. The above observations have an important consequence: if the whole of s 79(1)(b) in its operation with s 79(3) is to be supported by a positive head of power, it must be because of the duty referred to in the chaussette to s 79(1)(b). And it must be because that duty is a duty which is imposed by or arises under a valid law of the Commonwealth, with the balance of s 79(1)(b) (if it be valid) then being incidental to the underlying head of power supporting that duty. Were it otherwise, s 79(3), in its operation with s 79(1)(b) (and, in particular, its operation with s 79(1)(b)(iv), would be invalid. This conclusion is important as to the proper construction of s 79(1)(b), namely, it should be given a meaning which avoids the consequence that s 79(1)(b)(iv) is invalid.

28. Section 79(1)(c) extends to information that "relates to", *inter alia*, "anything in a prohibited place". A "prohibited place" includes any "office belonging to the Queen of the Commonwealth": see s 80(a). No positive head of Commonwealth power could authorise a prohibition on communication of information merely because the information "relates to" a thing that is "in" an office owned by the Commonwealth: the Commonwealth has no general power to regulate information relating to coffee mugs or pot plants in Commonwealth offices. This observation yields the same consequence as flowed in respect of s 79(1)(b): if s 79(1)(c) in its operation with s 79(3) is to be valid, it

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receives from a sub-contractor because of the contractor / sub-contractor relationship (for example, information received in the course of a mediation about underpayments by the contractor).

must be because the information which "should not be communicated" is information which should not be communicated because there is an underlying valid duty not to communicate the information arising under a valid Commonwealth law.

Construction of section 79

29. With the above general observations in mind, it is convenient to turn to the issues of construction identified in paragraph 16.

30. **"Entrusted"** (s 79(1)(b)): Parliament should be found to have chosen the word "entrusted" deliberately, and in doing so to have intended to draw a distinction between that which is entrusted, and that which is communicated or obtained. If the drafter of s 79 had intended the term "entrusted" to encompass mere communication or transfer, the drafter would have said so (and the drafter did say so expressly when that was the sense intended). Thus, not all things given to or information communicated to a person are *entrusted* to the person: rather, the thing or information must be given or communicated under condition that the thing or information be taken care of, which in context, would be construed to include a requirement that it be *kept confidential.* That accords with the dictionary definition: a thing or information is "entrusted" to another if it is "place[d] … in the care, custody, or charge of a specified person".[5] It also accords with the meaning given to "entrust" by Gibbs J in *Stephens v R* (1978) 139 CLR 315 at 333 ("confide the care or disposal of").

31. **"Owing to"** (s 79(1)(b)): a thing or information is obtained "owing to" a person holding a status of the kind described in s 79(1)(b)(i)-(v) only if the thing or information is obtained *because* the person has that status. As was said of the similar official secrets provision in s 81 of the *Criminal Code* (WA), which used the term "because", there must be "a causal connection between the information coming to the knowledge of, or into the possession of, a person on the one hand and the person's status or position as a public servant or government contractor on the other": *Western Australia v Burke* (2011) 42 WAR 124 at [154] (Buss JA) (Martin CJ agreeing at [1]; Mazza JA agreeing at [345]) (***Burke***).

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[5] Oxford English Dictionary, meaning 2 (transitive) of "entrust".

32. **"Other reason"** (s 79(1)(b) and s 79(1)(c)(ii)): the phrase "other reason" is not at large. By analogy with what has been said of those words in the statutory demand provisions of the *Corporations Act 2001* (Cth),[6] what constitutes an "other reason" is to be understood by reference to the overall object and intent of s 79.

33. **"Duty"** (s 79(1)(b)): the "duty" referred to is a *legal* duty imposed by virtue of the person's office; s 79(1)(b) does not refer to merely moral or civic duties.[7] This construction of "duty" is consistent with authority on the similar official secrecy provisions in Tasmania: *Johnston* at 215 (Evans J). Were s 79(1)(b) to extend to duties that are not *legal* duties, but are merely ethical or moral duties, there would be intolerable uncertainty in the reach of the prohibition.

34. Further, the duty must be one arising under a valid exercise of Commonwealth legislative, executive or judicial power. This is so for several reasons. *First*, absent a contrary intention, the reference to "duty" in s 79(1)(b) is a reference to a duty "in and of the Commonwealth": *Acts Interpretation Act 1901* (Cth) s 21(1)(b). There is no contrary intention here. *Secondly*, this construction of "duty" ensures that s 79(1)(b) serves a purpose that is compatible with the constitutionally-prescribed system: the purpose of s 79(1)(b) (in its operation with s 79(3)) is to render more effective the underlying Commonwealth duty. *Thirdly*, were it otherwise, there would be no way of connecting s 79(1)(b) to any positive head of legislative power: see paragraph 27 above.[8]

35. A legal duty arising *solely* under the common law or equity would not be a duty of that kind. Take, for example, a duty of confidence arising in equity: the Commonwealth has no general legislative power to prohibit a person from communicating information subject to a duty of confidence merely because that person is an employee of another person who (at some time) contracted with the Commonwealth and the person obtained the information in the person's capacity as employee.

36. Further, the duty must be one relating either to (i) the fact of entrustment, or (ii) *the* valid exercise of Commonwealth legislative, executive or judicial power which led to the

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6 See *Meehan v Glazier Holdings Pty Ltd* (2005) 53 ACSR 229 at [35] (Santow JA) (and cases there cited).

7 Noting that the word "duty" is "commonly used to encompass both moral and legal obligations": *Tasmania v Johnston* (2009) 18 Tas R 195 at 215 (Evans J) (***Johnston***).

8 Note also *Burke* at [159] ("[s]ection 81 assumes the existence of the duty under an external source").

person holding one or more of the statuses identified in s 79(1)(b)(i)-(v). This results in a coherent construction of s 79(1)(b): it is concerned only with duties arising out of the two classes of case identified in the chapeau to the sub-section. This is also consistent with the overarching mandate to give s 79 a narrow construction. Courts in Tasmania and Western Australia have reached similar conclusions in respect of the "duty" referred in similar official secrecy provisions: *Johnston* at 215 ("[t]he duty referred to is a duty imposed on the defendant as a public officer by virtue of that office; it is an official duty rather than a moral or civic duty"); *Burke* at [156] ("[a]lthough the 'duty' referred to in s 81 is not expressed as a 'duty in his or her office' or a 'duty of his or her office', the duty in question must arise or be laid upon the public servant or government contractor in his or her capacity as a public servant or government contractor").

37. This is also consistent with the kinds of duties identified in reported cases of successful prosecutions under s 79(3). In *Grant v Headland* (1977) 17 ACTR 29, Grant's duty was "high" and "a special kind of duty" arising in the field of national security by virtue of his employment as an ASIO probationary trainee.[9] The fact that the information Grant attempted to communicated had low security significance did not reduce the quality of his duty to treat it as secret. Similarly, in *R v Lappas* (2003) 152 ACTR 7, the respondent's conduct was described as "a grave dereliction of his duty to the Commonwealth"[10] and a "massive breach of trust"[11] because of the duty of intelligence officers "to keep confidential information secure, irrespective of the objective value of the information in question".[12]

38. **"Duty to treat [a thing or information] as secret"** (s 79(1)(b)): there is a duty to treat a thing or information as secret if and only if there is a duty not to disclose the thing or information save to a confined class of persons. This is consistent with the construction given to the similar Western Australia official secrecy provision by Burt CJ in *Cortis v R* [1979] WAR 30, 31 (accepting a submission to the effect that there is a duty to keep

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9 *Grant v Headland* (1977) 17 ACTR 29, 32 (Smithers J).

10 *R v Lappas* (2003) 152 ACTR 7 at [20] (Higgins CJ).

11 *R v Lappas* (2003) 152 ACTR 7 at [130] (Cooper and Weinberg JJ).

12 *R v Lappas* (2003) 152 ACTR 7 at [22] (Higgins CJ).

secret if there is duty to keep it from "public knowledge, or from the knowledge of persons specified").

39. **"Should"** (s 79(1)(c)): although, on its face, the term "should" may appear to have a broader connotation than the term "duty" in s 79(1)(b), it does not in fact have a broader connotation. The term refers to a legal duty not to communicate the thing or information arising under another valid exercise of Commonwealth power. That is so for a number of reasons. *First*, this helps render the reach of s 79(1)(c) ascertainable and certain. *Secondly*, "should" is capable of meaning "must": see, eg, *Lafu v Minister for Immigration and Citizenship* (2009) 112 ALD 1 at [20]-[21] (Lindgren, Rares and Foster JJ). *Thirdly*, this gives s 79(1)(c) a narrow construction consistent with the principles identified in paragraphs 18 and 19 above. *Fourthly*, this ensures that s 79(1)(c) (in its operation with s 79(3)) has an object that is compatible with the constitutionally-prescribed system: its object is to render more effective the underlying Commonwealth duty. *Fifthly*, otherwise s 79(1)(c) would not be supported be a positive head of power: see paragraph 28.

40. **"Authorized to communicate"** (s 79(3)(a)): the term "authorized" could refer to a Hohfeldian right (with a correlative duty) or a Hohfeldian privilege (with a correlative absence of a right). Consistently with the imperative to give s 79(3) a narrow construction, it refers to the latter. Accordingly, a person is authorised to communicate a thing or information to another if the person has a *freedom* to do so in the sense that no law imposes a duty *not* to communicate the thing or information. There is no need to search for a positive right *to* communicate the thing.

41. **"Interest of the Commonwealth or a part of the Queen's dominions"** (s 79(3)(b)): the "interest" referred to is the public interest. Whether a communication is or is not in the public interest calls for a discretionary value judgment by reference to many factual matters: see, eg, *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216. In the context of the Australian constitutional system, the interest referred to in s 79(3)(b) includes the public interest in communication on issues relevant to electoral matters and the accountability to Parliament of the Executive government. As this Court held in *Aid/Watch Incorporated v Federal Commissioner of Taxation* (2010) 241 CLR 539 in respect of the concept of the Australian "public welfare", the "system of law which applies in Australia ... postulates for its operation ... 'agitation' for legislative and political changes" and

"the operation of these constitutional processes ... contributes to the public welfare": at [45] (French CJ, Gummow, Hayne, Crennan and Bell JJ). Similarly, the disclosure of Commonwealth information, including information in a document marked as classified or information over which there may be a confidentiality claim, particularly by those who do not otherwise have a duty to treat it as secret, may "serve the public interest in keeping the community informed and in promoting discussion of public affairs" where disclosure does not prejudice the community in other respects.[13]

42. **"Duty to communicate"** (s 79(3)(b)): having regard to context, the "duty" referred to in s 79(3)(b) is a *moral* or *civic* duty arising from the fact that disclosure is in the interest of the Commonwealth (or a part of the Queen's dominions). Reading s 79(3)(b) as referring to a moral or civic duty gives work to the concept of the "interest of the Commonwealth": the moral or civic duty arises *because* disclosure is in the interest of the Commonwealth, not because of some law. That construction conforms with the language used, namely that the duty to communicate stems from the interest of the Commonwealth. If "duty" in s 79(3)(b) applied only to legal duties, then it would render the exemption in s 79(3)(a) redundant – for one must be authorised to communicate that which one is under a legal duty to communicate. Notably, conduct may be in the public interest even though it is contrary to law: see *Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health* (1995) 56 FCR 50, 59 (Lockhart J) ("[m]erely to say that State (or Territory) law may be infringed if the drug mifepristone is used ... does not necessarily conclude the question of public interest"). The effect of s 79(3)(b) is to introduce a form of "public interest" exception to s 79(3). This is consistent with the mandate that s 79(3) be given a narrow construction.

43. **"Permits"** (s 79(3)): the chaussette to s 79(3) prohibits "permit[ting] a person" to have access to a thing or information. The prohibition attaches to omissions and, in that sense, arises only where there is a pre-existing legal obligation to prevent the person from having access: see, eg, *Director of Public Prosecutions (Cth) v Poniatowska* (2011) 244 CLR 408 at [29] (French CJ, Gummow, Kiefel and Bell JJ); *Burns v R* (2012) 246 CLR 334 at [97] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

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[13] *Commonwealth v John Fairfax & Sons Limited* (1980) 147 CLR 39, 52 (Mason J).

Effective burden and the extent of the burden on the freedom imposed by s 79(3)

44. If s 79(1)(b) and (c) in their operation with s 79(3) are construed as contended for above, then an issue arises: does a law effectively burden the freedom if the law does no more than attach a new sanction to conduct that was already proscribed? The issue arises because, on the AHRC's construction; s 79(3), in its operation with s 79(1)(b) and (c), *only* prohibits engaging in conduct that there was already a legal duty not to engage in.

45. The parties' concession that s 79(3) effectively burdens the freedom (SC [56]) does not resolve this issue. If the Court is to assess the validity of s 79(3) as a whole, it must ascertain the *extent* of the burden on the freedom when assessing whether s 79(3) is proportionate to its end: eg *Unions NSW v New South Wales* (2013) 252 CLR 530 at [40] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

46. In the AHRC's submission, a law which attaches additional and different sanctions to conduct that was otherwise proscribed can effectively burden the freedom and, to the extent that the law does effectively burden the freedom, the burden it imposes can (and must) be considered when assessing the proportionality of the law. To the extent that this submission is contrary to authority,[14] the AHRC submits that those authorities should not be followed.

47. Whether a law effectively burdens the freedom is to be assessed by reference to its legal *and* practical operation: see, eg, *McCloy v New South Wales* (2015) 257 CLR 178 at [2] (referring to whether the law "effectively burden[s] the freedom in its terms, operation or effect"); *Tajjour* at [33] (French CJ), [60] (Hayne J), [145], [158] (Gageler J). It can be accepted that a law does not burden the freedom in its *legal* operation if the conduct proscribed by the law is already proscribed by another valid law. However, a law may burden the freedom in its *practical* operation if it has the effect of deterring communications that may otherwise have been engaged in even though those communications were unlawful. A law that has that effect "diminishes the extent"[15] of

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[14] See *Brown v Tasmania* (2017) 261 CLR 328 at [180]-[190], [258]-[262] (Nettle J), [557]-[563] (Edelman J); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at [104], [107], [111] (McHugh J), [183]-[190] (Gummow and Hayne JJ), [279] (Kirby J), [337] (Callinan J), [354] (Heydon J) (***Mulholland***); *Levy v State of Victoria* (1997) 189 CLR 579, 622, 625-6 (McHugh J); *McClure v Australian Electoral Commission* (1999) 73 ALJR 1086 at [28] (Hayne J).

[15] *Unions NSW v New South Wales* (2013) 252 CLR 530 at [121] (Keane J).

political communication, has a "real effect upon the content of political communication"[16] and "hinders" the exercise of free communication.[17] Further, a law effectively burdens the freedom of political communication if it "prohibits or limits political communication to any extent" and has "a material effect on the totality of political communication": *Comcare v Banerji* (2019) 93 ALJR 900 at [29] (Kiefel CJ, Bell, Keane and Nettle JJ) (***Banerji***).

48. A law which criminalises conduct that is already civilly proscribed is well capable of being described as a law which "limits political communication to any extent" and has "a material effect on the totality of political communication".

10 49. The burdens cognised by the freedom include those burdens arising because political communication is "penalised" and is "deterred for that reason": *Monis* at [343] (Crennan, Kiefel and Bell JJ). As Gordon J held in *Brown* at [411], "the incremental burden [of a law] may be described as making what was otherwise unlawful the subject of criminal sanction or subject to increased penalties".

50. This conclusion is required by the systemic basis of the implied freedom of political communication. The basis of the implied freedom is the recognition that "[f]reedom of communication on matters of government and politics is an indispensable incident of the system of representative government which the Constitution creates" and the fact that "[t]he choice given by ss 7 and 24 [of the Constitution] must be a true choice with 'an
20 opportunity to gain an appreciation of the available alternatives'": *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 559, 560 (***Lange***). The implied freedom does not exist to protect some underlying common law freedom of expression; it exists to protect the system of representative and responsible government and for amending the Constitution by referendum. That system is impaired by exercises of governmental power which deter political speech and thereby impede the electors' opportunity to gain an appreciation of the available alternatives; and that is so whether or not the speech deterred was already prohibited.

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[16] *Monis v R* (2013) 249 CLR 92 at [343] (Crennan, Kiefel and Bell JJ) (***Monis***).

[17] *Wotton v State of Queensland* (2012) 246 CLR 1 at [78] (Kiefel J).

51. It is constitutionally orthodox to hold that, in assessing the validity of a prohibition on communication under the implied freedom, one can have regard to the character of the sanction for breach of the prohibition.[18] For example, in *Levy*, Toohey and Gummow JJ said (at 614) that "[t]he attachment of a penalty is a significant matter in the assessment of the validity" of the law. Similarly, in *Brown*, Kiefel CJ, Bell and Keane JJ said (at [87]) that "[t]he possibility that a protester might be liable to a substantial penalty should not be overlooked". These matters reflect the commonsense proposition that a natural effect of criminal sanctions is to deter (and therefore have a practical effect on) the prohibited conduct.

10 52. It would be to prioritise form over substance if the implied freedom could not cognise the incremental real-world burden on political communication which the imposition of additional and different sanctions on otherwise-prohibited conduct is apt to inflict. That there are independently-existing prohibitions on communication is relevant to the extent of the additional burden imposed by a new law; but the existence of those other prohibitions does not conclude the implied freedom question.

53. That the implied freedom is a freedom not an individual right does not require any different conclusion: contra *Brown* at [558]-[559] (Edelman J). To recognise that the practical effect of a law on political communication includes the extent of its deterrent effect does not controvert the proposition that the freedom is not an individual right.

20 54. Nor is there any difficulty in the Court having regard to unlawful private conduct in assessing whether a law unduly burdens a constitutional freedom. Chief Justice French, and Gummow and Bell JJ did precisely that in *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at [28], [78], [130]-[131], [156]-[157].

55. *Mulholland* does not require any different conclusion. In *Mulholland*, the appellant was asserting a positive right to have his party affiliation included on the ballot. The Court held that the implied freedom did not assist the appellant: the freedom was not a sword giving Mr Mulholland positive rights of the kind he asserted. That does not mean that the implied freedom cannot operate as a shield against prohibitions on communication.

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[18] This issue was assumed in favour of the respondent by the plurality in *Banerji* at [39].

56. Further, *Mulholland* and *Levy* were impliedly departed from in *Wotton v State of Queensland* (2012) 246 CLR 1 (***Wotton***). In *Wotton*, there was a challenge to conditions of parole attached to Mr Wotton's release under s 200(2) of the *Corrective Services Act 2006* (Qld), including a condition that Mr Wotton not attend public meetings on Palm Island without the prior approval of a corrective services officer. Without the grant of parole, Mr Wotton had no freedom (or right) to attend public meetings on Palm Island. Queensland argued, in reliance on *Mulholland* and *Levy*, that there was no effective burden on the freedom.[19] Nevertheless, the Court held that "[t]he relevant burden imposed by s 200(2) is the observance of conditions the Parole Board reasonably considers necessary to ensure good conduct of the parolee and to stop the parolee committing an offence": at [28]. That conclusion can only have been reached if the freedom was effectively burdened by the practical burdening of communications which were, without the parole order, prohibited in any event.

57. What was said on this issue in *Brown* was not *ratio*. In *Brown*, Tasmania conceded effective burden (see at [89]) and, for the plurality, the issues raised in *Levy* did not arise (see at [109]). Further, since *Brown*, a majority of this Court has held that there is an effective burden on political communication if there is "a material effect on the totality of political communication" (*Banerji* at [29]) and, so put, it is not determinative that there was a pre-existing prohibition on the relevant communications.

Validity under the implied freedom

58. The construction of s 79 set out above helps in identifying the *object* of s 79. The section is directed to rendering more effective the underlying (valid) duty which renders the thing or information a prescribed thing or information (whether that be the underlying criminal prohibition referred to in s 79(1)(a) or the underlying duties which are necessary before s 79(1)(b) or (c) are relied on). That is an object that is compatible with the system of representative and responsible government: see *Becker v City of Onkaparinga* (2010) 108 SASR 163 at [62]-[63] (Bleby J) (Doyle CJ and Duggan agreeing). Further, in light of the construction of s 79(3) advanced by the AHRC, including the public interest exception in s 79(3)(b), it is likely that the provision is proportionate to that object.

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[19] See Annotated Submissions on behalf of the First Defendant dated 26 July 2011 at [77].

59. The submissions of the Plaintiff raise a question as to whether laws enacted *after* the enactment of s 79 (and after the date at which validity is to be assessed) are admissible as evidence of constitutional fact as to the *necessity* of s 79(3): see PS [43] (referring to the 2018 amendments). The AHRC submits that the answer to that question is "yes".

60. There is no difficulty in having regard to events occurring after enactment in assessing the validity of a law under the implied freedom. And that is so even if as a result of those events a law which was valid when enacted becomes invalid. As Dixon CJ said of s 92 in *Armstrong v Victoria [No 2]* (1957) 99 CLR 28 at 49 (***Armstrong***), "[i]f tomorrow the facts change so that the operation of the enactment changes too and s 92 is violated (an hypothesis making some demands on credulity) then s 92 will doubtless prevail"; see also eg *Armstrong* at 73 (Williams J) ("I can see no reason why an Act which is valid may not subsequently become invalid from change of circumstances"). This is no different in the case of the implied freedom. The freedom exists for the purpose of ensuring the efficacy of the constitutionally prescribed system of representative and responsible government. That system is not static; it evolves over time (see, eg, *Roach v Electoral Commissioner* (2007) 233 CLR 162 at [77] (Gummow, Kirby and Crennan JJ)). And the result may be to render unlawful that which was previously lawful (*Rowe v Electoral Commissioner* (2010) 243 CLR 1 at [356] (Crennan J)). Nor is there any difficulty in having regard to matters occurring (shortly) after 29 April 2018 (the date on which validity is to be assessed) in forming a satisfaction as to the constitutional facts as they stood on 29 April 2018. That an alternative measure was deemed sufficient shortly after 29 April 2018 is some evidence that this was an obvious and compelling alternative as at 29 April 2018.

61. The effective burden imposed by s 79(3) (even on the AHRC's construction) and the 2018 amendments further support a narrow construction of s 79(3) in order (if possible) to ensure its validity.

PART V: ORAL ARGUMENT

62. If the AHRC is given leave to make oral submissions, it estimates it will require 15 minutes.

Dated 9 October 2019

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