IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S196 of 2019

BETWEEN:

ANNIKA SMETHURST
First Plaintiff

NATIONWIDE NEWS PTY LTD
Second Plaintiff

10

and

COMMISSIONER OF POLICE
First Defendant

JAMES LAWTON
Second Defendant

20

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

30

Crown Solicitor for the State of South Australia
Level 9, 45 Pirie Street
ADELAIDE SA 5000

Telephone: 08 8204 2324
Fax: 08 8207 1794
Email: samantha.graham@sa.gov.au
Ref: Sam Graham, LM 182557

Part I: Certification

1. This submission is in a form suitable for publication on the internet.

Part II: The Basis for Intervention

2. The Attorney-General for the State of South Australia (**South Australia**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth).

Part III: Leave to Intervene

3. Not applicable

Part IV: Submissions

4. South Australia intervenes to make submissions in relation to the third question stated for the opinion of the Full Court, namely whether s 79(3) of the *Crimes Act 1914* (Cth), as in force on 29 April 2018, was invalid on the ground that it infringed the implied freedom of political communication.[1]

5. South Australia confines its submissions to principles relevant to the "second limb" of the test stated in *Lange v Australian Broadcasting Corporation*.[2] Specifically, South Australia makes submissions with respect to the structured proportionality testing now adopted by a majority of this Court as a tool of the justification analysis, and more particularly the second stage of that analysis concerning the *necessity* of the law.[3]

Proportionality Testing: Necessity

6. Proportionality testing asks whether an impugned law is reasonably appropriate and adapted to advance a legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government by reference to three identified stages: suitability, necessity and adequacy of balance.[4]

7. The plurality in *McCloy v New South Wales* described the second stage of proportionality testing as asking whether the law is necessary in the sense that "there is no obvious and compelling alternative, reasonably practicable means of achieving

---

1 Special Case at [57] (Special Case Book 8).
2 (1997) 189 CLR 520 at 567, see also 561-562 (the Court).
3 *McCloy v New South Wales* (2015) 257 CLR 178 at 195 [2] (French CJ, Kiefel, Bell and Keane JJ); *Brown v Tasmania* (2017) 261 CLR 328 at 416-417 [278]-[280] (Nettle J); *Clubb v Edwards* [2019] HCA 11 at [408] (Edelman J).
4 *McCloy v New South Wales* (2015) 257 CLR 178 at 194-195 [2] (French CJ, Kiefel, Bell and Keane JJ).

the same purpose which has a less restrictive effect on the freedom".[5] At least where a law has a significant purpose, "a law is not ordinarily to be regarded as lacking in necessity unless there is an obvious and compelling alternative which is *equally practicable and available* and would result in a *significantly* lesser burden on the implied freedom".[6]

8. The need for an alternative law to be "obvious and compelling" recognises the "proper role of the courts in assessing legislation for validity".[7] That cautionary qualification has been described as ensuring "that consideration of the alternatives remains a tool of analysis",[8] much like structured proportionality testing itself.[9]

10 9. The presence of an obvious and compelling alternative "may be decisive of invalidity"[10] as "it may be difficult for those arguing for the validity of the legislation to justify the legislative choice as necessary".[11] This does not deny the possibility that "other means of justifying the burden" or explaining the legislative choice may be identified in an appropriate case.[12]

An obvious and compelling alternative?

10. The Plaintiffs' submission that it was obvious a narrower law, more tailored to the legitimate ends sought to be achieved, could have been drafted is based principally on the 2018 amendments.[13] The obviousness of the 2018 amendments as an alternative is said to be supported by recommendations made in various reports, the enactment of
20 the *Official Secrets Act 1989* (UK) which adopted such an approach and the advent of

---

5 *McCloy v New South Wales* (2015) 257 CLR 178 at 195 [2] (French CJ, Kiefel, Bell and Keane JJ) (see also at 217 [81]).

6 *Comcare v Banerji* [2019] HCA 23 at [35] (Kiefel CJ, Bell, Keane and Nettle JJ) (emphasis added). The need for an obvious and compelling alternative to have a "significantly lesser burden on the implied freedom" has elsewhere not been conditioned on the impugned law having a "significant" purpose: *Clubb v Edwards* [2019] HCA 11 at [266] (Nettle J) and at [479] (Edelman J).

7 *Monis v The Queen* (2013) 249 CLR 92 at 214 [347] (Crennan, Kiefel and Bell JJ).

8 *Tajjour v New South Wales* (2014) 254 CLR 508 at 550 [36] (French CJ).

9 *McCloy v New South Wales* (2015) 257 CLR 178 at 213 [68], 215-216 [74] (French CJ, Kiefel, Bell and Keane JJ); *Brown v Tasmania* (2017) 261 CLR 328 at 369 [125], 370 [131] (Kiefel CJ, Bell and Keane JJ), 376 [158]-[159] (Gageler J), 417 [279]-[280] (Nettle J), 476-477 [473] (Gordon J); *Clubb v Edwards* [2019] HCA 11 at [468] (Edelman J).

10 *Brown v Tasmania* (2017) 261 CLR 328 at 370 [130] (Kiefel CJ, Bell and Keane JJ). See also at 478 [479], 464 [427] (Gordon J); *Tajjour v New South Wales* (2014) 254 CLR 508 at 581 [152] (Gageler J).

11 *Brown v Tasmania* (2017) 261 CLR 328 at 372 [139] (Kiefel CJ, Bell and Keane JJ).

12 *Brown v Tasmania* (2017) 261 CLR 328 at 370 [130] (Kiefel CJ, Bell and Keane JJ).

13 Plaintiffs' Submissions (**PS**) at [43].

Commonwealth policies for the classification of documents, all of which preceded the 2018 amendments.[14]

11. Where an impugned law is preceded or succeeded by a law that is narrower in scope, it is unsurprising that the narrower law would be proffered as an obvious and compelling alternative with a less restrictive effect on the freedom. Such claims are not new. This Court's unwillingness to accept them at face value has been demonstrated to be for good reasons.[15] Those good reasons exist whether the narrower law precedes or, as in this case, succeeds the broader law.

12. First, the two laws may pursue *different purposes*. The legislative object or purpose of an impugned law is to be discerned from the text, the context and, if relevant, the history of the law.[16] In some cases it may emerge from that process that the later, narrower law in fact pursues a different purpose than the earlier, broader law. In other cases it may emerge that the two laws pursue multiple purposes but do not share the same composite legislative object.[17] Given that necessity requires consideration of whether an alternative law could achieve the "same purpose"[18] as the impugned law, it can hardly be said that the later, narrower law which is directed to a particular purpose, is an obvious and compelling alternative to the earlier, broader law which is directed to a different purpose.

13. Second, the laws may pursue the same purpose yet seek to achieve that purpose to *differing degrees*. Just as Parliament may choose to enact further measures for the better achievement of an objective,[19] so too it may choose to reduce measures thereto

---

14 PS at [43].

15 *McCloy v New South Wales* (2015) 257 CLR 178 at 270–271 [258]–[261] (Nettle J), at 293 [361] (Gordon J); *Clubb v Edwards* [2019] HCA 11 at [117] (Kiefel CJ, Bell and Keane JJ), at [483]-[484] (Edelman J); *Unions NSW v New South Wales* [2019] HCA 1 at [112]-[113] (Nettle J). See also *Brown v Tasmania* (2017) 261 CLR 328 at 371-373 [139]-[146] (Kiefel CJ, Bell and Keane JJ).

16 *Brown v Tasmania* (2017) 261 CLR 328 at 432 [321] (Gordon J), citing *McCloy v New South Wales* (2015) 257 CLR 178 at 284 [320] (Gordon J) (see also 212-213 [67] (French CJ, Kiefel, Bell and Keane JJ), 232 [132] (Gageler J)); *Unions NSW v New South Wales* (2013) 252 CLR 530 at 557 [50] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). See also *Tajjour v New South Wales* (2014) 254 CLR 508 at 591 [188] (Keane J); *Comcare v Banerji* [2019] HCA 23 at [182] (Edelman J).

17 *McCloy v New South Wales* (2015) 257 CLR 178 at 203-204 [33]-[34] (French CJ, Kiefel, Bell and Keane JJ), at 285 [328] (Gordon J).

18 *McCloy v New South Wales* (2015) 257 CLR 178 at 195 [2], 217 [81] (French CJ, Kiefel, Bell and Keane JJ); *Brown v Tasmania* (2017) 261 CLR 328 at 371 [139] (Kiefel CJ, Bell and Keane JJ); *Clubb v Edwards* [2019] HCA 11 at [6] (Kiefel CJ, Bell and Keane JJ), at [267] (Nettle J), at [476], [479] (Edelman J).

19 *Unions NSW v New South Wales* [2019] HCA 1 at [113] (Nettle J).

enacted. As Gageler J observed in *McCloy*, "[t]he Parliament is not relegated by the implied freedom to resolving all problems … if it resolves any".[20]

14. Where Parliament makes a policy choice about the extent to which it will resolve an identified problem by legislative means, it is not for the Court to substitute its own judgment for that of Parliament. Legislative judgment "form[s] no part of the analysis of the second condition".[21] As the plurality in *McCloy* acknowledged: [22]

> *"it is the role of the legislature to determine which policies and social benefits ought to be pursued. This is not a matter of deference. It is a matter of the boundaries between the legislative and judicial functions."*

10 If the Court were to regard a later, narrower law as an obvious and compelling alternative when it does not achieve the identified end as comprehensively as the earlier, broader law, it would cross that boundary and "exceed [its] constitutional competence".[23]

15. Consistent with the boundaries of its judicial function, the Court recognises the need for a proffered alternative to be "as effective"[24] or "equally effective"[25] in achieving the legislative purpose as the impugned law. The alternative must be "as capable of fulfilling [the] purpose as the means employed by the impugned provision, 'quantitatively, qualitatively, and probability-wise'".[26] An alternative that is not capable of achieving the purpose to the "same extent" [27] as the impugned law is not a
20 "true alternative".[28]

---

20 *McCloy v New South Wales* (2015) 257 CLR 178 at 251 [197] (Gageler J).
21 *McCloy v New South Wales* (2015) 257 CLR 178 at 286-287 [332] (Gordon J).
22 *McCloy v New South Wales* (2015) 257 CLR 178 at 220 [90] (French CJ, Kiefel, Bell and Keane JJ).
23 *Tajjour v New South Wales* (2014) 254 CLR 508 at 550 [36] (French CJ).
24 *Tajjour v New South Wales* (2014) 254 CLR 508 at 571 [114] (Crennan, Kiefel and Bell JJ); *McCloy v New South Wales* (2015) 257 CLR 178 at 211 [61] (French CJ, Kiefel, Bell and Keane JJ), 285 [328] (Gordon J); *Clubb v Edwards* [2019] HCA 11 at [70], [92] and [100] (Kiefel CJ, Bell and Keane JJ). See also at [478] (Edelman J).
25 *McCloy v New South Wales* (2015) 257 CLR 178 at 217 [81] (French CJ, Kiefel, Bell and Keane JJ). See also *Clubb v Edwards* [2019] HCA 11 at [463] (Edelman J).
26 *Tajjour v New South Wales* (2014) 254 CLR 508 at 571 [114] (Crennan, Kiefel, Bell and Keane JJ), citing Barak, *Proportionality: Constitutional Rights and their Limitations* (2012), p 324.
27 *Tajjour v New South Wales* (2014) 254 CLR 508 at 563 [81], 564 [83], 565 [90] (Hayne J); *McCloy v New South Wales* (2015) 257 CLR 178 at 293 [361] (Gordon J). See also *Clubb v Edwards* [2019] HCA 11 at [479] (Edelman J) and *Comcare v Banerji* [2019] HCA 23 at [194], [201] (Edelman J): an obvious and compelling alternative is one that could reasonably be expected to achieve the stated purpose to "the same or similar extent". Gageler J's observation in *Tajjour v New South Wales* (2014) 254 CLR 508 at 584 [163] that "the consequence of the implied constitutional freedom is that there are some legitimate ends which cannot be pursued by some means, the results of which in some

16. Third, a later, narrower law may arise following a *change in circumstances*. Such a change may have the consequence that at the time the later law is enacted, narrower means can achieve the identified purpose to the same extent as the earlier, broader law. As Nettle J explained in *Unions NSW v New South Wales*, "[i]t is open to the Parliament to take different views from time to time according to the circumstances as they evolve or are reasonably anticipated as likely to develop in future."[29] Parliament's decision to enact a narrower law in consequence of a change in circumstances simply demonstrates Parliament's responsiveness to those evolving circumstances. The fact of the enactment of the narrower law does not make out the claim that the narrower law is, much less has always been, an obvious and compelling alternative to the broader predecessor which was enacted under different circumstances.

17. Moreover, any identified underlying change in circumstances cannot necessarily be relied upon to make out such a claim. Even if it could be said that from the time of the change, the narrower law could be considered less burdensome when compared with the terms of the broader law, the emergence of that alternative sometime after the broader law's enactment does not of itself have the effect that the broader law ceases to be justified and is thereafter invalid. There is a distinction between, on the one hand, a law the operation of which has changed to impose a much greater burden in the changed circumstances, or which no longer pursues a legitimate purpose in those changed circumstances, and, on the other hand, a law that despite the changed circumstances operates in the same way, with the same burden and the same purpose, but which now could be achieved through narrower means.[30]

18. Whatever may be the consequence of that distinction for the validity of a legislative provision in the former cases, for the continued validity of a legislative provision in the latter case to depend on its necessity (as framed within proportionality testing) determined by reference to the constitutional facts and circumstances not only at the

---

circumstances is that some ends will not be able to be pursued to the same extent as they might have been pursued absent the implied constitutional freedom" does not deny that an alternative law must achieve the purpose to the same extent. It simply recognises that some purposes may not be able to be achieved to their full extent consistently with the implied freedom.

28 *Tajjour v New South Wales* (2014) 254 CLR 508 at 571 [114] (Crennan, Kiefel and Bell JJ); *McCloy v New South Wales* (2015) 257 CLR 178 at 285 [328] (Gordon J).

29 *Unions NSW v New South Wales* [2019] HCA 1 at [113] (Nettle J).

30 See *Armstrong v Victoria [No 2]* (1957) 99 CLR 28 at 48-49 (Dixon CJ), 73-74 (Williams J).

time of enactment but also at the time of challenge (as well as at all times in between), would invite volatility.[31]

19. Indeed, this would enable the validity of a law that burdens the implied freedom to "wax and wane" as the relevant constitutional facts and circumstances change,[32] a concept that has been described as "creeping unconstitutionality".[33] As Keane J expressed it in *Murphy v Electoral Commissioner*:[34]

> *"It is the function of Parliament to make laws in order to change the world. To assert that changes in the world may unmake laws made by Parliament is to assert the existence of an exception to this understanding of the role of Parliament."*

20. The idea that a court could "pull the constitutional rug from under a valid legislative scheme",[35] on the basis that a change in constitutional facts and circumstances has led to the emergence of an obvious and compelling alternative, must be resisted. The Court would otherwise be engaged in a process of legislative reform, effectively compelling the Parliament to redesign its legislative scheme to adopt the newly available, less restrictive, alternative means to achieve its purpose. To engage in such a process would be inconsistent with the role of the judiciary in our constitutional system.[36]

21. To accept that this would be so inconsistent is to give content to the recognised role of necessity as a tool in the justification analysis, rather than as a constitutional test itself.[37] To resist the conclusion that a change in constitutional facts and circumstances has led to the emergence of an obvious and compelling alternative is not to deny any essential element of proportionality testing. At its highest, it is to recognise that the articulated tools are themselves subject to constitutional limits.

---

31 *XYZ v Commonwealth* (2006) 227 CLR 532 at 608 [218] (Callinan and Heydon JJ).

32 *Clubb v Edwards* [2019] HCA 11 at [470] – [471] (Edelman J). While Edelman J there acknowledged this was not an entirely novel suggestion, his Honour observed that strong opposition had been expressed to the suggestion, including recently.

33 *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 90 [191] (Keane J).

34 *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 93 [199] (Keane J).

35 *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 55 [42] (French CJ and Bell J).

36 *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 73-74 [109]-[110] (Gageler J).

37 *McCloy v New South Wales* (2015) 257 CLR 178 at 213 [68], 215 [73], 216 [77], 217 [78] (French CJ, Kiefel, Bell and Keane JJ); *Brown v Tasmania* (2017) 261 CLR 328 at 376 [158]-[159] (Gageler J), 417 [278], [280] (Nettle J), 464 [427], 476 [473], 478 [479] (Gordon J).

22. In a given circumstance where this particular limit to the utility of the tool of necessity[38] may be found to bite, the Court is in no sense hampered in ensuring that the greater burden imposed by the broader law is justified. Nor is the Court so hampered if, for any of the other reasons identified above, it concludes that a later, narrower law is not an obvious and compelling alternative to the earlier, broader law. The Court will, to this end, necessarily focus on assessing whether the extent of the burden imposed by the broader law is adequately balanced against the importance of the purpose sought to be achieved by the legislature. That assessment is only called for at the third stage of proportionality testing.

10 **Part V: Estimate of Time for Oral Argument**

23. South Australia estimates that 15 minutes will be required for the presentation of oral argument.

Dated: 29 October 2019

C D Bleby SC
Solicitor-General for South Australia
20 T: 08 8207 1616
F: 08 8207 2013
E: chris.bleby@sa.gov.au

K M Scott
Counsel
T: 08 8204 2085
F: 08 8207 1794
E: kelly.scott@sa.gov.au

---

38 But not, it should be noted, the complete abrogation of that tool.

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

ANNEXURE TO THE SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

Crown Solicitor for the State of South Australia
Level 9, 45 Pirie Street
ADELAIDE SA 5000

Telephone: 08 8204 2324
Fax: 08 8207 1794
Email: samantha.graham@sa.gov.au
Ref: Sam Graham, LM 182557

ANNEXURE: LIST OF RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES AND STATUTORY INSTRUMENTS

1. The relevant constitutional provisions, statutes and statutory instruments referred to in these submissions are:

   1.1 *Crimes Act 1914* (Cth), compilation no. 118, as in force on 29 April 2018;

   1.2 *Official Secrets Act 1989* (UK), as enacted.