

CRIMINALISING ‘GLOBALISE THE INTIFADA’ AND ‘FROM THE RIVER TO THE SEA’: WILL THE CONSTITUTION ALLOW IT?

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Following the 2025 Bondi Beach terror attack, state governments have enacted, or are seeking to enact, laws criminalising the public use of certain pro-Palestine slogans, including the slogans 'globalise the intifada' and 'from the river to the sea'. This comment examines whether the prohibitions recently introduced by Queensland are likely to survive a constitutional challenge under the implied freedom of political communication. While last-minute amendments to the law — which mean that the slogans are now directly identified and prohibited by the legislation itself — have rendered it more vulnerable to constitutional challenge, the paper argues that the new laws will probably withstand such a challenge, nonetheless.

I INTRODUCTION

The antisemitic terror attack at Bondi Beach on 14 December 2025, in which fifteen people were killed by two gunmen at a Hanukkah celebration, has been a horrifying and deeply saddening tragedy for Australia. In its aftermath, Australian governments have introduced sweeping measures to combat antisemitism and hate speech. These include laws that explicitly criminalise the public use of certain pro-Palestine slogans, justified on the basis that such expressions incite hatred and violence towards Jewish communities. In March 2026, the Queensland Government passed the Fighting Antisemitism and Keeping Guns out of the Hands of Terrorists and Criminals Amendment Bill 2026 (Qld) ('Fighting Antisemitism Bill') into law which, among other things, introduced an offence to criminalise the public use of the slogans 'globalise the intifada' and 'from the river to the sea', the latter of which is often accompanied at pro-Palestine rallies by the chant 'Palestine will be free'.¹

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¹ See, eg, Joint Statement of the Premier and Attorney-General of Queensland, *Reforms to Fight Antisemitism and Hate and Protect Faith Communities* (Web Page, 8 February 2026) <<https://statements.qld.gov.au/statements/104460>>.

The New South Wales ('NSW') Government has also sought to criminalise the public use of the slogan 'globalise the intifada'. The NSW Legislative Assembly Committee on Law and Safety recommended that the proposed prohibition proceed, though it did not recommend that the slogan 'from the river to the sea' be prohibited, on the basis that its meaning is too contested and ambiguous to warrant proscription.² However, at the time of writing, NSW has yet to introduce a Bill into Parliament, likely because it is waiting to see whether Queensland's laws will survive constitutional challenge.

At the federal level, the Commonwealth has enacted a suite of new offences in the *Combatting Antisemitism, Hate and Extremism (Criminal and Migration Laws) Act 2026* (Cth), which the government promoted as 'the toughest federal hate crime laws in Australian history'.³ However, Prime Minister Anthony Albanese has not clearly indicated whether the new law will have the effect of criminalising the two slogans in question, avoiding directly answering questions on the matter.⁴

As Queensland's outright prohibitions on these two political slogans are unprecedented and face the active threat of a constitutional challenge, the question of whether Queensland's prohibitions are permissible under the *Australian Constitution* calls to be examined.⁵ While Australians sometimes presume that the *Constitution* guarantees a right to freedom of speech, as the First Amendment to the *United States Constitution* does, no such express right exists in Australia.⁶ The High Court of Australia has, however, found that an implied freedom of political communication ('implied freedom') is inferred from the system of representative and responsible government prescribed by ss 7 and 24 of the *Constitution*.⁷

Significant issues of principle, as well as constitutional law, arise from any criminalisation of political speech, particularly where the speech is not necessarily made with malicious intent. The two pro-Palestine slogans — while controversial — are characterised by many of those who use them as non-violent expressions of

² Legislative Assembly Committee on Law and Safety, Parliament of NSW, *Measures to Prohibit Slogans that Incite Hatred* (Report, January 2026) iv–v, 3, 8.

³ See Attorney-General's Department, *Albanese Government Passes Legislation to Combat Antisemitism, Hate and Extremism* (Web Page, 21 January 2026) <<https://ministers.ag.gov.au/media-centre/albanese-government-passes-legislation-combat-antisemitism-hate-and-extremism-21-01-2026>>.

⁴ See, eg, Prime Minister of Australia, *Press conference – Parliament House, Canberra* (Web Page, 23 December 2025) <<https://www.pm.gov.au/media/press-conference-parliament-house-canberra-23-dec-2025>>.

⁵ Rashida Yosufzai, "‘Highly vulnerable’: Could Queensland's controversial hate speech laws be quashed in court?" *SBS News* (online, 24 April 2026) <<https://www.sbs.com.au/news/article/could-queenslands-controversial-banned-speech-laws-be-quashed-in-court/91h8ipixx>>.

⁶ *Comcare v Banerji* (2019) 267 CLR 373, 395 [20] (Kiefel CJ, Bell, Keane and Nettle JJ) ('*Comcare*').

⁷ See, eg, *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 ('ACTV'); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

protest and solidarity with Palestine.⁸ Their criminalisation is therefore problematic, given that they carry different meanings for different people.⁹

That said, the implied freedom's capacity to invalidate laws that curtail speech is limited, particularly where: the controls are 'content-neutral',¹⁰ their burden on political communication is 'incidental' rather than direct,¹¹ and they are legislated for a legitimate purpose compatible with Australia's system of representative and responsible government.¹² This, however, may not entirely characterise Queensland's new laws. Following political pressure, the Queensland Government made last-minute amendments to the offence such that it is no longer written in a predominantly 'content-neutral' or 'viewpoint-neutral' manner.¹³ The enacted offence explicitly identifies and prohibits the slogans *in its text*, rather than by reference to accompanying regulation as was initially planned.¹⁴

As a result, Queensland's new offence appears significantly more vulnerable to constitutional challenge when compared to its form when it was initially tabled in the Fighting Antisemitism Bill.¹⁵ There is therefore a real risk that the High Court may strike down the new law, or parts of it, on the basis that it exceeds the legislative power of Queensland Parliament by infringing the implied freedom. Then again, the offence may survive such a challenge, as the High Court has demonstrated a reluctance to question the political judgment and policy of Parliament on matters concerning freedom of expression and national security.¹⁶

This Comment begins with a doctrinal overview of the implied freedom, explaining the current three-step test courts undertake when adjudicating implied freedom claims.¹⁷ It then examines Queensland's new offence introduced into s 52DA of the *Criminal Code Act 1899* (Qld) ('*Criminal Code*') and argues that, while s 52DA is more vulnerable to constitutional challenge following the last-

⁸ See, eg, Legislative Assembly Committee on Law and Safety of NSW (n 2) 3–9.

⁹ Ibid. See also *University of Toronto (Governing Council) v Doe et al.* 2024 ONSC 3755, 37 [92]–[98], 42 [100]–[101] (Koehnén J) ('*Doe*').

¹⁰ *Farmer v Minister for Home Affairs* (2025) 425 ALR 116, [57] (Gageler CJ, Gordon and Beech-Jones JJ), [138] (Steward J), [249]–[250], [258] (Jagot J) ('*Farmer*').

¹¹ *ACTV* (n 7) 169 (Deane and Toohey JJ); *Hogan v Hinch* (2011) 243 CLR 506, 555–6 [95] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) ('*Hogan*').

¹² *McCloy v NSW* (2015) 257 CLR 178, 193 (French CJ, Kiefel, Bell and Keane JJ) ('*McCloy*').

¹³ Alex Brewster, 'Queensland government makes 11th-hour changes to hate speech laws after criticism' *ABC News* (online, 3 March 2026) <<https://www.abc.net.au/news/2026-03-03/hate-speech-queensland-changes-proposed-law/106408468>>.

¹⁴ *Criminal Code Act 1899* (Qld) sub-s 52DA(6) ('*Criminal Code*').

¹⁵ See, eg, *Farmer* (n 10) [57] (Gageler CJ, Gordon and Beech-Jones JJ), [138] (Steward J), [249]–[250], [258] (Jagot J). See also Anne Twomey, 'The LNP's phrase-banning law is wide open to constitutional attack. Is it a victory for the people, or a smart political play?' *The Guardian* (online, 8 March 2026) <<https://www.theguardian.com/commentisfree/2026/mar/08/the-lnps-phrase-banning-law-is-wide-open-to-constitutional-attack-is-it-a-victory-for-the-people-or-a-smart-political-play>> ('The LNP's phrase-banning law is wide open to constitutional attack').

¹⁶ See, eg, *Comcare* (n 6) 442 [165] (Edelman J); *LibertyWorks Inc v Commonwealth of Australia* (2021) 274 CLR 1, 78 [201] (Edelman J) ('*LibertyWorks*'); *Farm Transparency International Ltd v NSW* (2022) 277 CLR 537, 617 [253] (Edelman J). See also Rebecca Ananian-Welsh and Nicola McGarrrity, 'National Security: A Hegemonic Constitutional Value?' in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 274.

¹⁷ *McCloy* (n 12) 193 (French CJ, Kiefel, Bell and Keane JJ).

minute amendments to the Fighting Antisemitism Bill, it is likely to survive such a challenge nonetheless. The Commonwealth legislation is not discussed in this paper as, unlike the Queensland offence, it was not legislated with the specific intent of criminalising the two slogans in question.¹⁸ Nonetheless, the present analysis of Queensland law carries broader implications for the constitutional validity of the Commonwealth legislation and any similar laws — state or federal — enacted in the future.¹⁹

II THE MCCLOY/BABET TEST

The implied freedom does not confer a right to freedom of expression.²⁰ Rather, it operates as a negative constraint on legislative and executive power, preventing undue government interference with communication on government and political matters.²¹ Under the current test, first articulated in *Lange v Australian Broadcasting Corporation* ('*Lange*'),²² and further developed in *McCloy v NSW* ('*McCloy*')²³ and *Babet v Commonwealth* ('*Babet*'),²⁴ a three-step analysis determines whether a law impermissibly burdens the implied freedom. These steps are:

1. Does the law effectively burden freedom of communication about government or political matters?
2. Is the purpose of the law 'legitimate', in the sense of being compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?
3. Is the law reasonably appropriate and adapted to advance that aim?²⁵

If the answer to the first question is 'yes', and the answer to the second or third is 'no', then the law is invalid.²⁶ Following *Lange*, the test was, for a period of time limited to the first two steps of the current *McCloy/Babet* test.²⁷ However, following *Coleman v Power* ('*Coleman*'), the High Court developed the third, final

¹⁸ Joint Statement of the Premier and Attorney-General of Queensland (n 1).

¹⁹ The Commonwealth legislation also faces the threat of constitutional challenge. See Rule of Law Institute Australia, *Hate law faces court test* (Web Page, 2026) <<https://ruleoflawaustralia.com.au/commentary/hate-law-faces-court-test/>>.

²⁰ *Comcare* (n 6) 395 [20] (Kiefel CJ, Bell, Keane and Nettle JJ).

²¹ *Ibid.*

²² (1997) 189 CLR 520, 567–8 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) ('*Lange*').

²³ (n 12) 193 [2] (French CJ, Kiefel, Bell, and Keane JJ). See also *Coleman v Power* (2004) 220 CLR 1, 77–8 (Gummow and Hayne JJ), 50 [92]–[93] (McHugh JJ) ('*Coleman*').

²⁴ (2025) 423 ALR 83 ('*Babet*').

²⁵ *Ibid.*

²⁶ *Ibid.* See also Sarah Soriel and Shireen Morris, 'Does it Exist? *LibertyWorks* and Australia's Shrinking Implied Freedom of Political Communication' (2023) 42(1) *University of Queensland Law Journal* 1, 8.

²⁷ *Lange* (n 22) 567–8 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

step — inquiring whether the law is ‘reasonably appropriate and adapted’ in advancing its legitimate purpose.²⁸ In *McCloy*, a majority of the High Court stipulated a structured proportionality test to guide the third step, inquiring whether the impugned law is: (a) suitable; (b) necessary; and (c) adequate in balance.²⁹

While structured proportionality was important in *McCloy* and subsequent implied freedom cases, in 2025 a majority of the High Court in *Babet* held that structured proportionality is merely a relevant ‘tool of analysis’, rather than a required approach.³⁰ The Court now, therefore, typically employs what Gageler CJ described as a ‘calibrated scrutiny test’, which considers a range of different context-specific factors to resolve the third step of the implied freedom analysis.³¹ These factors include whether the law is content-neutral or content-based,³² controlled communication in a manner that was ‘inherently political’ or operated ‘incidentally to restrict political communication’,³³ or involved ‘singling out’ particular communication.³⁴

III THE QUEENSLAND CRIMINAL CODE’S S 52DA OFFENCE

The *Fighting Antisemitism and Keeping Guns out of the Hands of Terrorists and Criminals Amendment Act 2026* (Qld) inserts a new strict liability offence into sub-s 52DA(1) of the *Criminal Code*, providing:

A person who publicly recites, publicly distributes, publishes or publicly displays a *prohibited expression* in a way that might reasonably be expected to cause a member of the public to feel menaced, harassed or offended commits an offence, unless the person has a *reasonable excuse*.

The ‘prohibited expressions’ are the two slogans — ‘globalise the intifada’ and ‘from the river to the sea’ — identified in sub-s 52DA(6). Their explicit identification in the legislation represents a significant departure from what was previously proposed in the *Fighting Antisemitism Bill*, which had proposed sub-s 52C(1A) provide:

²⁸ (n 23) 82 [210]–[212] (Kirby J).

²⁹ *McCloy* (n 12) 179. See also Mark Watts, ‘Reasonably Appropriate and Adapted? Assessing Proportionality and the “Spectrum” of Scrutiny in *McCloy v New South Wales*’ (2016) 35(2) *University of Queensland Law Journal* 349, 351.

³⁰ *Babet* (n 24) [49] (Gageler CJ and Jagot J) (*‘Babet’*).

³¹ *Tajjour v NSW* (2014) 254 CLR 508, 580 [151] (Gageler J). See also Anne Twomey, Submission No 15 to Queensland Parliament Justice, Integrity and Community Safety Committee, *Inquiry into Fighting Antisemitism and Keeping Guns Out of the Hands of Terrorists and Criminals Amendment Bill 2026* (15 February 2026) 8.

³² *McCloy* (n 12) 269 (Nettle J), 282 (Gordon J).

³³ *Ibid*.

³⁴ *Ibid* 238 [150] (Gageler J). See also Rosalind Dixon, ‘Calibrated Proportionality’ (2020) 48(1) *Federal Law Review* 92, 96.

A prohibited expression is an expression —

- (a) prescribed by regulation for this subsection; or
- (b) that so nearly resembles an expression mentioned in paragraph (a) that it is likely to be confused with or mistaken for that expression.³⁵

There were good reasons for this change. The offence, as was previously slated, would have given Queensland governments the ability to ban a wide range of expressions, beyond the two initially tabled, if they so wished. The original text of sub-s 52DA(1) was broad enough to prohibit expressions that extend beyond antisemitism, provided they can cause a member of the public to feel menaced, harassed, or offended. As a result, the offence as originally proposed may had a far greater potential impact on freedom of expression than initially intended by the Crisafulli Liberal-National Government. While the changes to the Bill significantly narrow the scope of s 52DA, they also render it more vulnerable to constitutional challenge (see Part IV below).

Under the enacted law, ‘reasonable excuses’ which may avoid criminal liability include, but are not limited to, the person using a slogan for a ‘genuine artistic, religious, educational, historical, legal or law enforcement purpose’, or for ‘a purpose that is in the public interest’, where the use was reasonable, in the circumstances, for that purpose.³⁶ ‘Public interest’ is not defined and is, therefore, open to interpretation. The offence also attracts a notably high maximum penalty of two years’ imprisonment or 150 penalty units.³⁷

While ‘globalise the intifada’ and ‘from the river to the sea’ mean different things to different people,³⁸ their actual meaning is not necessarily what is in question. This is significant, as while some individuals and communities understand the slogans to be calls for violence, the ethnic cleansing of Jews from the land, and/or the destruction of the Israeli state, others argue that they constitute non-violent calls for solidarity with Palestine, expressions of hope for coexistence in Palestine and Israel, and opposition to Israel’s actions in Gaza — which the United Nations Independent International Commission of Inquiry on the Occupied Palestinian Territory has deemed ‘the commission of genocide’.³⁹

The Ontario Superior Court of Justice in *University of Toronto (Governing Council) v Doe et al*, when considering the meaning of ‘from the river to the sea’, noted:

³⁵ *Criminal Code* (n 14) sub-ss 52C(1A)–52DA(2). See also Fighting Antisemitism and Keeping Guns out of the Hands of Terrorists and Criminals Amendment Bill 2026 (Qld) sub-s 4(6).

³⁶ *Ibid*.

³⁷ *Ibid* sub-s 52DA(1).

³⁸ See, eg, Legislative Assembly Committee on Law and Safety of NSW (n 2) 3. See also *Doe* (n 9) 37 [92]–[98], 42 [100]–[101] (Koehnen J).

³⁹ *Doe* (n 9) 37 [92]–[98], 42 [100]–[101] (Koehnen J). See also Human Rights Council, *Legal Analysis of the Conduct of Israel in Gaza Pursuant to the Convention on the Prevention and Punishment of the Crime of Genocide*, UN Report A/HRC/60/CRP 3 (16 September 2025) 68 [240].

the phrase appears to have been used by both Israeli and Palestinian politicians on the far ends of their respective political spectrums to claim the land ‘from the river to the sea’ as belonging exclusively to either Jews or Palestinians and by more moderate camps amongst both Israelis and Palestinians as reflecting a desire for a political solution that would allow both groups to live in freedom in either one or two states.⁴⁰

While the meaning of the slogans is deeply contested, their actual meaning and the motive behind their use is not the primary issue for the Court when considering a charge brought under s 52DA. In theory, the Court need only be satisfied that the use of the expression might reasonably be expected to cause a person to feel menaced, harassed, or offended to make out liability under s 52DA, and there is a section of Australian society that perceives the slogans as hate speech.⁴¹

Ultimately, the breadth of s 52DA, alongside the indeterminate nature of the slogans, suggests that Queensland’s new laws are deeply problematic as a matter of principle. As Katharine Gelber and Luke McNamara have argued, the text ‘menaced, harassed or offended’ — especially ‘offended’ — is arguably too broad for a criminal offence attracting a maximum penalty of two years’ imprisonment.⁴² As Gelber and McNamara also note, an argument in favour of the new laws is that they contain a requirement that the slogans be used in a way that ‘might reasonably be expected to cause a member of the public to feel menaced, harassed or offended’.⁴³ This would mean that only those who use the slogans in a genuinely harmful manner would be captured by the offence.⁴⁴

However, they further observe that the new laws are likely to create a significant chilling effect, whereby individuals simply avoid using the phrases — regardless of whether they could be prosecuted under the law — for fear of attracting criminal sanctions.⁴⁵ This is especially so given that individuals in Queensland have already been arrested and charged for using such slogans.⁴⁶ On the one hand, the continued use of the slogans by some people might suggest that the law is not having a strong deterrent effect. Indeed, a large rally of pro-Palestine demonstrators in April 2026 sang the John Farnham song *Two Strong Hearts*, which contains the lyrics ‘reaching out forever like a river to the sea’, as a deliberate test of the new laws.⁴⁷ However, it could reasonably be expected that

⁴⁰ Doe (n 9) 41 [98] (Koehnen J).

⁴¹ See, eg, Legislative Assembly Committee on Law and Safety of NSW (n 2) 3.

⁴² Katharine Gelber and Luke McNamara, Submission No 14 to Queensland Parliament Justice, Integrity and Community Safety Committee, *Inquiry into Fighting Antisemitism and Keeping Guns Out of the Hands of Terrorists and Criminals Amendment Bill 2026* (13 February 2026) 5 (‘Submission No 14’).

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Queensland Police News, ‘Protestors arrested, Brisbane City’ *QPS Media* (online, 11 March 2026) <<https://mypolice.qld.gov.au/news/2026/03/11/protestors-arrested-brisbane-city/>>.

⁴⁷ Special Broadcasting Service, ‘Twenty protestors arrested for violating Queensland’s ban on pro-Palestinian phrases’ *SBS News* (online, 18 April 2026) <<https://www.sbs.com.au/news/article/twenty-protesters-arrested-for-violating-queenslands-ban-on-pro-palestinian-phrases/x2c4i9i4p>>.

most people would refrain from using the slogans out of fear of attracting criminal sanctions.

IV IS THE QUEENSLAND OFFENCE UNCONSTITUTIONAL?

A Issues Brought About by the Last-Minute Changes

Section 52DA in its current form explicitly identifies and prohibits the use of the identified slogans. However, the Fighting Antisemitism Bill previously proposed a more ‘content-neutral’ offence resembling Queensland’s public nuisance offences in s 6 of the *Summary Offences Act 2005* (Qld), leaving the relevant slogans to be identified by regulation. The text of s 52DA, as originally drafted, was cleverly constructed: its ‘content-neutral’ and ‘viewpoint-neutral’ language — which made no reference to the two slogans — would have made it more difficult to challenge through the implied freedom.⁴⁸ For instance, in *Farmer v Minister for Home Affairs* — an implied freedom challenge to aspects of the ‘character test’ which applies in the visa and migration context — the High Court reasoned that exclusions on persons who risk ‘inciting discord’ were less likely to violate the implied freedom as they were ‘viewpoint-neutral’, ‘content-neutral’, and ‘indifferent to the content of any political communication other than by reference to its effect of harm.’⁴⁹ As Anne Twomey notes, ‘[a]s originally introduced, the [Queensland] bill was a quite sophisticated attempt to repel any constitutional attack.’⁵⁰

That said, the original Bill did risk invalidity on the basis the High Court assesses whether a law burdens the implied freedom by reference to its ‘terms, legal effect and practical operation’, not merely its textual formulation.⁵¹ Even though the offence was drafted in content-neutral language, the Court would still have regard to the full range of its practical impacts on political communication — including the fact that its obvious purpose and effect was to criminalise the use of specific political slogans.⁵² The content-neutral drafting alone would therefore have been insufficient to insulate the provision from constitutional scrutiny.

That said, controls on speech that directly target certain political content and impose a direct burden on political communication, as s 52DA *currently* does, have been held by the High Court to require ‘compelling justification’.⁵³ In *Wotton v*

⁴⁸ See, eg, *Farmer* (n 10) [57] (Gageler CJ, Gordon and Beech-Jones JJ), [138] (Steward J), [249]–[250], [258] (Jagot J). See also *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1, 33 [46] (French CJ).

⁴⁹ *Ibid.*

⁵⁰ Twomey, ‘The LNP’s phrase-banning law is wide open to constitutional attack’ (n 15).

⁵¹ *LibertyWorks* (n 16) 53 [135] (Gordon J), citing *Lange* (n 22) 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *Unions New South Wales v New South Wales* (2013) 252 CLR 530, 553 [35] (French CJ, Hayne, Crennan, Kiefel and Bell JJ) (‘*Unions NSW*’); *Brown v Tasmania* (2017) 261 CLR 328, 353 [61] (Kiefel CJ, Bell and Keane JJ), 382 [180] (Gageler J) (‘*Brown*’).

⁵² *Ibid.*

⁵³ See, eg, *Levy v Victoria* (1997) 189 CLR 579, 647 [6] (Kirby J), citing *ACTV* (n 7) 143 (Mason CJ).

Queensland ('Wotton'), the High Court also reasoned that laws which directly and substantially restrict political communication, as opposed to those which impose merely incidental restrictions, are 'more readily seen to satisfy the second *Lange* question', that being: 'Is the purpose of the law legitimate and compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?'.⁵⁴

By 'splitting' the offence between legislation and regulation,⁵⁵ the drafters of the initial Bill were also seemingly attentive to High Court decisions suggesting the scope of constitutional challenge primarily concerns legislation, as opposed to regulation. In *Wotton*, when the plaintiff challenged his parole conditions issued under ss 132(1)(a) and 200(2) of the *Corrective Services Act 2006* (Qld) — which limited his freedom to speak to the media — on the basis they were contrary to the implied freedom, the High Court, found against him. In so doing, the Court accepted the Commonwealth's submissions that:

(i) where a putative burden on political communication has its source in statute, the issue presented is one of a limitation upon legislative power; (ii) *whether a particular application of the statute, by the exercise or refusal to exercise a power or discretion conferred by the statute, is valid is not a question of constitutional law*; (iii) *rather, the question is whether the repository of the power has complied with the statutory limits*; (iv) if, on its proper construction, the statute complies with the constitutional limitation, without any need to read it down to save its validity, any complaint respecting the exercise of power thereunder in a given case, such as that in this litigation concerning the conditions attached to the Parole Order, does not raise a constitutional question, as distinct from a question of the exercise of statutory power.⁵⁶

In other words, the validity of the parole conditions — an exercise of executive power conferred by statute — did not raise a question of constitutional law. Rather, the scope of a challenge to that exercise of executive power would be limited to whether it was compliant with the statute — that is, whether the decision-maker applied the law correctly.

Likewise, in *Comcare v Banerji*, where a public servant had been dismissed pursuant to s 15 of the *Public Service Act 1999* (Cth) for making tweets critical of the government department she was employed by, the majority of the High Court also favoured the Commonwealth's argument that:

The implied political freedom is concerned with legislative power, not the facts of particular cases. The wide range of sanctions permitted by s 15 for any breach of the normative standard of conduct ... *If the measures are wrongly applied, it is a matter for merits review or judicial review, not an occasion for constitutional invalidity* ... It is unnecessary to consider whether, in each case, the deterrent effect of a particular

⁵⁴ (2012) 246 CLR 1, 16 [30] (French CJ, Gummow, Hayne, Crennan and Bell JJ) ('*Wotton*'). See also Sam Thompson, '*Wotton v Queensland* (2012) 285 ALR 1' (2012) 31(2) *University of Tasmania Law Review* 168.

⁵⁵ Fighting Antisemitism Bill (n 35) sub-s 4(6).

⁵⁶ (n 54) 5–6.

sanction could be disproportionately too high for the purpose of preventing political communications in a particular case ...⁵⁷

Again, the decision illustrates that administrative decisions made pursuant to legislation are primarily subject to merits or judicial review, rather than direct constitutional challenge.

This would have made it more difficult to challenge Queensland's prohibitions through the implied freedom, as they were originally slated. As the prohibitions of the two pro-Palestine slogans would have been made by way of a Ministerial decision under sub-s 52DA(6), a challenge to *that decision*, or the exercises of police power that followed, would have engaged administrative law.⁵⁸ The scope of a challenge to the former would have been effectively limited to whether the Minister identified the slogans in the regulation lawfully in accordance with the statute.⁵⁹

However, as the two slogans are now explicitly identified in sub-s 52DA(6) and prohibited outright in statute, the provision is more vulnerable to constitutional challenge. As the 'putative burden on political communication has its source in statute, the issue presented is one of a limitation upon legislative power'.⁶⁰ The criminalisation of the slogans in sub-s 52DA(6) can now be directly subjected to constitutional scrutiny — a challenge can contend the slogans' proscription in sub-s 52DA(6) is beyond the legislative power of Queensland's Parliament. This, alongside the fact that s 52DA is no longer drafted in a 'content-neutral' manner, makes the provision more vulnerable to constitutional challenge when compared to its previous drafting.⁶¹

That said, the High Court has held that 'the question whether a statute burdens the implied freedom is answered by reference to the terms, legal effect and practical operation of the statute'.⁶² Therefore, while the original Bill was cleverly designed with the intent to ward off a constitutional attack, it may have been the case that the drafting alone would have been insufficient to ensure the validity of s 52DA, as its legal effect and practical operation obviously burden political communication, and the Court may find that burden to be unjustified in not being reasonably appropriate and adapted for its purpose of preventing racially-motivated hate speech.

⁵⁷ *Comcare* (n 6) 383.

⁵⁸ *Ibid.*

⁵⁹ See, eg, *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559, 577 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ); *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35–8 (Brennan J).

⁶⁰ *Wotton* (n 54) 5–6.

⁶¹ *Farmer* (n 10) [57] (Gageler CJ, Gordon and Beech-Jones JJ), [138] (Steward J), [249]–[250], [258] (Jagot J). See also *ACTV* (n 7) 169 (Deane and Toohey JJ); *Hogan* (n 11) 435–6 [95] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

⁶² *LibertyWorks* (n 16) 53 [135] (Gordon J), citing *Lange* (n 22) 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *Unions NSW* (n 51) 553 [35] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Brown* (n 51) 353 [61] (Kiefel CJ, Bell and Keane JJ), 382 [180] (Gageler J).

Regardless, difficulties persist in challenging s 52DA, even in its current form. Discrimination-based menace, harassment, and offence can give rise to serious harms. The link that s 52DA draws between the prohibited expressions and these harms supports the argument that the provision is legislated for the legitimate purpose of preventing those harms. This would not be the first time, however, that a court has been asked to consider whether limits on speech to prevent harms of this nature infringe the implied freedom. While, at the time of writing, the High Court has not yet decided on the constitutionality of any of Australia's anti-vilification or anti-discrimination laws on implied freedom grounds,⁶³ no such challenge in Australia's lower courts has been successful.⁶⁴ This suggests that such laws are constitutionally permissible, and that an attempt to invalidate Queensland's law could be unlikely to succeed.

B Does Section 52DA Violate the Implied Freedom?

Applying the *McCloy/Babet* test to s 52DA, the Court would likely find that the provision burdens freedom of political communication, thereby satisfying the first step (and the State would likely concede this point). A challenge is, however, unlikely to succeed at the second step. It would be difficult to refute that the law's purpose of preventing the harms associated with menacing, harassing, or offensive language is legitimate and compatible with the maintenance of Australia's constitutionally prescribed system of representative and responsible government.⁶⁵ In *Faruqi v Hanson*, Stewart J found that the purpose of ss 18C and 18D of the *Racial Discrimination Act 1975* (Cth) ('RDA') — 'to deter and eliminate, and thus protect members of the public from, racial hatred and discrimination' — was legitimate and compatible with the maintenance of Australia's system of responsible and representative government, and accordingly held that the provisions satisfied the second step of the *McCloy* test.⁶⁶

Sections 18C and 18D of the RDA provide:

18C Offensive behaviour because of race, colour or national or ethnic origin

(1) It is unlawful for a person to do an act, otherwise than in private, if:

⁶³ Gelber and McNamara, Submission No 14 (n 42) 4. See also *Monis v The Queen* (2013) 249 CLR 92.

⁶⁴ Ibid; Nicholas Aroney and Paul Taylor, 'Building Tolerance into Hate Speech Laws: State and Territory Anti-Vilification Legislation Reviewed Against International Law Standards' (2023) 42(3) *University of Queensland Law Journal* 317, 322. See also *Faruqi v Hanson* [2024] FCA 1264 [345] (Stewart J) (currently on appeal) ('*Faruqi*').

⁶⁵ See examples where protection against discrimination and harm has been held as a legitimate purpose: *Faruqi* (n 64) [345] (Stewart J) (currently under appeal); *Clubb v Edwards* (2019) 267 CLR 171, 198 [60] (Kiefel CJ, Bell and Keane JJ), 235–6 [197] (Gageler J), 260–1 [258] (Nettle J); *ACTV* (n 7) 169 (Deane and Toohey JJ).

⁶⁶ [2024] FCA 1264, [342]–[345] (Stewart J).

- (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
- (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

...

18D Exemptions

Section 18C does not render unlawful anything said or done reasonably and in good faith:

- (a) in the performance, exhibition or distribution of an artistic work; or
- (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or
- (c) in making or publishing:
 - (i) a fair and accurate report of any event or matter of public interest; or
 - (ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

Given that s 52DA is essentially legislated for the same purpose — protecting vulnerable communities from speech deemed to be discriminatory and harmful — it is unlikely that the Court would find that s 52DA lacks a legitimate purpose.

It should be noted, however, that the NSW Court of Appeal in *Jarrett v State of NSW* held that NSW laws enacted in the aftermath of the 2025 Bondi Beach attacks to restrict the holding of public assemblies in certain areas, infringed the implied freedom.⁶⁷ Importantly, the Court found the purpose of the anti-protest laws — promoting ‘social cohesion’ or the ‘notion that the community can and should be protected from political expression by some members of the community because it might be upsetting, inflammatory and divisive for other members of the community’ — was not a legitimate legislative purpose.⁶⁸ In other words, the prevention of distress or offence that would arise from a demonstration occurring was *not* an sufficient justification for laws that burden political communication.⁶⁹

As s 52DA is legislated in part to prevent ‘offence’, *Jarrett* suggests possible invalidity for the Queensland provision. Although the authority arises from a different jurisdiction, the decision of the NSW Court of Appeal could influence a Queensland or federal court considering the validity of s 52DA. That said, Queensland’s laws differ from the NSW laws: they are additionally legislated for

⁶⁷ [2026] NSWCA 62. The specific provisions invalidated were: *Terrorism (Police Powers) Act 2002* (NSW) Part 2, Division 3A; *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 200(5); *Summary Offences Act 1988* (NSW) ss 27A and 27B.

⁶⁸ *Jarrett v State of NSW* [2026] NSWCA 62 [143] (Bell CJ, Ward P and Free JA).

⁶⁹ *Ibid.*

the purpose of preventing the harms associated with speech that is threatening or harassing in nature, not merely for the promotion of social cohesion and the prevention of distress or offence (such as may arise from an assembly occurring). The legislative purpose of s 52DA may accordingly be found to be more legitimate and justifiable, as it seeks to prevent more serious harms — the harms that arise from alleged *hate speech*, as opposed to more general threats to ‘social cohesion’.

The third step of the *McCloy/Babet* test is most likely to be contested. At this stage of the analysis, the Court, if it adopts the structured proportionality analysis stipulated in *McCloy*, will inquire whether there is an ‘obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom.’⁷⁰ An indication of possible invalidity is that Queensland already has similar public nuisance offences in s 6 of the *Summary Offences Act 2005* (Qld), that are significantly less onerous than s 52DA — attracting the much lower penalty of maximum of six months’ imprisonment. In *Lees v NSW*, the NSW Supreme Court relied on the existence of a less onerous law to find the impugned law was not reasonably ‘necessary’, suggesting that the existence of offences similar to s 52DA may pose a similar problem for Queensland.⁷¹

Moreover, there is a criminal offence concerning racial hatred in s 52A of Queensland’s *Criminal Code*, which makes it an offence for a person to

by a public act, knowingly or recklessly incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race, religion, sexuality, sex characteristics or gender identity.

There are also federal offences prohibiting the advocacy of force or violence against groups or members of groups in ss 80.2A and 80.2B of the *Criminal Code Act 1995* (Cth). The existence of these federal and state laws which apply in Queensland could further indicate that Queensland’s s 52DA offence is not ‘necessary’.

Moreover, Queensland’s decision to attach such a high maximum sentence, two years’ imprisonment, to its s 52DA offence could also indicate the law is not appropriately adapted to its purpose. (It follows, a reduction in the maximum sentence could increase the prospect of the offence surviving constitutional scrutiny.) On the other hand, the fact the provision allows for ‘reasonable excuses’ as a defence could be harnessed by a Court to find the provisions are ‘reasonably appropriate and adapted’ to their legitimate purpose of seeking to prevent harm.

Courts have struck down broadly framed public order laws prohibiting the dissemination of insulting language in *Coleman*, on the basis that the laws contravened the implied freedom.⁷² *Coleman* is particularly important in illustrating how a finding of invalidity might be avoided by statutory interpretation.⁷³ In this case, Patrick Coleman was charged with the use and

⁷⁰ *McCloy* (n 12) 195 [2] (French CJ, Kiefel, Bell and Keane JJ).
[2025] NSWSC 1209, 152–7 (Mitchelmore J).

⁷² *Coleman* (n 23).

⁷³ *Ibid.*

publication of insulting words in a public place contrary to sub-ss 7(1)(d) and 7A(1)(c) of the *Vagrants Gaming and Other Offences Act 1931* (Qld), after distributing leaflets in Townsville Mall titled 'Get to Know Your Local Corrupt Type Cops'.⁷⁴ Sub-section 7(1)(d) prohibited the use of 'any threatening, abusive, or insulting words to any person' in or near a public place. When approached by Constable Brendan Power, who requested a leaflet, Coleman announced to the mall: 'This is Constable Brendan Power, a corrupt police officer'.⁷⁵

Although Coleman was found guilty of contravening both sub-ss 7(1)(c) and (d) at trial, the Queensland Court of Appeal found that the offence of disseminating insulting words in sub-s 7A(1)(c) was beyond the legislative power of Queensland Parliament, by infringing upon the implied freedom.⁷⁶ Coleman was subsequently not liable for sub-s 7A(1)(c), a decision which the High Court did not question.⁷⁷ Instead, the issue considered by the High Court was therefore limited to whether the conviction of Coleman under sub-s 7(1)(d) for using insulting words should be set aside.⁷⁸

The High Court, by a majority of 4:3, set aside Coleman's conviction. However, only McHugh J found for Coleman on the basis that sub-s 7(1)(d) impermissibly infringed upon the implied freedom in that it was not 'reasonably appropriate and adapted for preventing breaches of the peace'.⁷⁹ The position of the other majority Justices was that the law was valid but had to be read narrowly to be consistent with the implied freedom:⁸⁰ Coleman should not be convicted because he had no intention of provoking an unlawful physical reaction.⁸¹

The decision in *Coleman* is relevant to Queensland's s 52DA offence, as the High Court might similarly read s 52DA narrowly so as not to capture individuals who use the two pro-Palestine slogans without inciting violence or hate. As noted earlier, the slogans mean different things to different people, and some who use them do so as expressions of political protest and solidarity with Palestine, rather than as calls for violence.⁸² If the Court were to adopt an approach similar to that of the majority of the High Court in *Coleman*, with the exception of McHugh J, it may find that s 52DA, while constitutionally valid, must be read so as not to apply to individuals who use the slogans without any intention of menacing, harassing, or offending others, even where the text of the offence suggests it is of a strict liability nature.

Coleman is typically regarded as a rarity in Australian constitutional law.⁸³ Adrienne Stone and Simon Evans argue the decision is exceptional, in that the

⁷⁴ Ibid 35 [42] (McHugh J).

⁷⁵ Ibid 36 [46] (McHugh J).

⁷⁶ Ibid 83 [216] (Kirby J).

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid 53 [102] (McHugh J).

⁸⁰ Ibid 2. See also Adrienne Stone and Simon Evans, 'Australia: Freedom of Speech and Insult in the High Court of Australia' (2006) 4(4) *International Journal of Constitutional Law* 677, 678.

⁸¹ *Coleman* (n 23).

⁸² Legislative Assembly Committee on Law and Safety of NSW (n 2) 3–9.

⁸³ Stone and Evans (n 80) 678.

High Court rejected government arguments grounded in the legitimacy of the State's desire to mandate civility in political communication.⁸⁴ The few rights and freedoms conferred by the *Constitution* have typically been interpreted narrowly, including the implied freedom.⁸⁵ Moreover, *Coleman* concerns a qualitatively different issue. In that case, the High Court was asked to consider whether the use and dissemination of insulting language was constitutionally protected — not whether the use of language deemed by the State and some communities to be *racially-motivated hate speech* should be constitutionally protected.

Ultimately, while s 52DA is problematic and raises several complex constitutional issues, it has strong chances of surviving a constitutional challenge, notwithstanding the last-minute amendments. In *Faruqi v Hanson*, Stewart J found that racial vilification and discrimination continue to be significant and harmful problems in Australia, meaning that the impugned provisions of the *Racial Discrimination Act* were necessary in their legitimate purpose of preventing such harms.⁸⁶ A challenge to Queensland's new laws may be unsuccessful along similar lines, on the basis that the laws are legislated for the legitimate purpose of preventing harm and discrimination, and are appropriate, adapted, and necessary for that purpose, given that antisemitism and racial discrimination remain significant and harmful problems in Australia.⁸⁷ With *Coleman* in mind, a more likely outcome may be that the Court finds s 52DA valid but reads it in a manner that does not capture individuals who use the slogans in a genuinely political context without any intention of menacing or harassing others, so as to be consistent with the implied freedom.⁸⁸

The likelihood of a finding of validity is reinforced by judges' typical deference to the legislature when applying the second and third steps of the *McCloy* test.⁸⁹ In *Comcare v Banerji*, Edelman J stressed that 'freedom of political communication is not a trump over other values that are sought to be implemented in legislation that gives effect to government policy',⁹⁰ whilst also noting that 'in Australia the boundaries of freedom of speech are generally the province of parliament.'⁹¹ The concept of free speech as an affirmative right does not apply in Australian law — it is a freedom firmly demarcated by parliamentary policy.

As a result, while the last-minute changes to the laws mean that they are now more vulnerable to constitutional challenge, the deference that the High

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ *Faruqi* (n 64) [346], [369] (Stewart J).

⁸⁷ Ibid. For the continued prevalence of racial discrimination and vilification in Australia, see, eg, Katharine Gelber and Luke McNamara, 'Anti-Vilification Laws and Public Racism in Australia: Mapping the Gaps Between the Harms Occasioned and the Remedies Provided' (2016) 39(2) *University of New South Wales Law Journal* 488, 500.

⁸⁸ See, eg, *Coleman* (n 23).

⁸⁹ Samuel Murray, 'The Public Interest, Representative Government and The Legitimate Ends of Restricting Political Speech' (2008) 43(1) *Monash University Law Review* 1, 3.

⁹⁰ *Comcare* (n 6) 442 [165].

⁹¹ Ibid 442 [164].

Court has afforded to parliamentary policy in recent years — including on freedom of expression and national security issues — suggests that the new laws will probably weather a constitutional challenge regardless.

V CONCLUSION

Queensland's new offence provisions are highly problematic at a principled level. However, as originally proposed in the Fighting Antisemitism Bill, they were seemingly drafted with careful foresight to ensure they would survive constitutional scrutiny. The last-minute amendments mean that these offences are now more vulnerable to constitutional challenge. Specifically, the enacted laws are at greater risk of being struck down by the High Court, as they are no longer written in a purely 'content-neutral' manner, explicitly prohibiting the slogans in legislation and thereby imposing a direct burden on political communication.

Moreover, the banning of the slogans outright at the level of legislation means that they can now be directly subjected to constitutional scrutiny. As the source of the burden on political communication is found at the level of statute, it can be more readily contended that the provision is beyond the ambit of Parliament's legislative powers. Nonetheless, given the High Court has demonstrated reluctance in recent years to questioning parliamentary policy on freedom of expression and national security issues, the laws will probably withstand challenge. A likely outcome may be that the High Court upholds the new law as valid but interprets the offence narrowly so as to exclude individuals who use the slogans in a political context without any intention of menacing, harassing, or offending others.