

# AN OPPORTUNITY MISSED? A CONSTITUTIONAL ANALYSIS OF PROPOSED REFORMS TO TASMANIA'S 'HATE SPEECH' LAWS

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## ABSTRACT

*The Tasmanian government has proposed reforms to the 'hate speech' provisions in the Anti-Discrimination Act 1998 (Tas). However, these reforms are unsatisfactory. They do not address, and in fact compound, the constitutional invalidity of Tasmania's 'hate speech' laws. In this article, we demonstrate that Tasmania's present 'hate speech' laws, like equivalent provisions in other States and Territories, impermissibly infringe the implied freedom of political communication. We also demonstrate that certain proposed reforms further infringe the implied freedom of political communication. We will conclude by proposing elements of a constitutionally valid law against incitement to enmity.*

## I INTRODUCTION

In September 2016, the Tasmanian government introduced to the Tasmanian Parliament the *Anti-Discrimination Amendment Bill 2016* (the 'Bill'). The Bill proposes amending Tasmania's 'hate speech laws found in its *Anti-Discrimination Act 1998* (Tas) (the 'Act') (we refer below to these proposed amendments as the 'proposed reforms'). In this article, we

argue that the proposed reforms are entirely unsatisfactory. This is because the proposed reforms do not overcome the constitutional invalidity of sections 17(1),<sup>1</sup> 19,<sup>2</sup> 20<sup>3</sup> and 55<sup>4</sup> of the Act.

Our argument is broken into the following parts. In Part II, we provide background to the proposed reforms. In Part III, we outline the proposed reforms. In Part IV, we argue that those parts of s 17(1) that make unlawful (amongst other things) certain acts that offend, insult, ridicule or humiliate, are unconstitutional. This is because these parts of s 17(1) impermissibly infringes the freedom to communicate about government and political matters implied from the *Commonwealth Constitution*.<sup>5</sup>

In Part V, we argue that s 55, which provides exceptions to s 17(1), does not overcome s17(1)'s difficulties but actually worsens them. Further, s 55 impermissibly infringes the implied equality of political communication for which we argued in our book *No Offence Intended: Why 18C is Wrong*.<sup>6</sup> In Part VI, we analyse the proposed reforms in light of our analysis of ss 17(1) and 55. We also comment on the proposed

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<sup>1</sup> Subsequent mentions of s 17(1) of the Act will be to just 'section 17(1)' or 's 17(1)' as the case requires.

<sup>2</sup> Subsequent mentions of s 19 of the Act will be to just 'section 19' or 's 19' as the case requires.

<sup>3</sup> Subsequent mentions of s 20 of the Act will be to just 'section 20' or 's 20' as the case requires.

<sup>4</sup> Subsequent mentions of s 55 of the Act will be to just 'section 55' or 's 55' as the case requires.

<sup>5</sup> We refer to this freedom below as 'the implied freedom of political communication'.

<sup>6</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) ('*No Offence Intended*').

reforms to s 64 of the Act,<sup>7</sup> which provides for the rejection of complaints made under the Act.

In Part VII, we argue that s 19, which makes unlawful certain public acts that incite hatred, serious contempt or severe ridicule, is unconstitutional. This is because s 19 impermissibly infringes the implied freedom of political communication. In this Part, we also examine similar ‘hate speech’ provisions in the *Anti-Discrimination Act 1977* (NSW) (the ‘NSW Act’) and the *Racial and Religious Tolerance Act 2001* (Vic) (the ‘Victorian Act’). We conclude that, like s 19, the NSW and Victorian provisions impermissibly infringe the implied freedom of political communication. In Part VIII, we argue that s 20, which makes unlawful promoting discrimination and prohibited conduct (including that made unlawful by ss 17(1) and 19) is unconstitutional. Like ss 17(1) and 19, s 20 impermissibly infringes the implied freedom of political communication. In Part IX, we suggest elements of an alternative laws that would be less restrictive of freedom of expression while targeting enmity and incitement to violence.

Before going further, we should note that this article is intended to build upon the work in our book *No Offence Intended*.<sup>8</sup> In *No Offence Intended* we examined, amongst other things, whether or not s 18C of the *Racial Discrimination Act 1975* (Cth) (‘RDA’)<sup>9</sup> impermissibly infringes the implied freedom of political communication. Section 18C can be considered the Commonwealth’s ‘hate speech’ law. In this article, we extend our analysis to whether State ‘hate speech’ laws impermissibly

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<sup>7</sup> Subsequent mentions of s 64 of the Act will be to just ‘section 64’ or ‘s 64’ as the case requires.

<sup>8</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016).

<sup>9</sup> Subsequent mentions of s 18C of the RDA will be to just ‘section 18C’ or ‘s 18C’ as the case requires.

infringe the implied freedom of political communication. It should be noted from the outset that our analysis in this article is based on that found in *No Offence Intended*. However, we will summarise (and, where needed, refine) the arguments presented in *No Offence Intended* when required.

## II BACKGROUND TO THE PROPOSED REFORMS

In September 2015, Martine Delaney lodged a complaint under the Act with Tasmania's Anti Discrimination Commissioner (the 'Commissioner') against the Catholic Church and, in particular, Archbishop Julian Porteous.<sup>10</sup> This complaint concerned *Don't Mess With Marriage*,<sup>11</sup> a Pastoral Letter issued by the Catholic Bishops of Australia concerning the same-sex marriage debate in Australia. *Don't Mess With Marriage* stated, amongst other things, that 'marriage should be a "heterosexual union between a man and a woman" and changing the law would endanger a child's upbringing'.<sup>12</sup> The complaint was later dropped.<sup>13</sup> However, the complaint prompted the Tasmanian government to consider reforming its 'hate speech' laws.<sup>14</sup>

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<sup>10</sup> Australian Broadcasting Corporation, 'Anti-discrimination complaint "an attempt to silence" the Church over same-sex marriage, Hobart Archbishop says', *ABC News* (online), 28 September 2015 <<http://www.abc.net.au/news/2015-09-28/anti-discrimination-complaint-an-attempt-to-silence-the-church/6810276>>.

<sup>11</sup> Australian Catholic Bishops Conference, *Don't Mess With Marriage: A Pastoral Letter from the Catholic Bishops of Australia to all Australians on the 'Same-sex Marriage' Debate* (Australian Catholic Bishops Conference, 2015).

<sup>12</sup> Australian Broadcasting Corporation, 'Anti-discrimination complaint "an attempt to silence" the Church over same-sex marriage, Hobart Archbishop says', *ABC News* (online), 28 September 2015 <<http://www.abc.net.au/news/2015-09-28/anti-discrimination-complaint-an-attempt-to-silence-the-church/6810276>>.

<sup>13</sup> Andrew Drummond, 'Transgender rights activist Martine Delaney drops complaint over Catholic Church's marriage booklet', *The Mercury* (online), 5 May 2016 <<http://www.themercury.com.au/news/tasmania/>

### III THE PROPOSED REFORMS

The proposed reforms seek to, amongst other things, amend the Act to:

- Add ‘religious purposes’ to the exemptions in s 55.<sup>15</sup> Presently, s 55 exempts public acts done for ‘academic, artistic, scientific or research purposes’.<sup>16</sup>
- Amend s 64 to require the Commissioner to reject a complaint in certain circumstances.<sup>17</sup>

Before going further, we should note that an earlier version of the Bill added a ‘reasonableness requirement’ to s 55. Presently, s 55 provides that a public act be done ‘in good faith’.<sup>18</sup> However, this reform would have meant that a public act would have to be done ‘reasonably and in good faith’.<sup>19</sup> This reform was removed from the Bill after public consultation.<sup>20</sup> However, we will examine it below because a ‘reasonableness requirement’ may ultimately be added to s 55, either as the result of the Bill’s current passage through Parliament or as the result of some future reform.

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<sup>14</sup> transgender-rights-activist-martine-delaney-drops-complaint-over-catholic-churchs-marriage-booklet/news-story/d8d9079bf932526b27e5f094e57dbe84>.  
Andrew Drummond, ‘Tasmania tussles over free speech debate’, *news.com.au* (online), 20 September 2016 <<http://www.news.com.au/national/breaking-news/tas-govt-tables-free-speech-amendment/news-story/ac35b8f5e2fff4991e86f1e4aa9dce70>>.

<sup>15</sup> Bill cl 4.

<sup>16</sup> Act s 55(c)(i).

<sup>17</sup> Bill cl 5.

<sup>18</sup> Act s 55(c).

<sup>19</sup> This reform was contained in cl 4 of the version of the Bill released for public comment.

<sup>20</sup> See the second reading speech for the Bill: Tasmania, *Parliamentary Debates*, Legislative Assembly, 22 September 2016, (Michael Ferguson) <<http://www.parliament.tas.gov.au/ParliamentSearch/isysquerydb2b1433-fcb9-4565-881f-f3bcde3fd261/2/doc/>>.

Putting the ‘reasonableness’ requirement aside, the proposed reforms presently in the Bill are unsatisfactory. They overlook that significant parts, if not all, of ss 17(1) and 19 impermissibly infringe the implied freedom of political communication. Further, the reforms to s 55 further infringe the implied freedom of political communication by adding more complexity and uncertainty to laws whose scope is already uncertain. Finally, the changes to s 64 entail no consequences to the Commissioner for failing to dismiss a complaint, thereby exposing all parties to unnecessary costs in time, money and stress. We will now consider these issues in greater depth.

#### IV SECTION 17(1)

Section 17(1) presently provides:

A person must not engage in any conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of an attribute referred to in section 16(e), (a), (b), (c), (d), (ea), (eb) and (k), (f), (fa), (g), (h), (i) or (j) in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.

The attributes mentioned in s 16 of the Act to which s 17(1) refers are (in the order they appear in s 17(1)): gender, race, age, sexual orientation, lawful sexual activity, gender identity, intersex, disability, marital status, relationship status, pregnancy, breastfeeding, parental status and family responsibilities.

In *Lange v Australian Broadcasting Corporation*,<sup>21</sup> the High Court noted that the implied freedom of political communication applies to State as

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<sup>21</sup> [1997] HCA 25; (1997) 189 CLR 520 (*‘Lange’*).

well as Commonwealth laws.<sup>22</sup> As presently drafted, s 17(1) impermissibly infringes the implied freedom of political communication. The test for determining whether or not a law impermissibly infringes the implied freedom of political communication is that stated in *Lange* as modified in *McCloy v New South Wales*<sup>23</sup> (which we refer to below as the ‘modified *Lange* test’). The modified *Lange* test is as follows:

1. Does the law effectively burden the implied freedom of political communication in its terms, operation or effect?
2. If ‘yes’ to question 1, are the purpose of the law and the means adopted to achieve that purpose legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative government?
3. If ‘yes’ to question 2, is the law reasonably appropriate and adapted to advance that legitimate object? If not, then the measure will exceed the implied limitation on legislative power.<sup>24</sup>

We now examine each step of this test with respect to s 17(1).

A      *Does s 17(1) burden the implied freedom of political communication?*

Section 17(1) burdens the implied freedom of political communication in its terms, operation and effect. However, it is important to understand the *nature* of the burden that s 17(1) imposes. This is because, in *McCloy*, members of the High Court held that the impugned law’s overall burden on the implied freedom of political communication was relevant to

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<sup>22</sup> Ibid 567.

<sup>23</sup> [2015] HCA 34 (*McCloy*).

<sup>24</sup> Ibid [2] (French CJ, Kiefel, Bell and Keane JJ).

determining whether or not it was impermissibly infringed. The majority in *McCloy* noted that such a determination required comparing ‘the positive effect of realising the law's proper purpose with the negative effect of the limits on constitutional rights or freedoms’, and that ‘[l]ogically, the greater the restriction on the freedom, the more important the public interest purpose of the legislation must be for the law to be proportionate...’.<sup>25</sup>

Gageler J stated that judicial scrutiny of the relevant law should be ‘calibrated to the degree of risk to the system of representative and responsible government established by the Constitution that arises from the nature and extent of the restriction on political communication that is identified at the first step in the analysis.’<sup>26</sup> Nettle J observed that ‘a direct or severe burden on the implied freedom requires a strong justification’.<sup>27</sup> Gordon J stated that whether a law impermissibly infringes the implied freedom of political communication ‘is a question of judgment about the nature and extent of the effect of the impugned law on the maintenance of the constitutionally prescribed system of representative and responsible government’.<sup>28</sup>

Section 17(1)'s burden on the implied freedom of political communication is *direct, heavy, and sweeping*. We will explain what we mean by these terms.

### 1 *A direct burden*

Section 17(1) directly burdens the implied freedom of political communication. This is because legislation made under various

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<sup>25</sup> Ibid [87] (French CJ, Kiefel, Bell and Keane JJ) (citations omitted).

<sup>26</sup> Ibid [150] (Gageler J).

<sup>27</sup> Ibid [255] (Nettle J).

<sup>28</sup> Ibid [336] (Gordon J).



Commonwealth heads of power necessarily entails communication involving attributes that s 17(1) purports to protect from, amongst other things, offence, insult, ridicule or humiliation.

For example, one of the protected attributes in s 17(1) is race. Section 3 of the Act defines ‘race’ as including colour, nationality, descent, ethnic, ethno-religious or national origin, and the status of being or having been an immigrant.<sup>29</sup> Commonwealth legislation with respect to the following heads of power may well involve discussing race, colour, ethnicity or nationality:<sup>30</sup>

- ‘the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth’;<sup>31</sup>
- ‘quarantine’;<sup>32</sup>
- ‘naturalisation and aliens’;<sup>33</sup>
- ‘the people of any race, ~~other than the aboriginal race in any State,~~ for whom it is necessary to make special laws’;<sup>34</sup>

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<sup>29</sup> Act s 3 (definition of ‘race’).

<sup>30</sup> The following lists are taken from Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 119-20.

<sup>31</sup> *Commonwealth Constitution* s 51(vi).

<sup>32</sup> *Ibid* s 51(ix). This is not a fanciful inclusion. During the Ebola outbreak in Africa in 2014, commentators noted racial aspects to restricting travel to and from countries in which the Ebola outbreaks were located, and the treatment of those afflicted with Ebola: see, for example, Hannah Kozłowska, ‘Has Ebola Exposed a Strain of Racism?’, *New York Times* (online), 21 October 2014 <[optalk.blogs.nytimes.com/2014/10/21/has-ebola-exposed-a-strain-of-racism/?\\_r=1](http://optalk.blogs.nytimes.com/2014/10/21/has-ebola-exposed-a-strain-of-racism/?_r=1)>.

<sup>33</sup> *Ibid* s 51(xix).

<sup>34</sup> *Ibid* s 51 (xxvi) (the strike-through appears in official versions of the *Commonwealth Constitution*).

- ‘immigration and emigration’,<sup>35</sup>
- ‘external affairs’;<sup>36</sup>
- ‘the relations of the Commonwealth with the islands of the Pacific’;<sup>37</sup> and
- ‘the influx of criminals’.<sup>38</sup>

Other heads of power that may involve discussing race, colour, ethnicity or nationality include:

- ‘trade and commerce with other countries, and among the States’;<sup>39</sup>
- ‘fisheries in Australian waters beyond territorial limits’;<sup>40</sup>
- ‘census and statistics’;<sup>41</sup> and
- ‘foreign corporations...’.<sup>42</sup>

As we noted in *No Offence Intended*, legislation or policy made under the heads of power noted above, and especially those noted in the first-mentioned list, often involve discussing controversial issues. For example, the matters of border protection, refugee intake and immigration raise controversial issues concerning the level of refugee and immigrant

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<sup>35</sup> Ibid s 51(xxvii).

<sup>36</sup> Ibid s 51(xxix).

<sup>37</sup> Ibid s 51(xxx).

<sup>38</sup> Ibid s 51(xxviii).

<sup>39</sup> Ibid s 51(i).

<sup>40</sup> Ibid s 51(x).

<sup>41</sup> Ibid s 51(xi).

<sup>42</sup> Ibid s 51(xx).

intake, the racial, ethnic or national composition of such intake and the level of integration expected of immigrants.<sup>43</sup>

In addition to Commonwealth legislation, the Commonwealth's executive government is responsible for implementing legislation as well as other executive functions.<sup>44</sup> The manner in which the Commonwealth's executive government does this with respect to matters involving race, colour, ethnicity or nationality may also raise controversial issues. For example, the manner in which Australia's executive government conducts border protection and administers refugee and immigration programs involve controversial issues. To conclude with perhaps the most dramatic (but not uncommon) example, Australia's prosecution of wars involves critical but controversial issues about the nature of the conflict and the enemy.<sup>45</sup>

As to issues at State level, matters local to a State, such as law and order, health, welfare, or education, may involve discussions involving race, colour, ethnicity or nationality.<sup>46</sup>

To take another example, Commonwealth legislation or policy with respect to the following heads of power may well involve discussing sexual orientation, lawful sexual activity, gender, gender identity, intersex status, marital status, relationship status, pregnancy, position on breastfeeding, parental status or family responsibilities.<sup>47</sup> These powers include:

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<sup>43</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 120.

<sup>44</sup> *Commonwealth Constitution* s 61.

<sup>45</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 121.

<sup>46</sup> *Ibid.*

<sup>47</sup> These are protected attributes in s 17(1).

- Marriage;<sup>48</sup> and
- Parental rights.<sup>49</sup>

As to marriage, controversies can and do arise concerning who may marry, how many may marry, and over the consequences if a marriage fails.

As to parental rights, controversies can and do arise over such things as how a child is best raised and cared for, parental rights if a marriage fails, surrogacy arrangements, and who can adopt.

## 2 *A heavy burden*

As to the heaviness of the burden that s 17(1) imposes, this requires considering popular sovereignty, the general nature of laws and discussions about them, the uncertainty of the terms used in s 17(1), and the dispute resolution process that the Commissioner uses.

### (a) *Popular sovereignty*

The *Commonwealth Constitution* provides for popular sovereignty. That is, under the *Commonwealth Constitution*, the Australian people are sovereign.<sup>50</sup> It is Australian electors who elect representatives to make laws on their behalf.<sup>51</sup> It is Australian electors to whom these

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<sup>48</sup> *Commonwealth Constitution* s 51(xxii).

<sup>49</sup> *Ibid* s 51(xxii).

<sup>50</sup> *Unions NSW v New South Wales* [2013] HCA 58; (2013) 252 CLR 530, 548 [17] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). See also *McCloy* [2015] HCA 23 [45] (French CJ, Kiefel, Bell and Keane JJ), [215] (Nettle J), [318] (Gordon J).

<sup>51</sup> *Australian Capital Television Pty Ltd v The Commonwealth* [1992] HCA 45; (1992) 177 CLR 106, 137-8 (Mason CJ).

representatives are ultimately answerable.<sup>52</sup> And it is Australian electors who have the power to amend the *Commonwealth Constitution*.<sup>53</sup>

The *Commonwealth Constitution* also provides for a Commonwealth Parliament that, along with State and Territory Parliaments, has what is known as the plenary power to make laws.<sup>54</sup> These plenary powers are extremely broad.<sup>55</sup> The Commonwealth Parliament is confined to legislating with respect to matters under specified heads of power. That said, the Commonwealth Parliament's plenary power to legislate under these heads of power is extremely wide. As to the State and Territory Parliaments, unless confined by the *Commonwealth Constitution*<sup>56</sup> or the respective State or Territory constitutions,<sup>57</sup> their plenary powers to legislate are *unlimited in scope* and extend to *any matter*.<sup>58</sup> In summary, Commonwealth, State, and Territory Parliaments may make laws with

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<sup>52</sup> *Nationwide News Pty Ltd v Wills* [1992] HCA 46; (1992) 177 CLR 1, 47 (Brennan J). See also Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 122.

<sup>53</sup> *Commonwealth Constitution* s 128.

<sup>54</sup> Section 51 of the *Commonwealth Constitution* provides that the Commonwealth Parliament has the 'power to make laws for the peace, order, and good government of the Commonwealth' with respect to the various heads of power specified in s 51.

<sup>55</sup> *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 151 (Knox CJ, Isaacs, Rich and Starke JJ).

<sup>56</sup> Such as *Commonwealth Constitution* ss 114, 115.

<sup>57</sup> We are referring to "manner and form" provisions that may force State Parliaments to use certain procedures (special majorities, referendums, and the like) to legislate with respect to laws concerning the constitution, powers and processes of Parliament.

<sup>58</sup> 'A power to make laws for the peace, order and good government of a territory is as ample and plenary as the power possessed by the Imperial Parliament itself': *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 10 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ). The plenary power of the Tasmanian Parliament is not found in the *Constitution Act 1934* (Tas). However, it is found in the *Australian Constitutions Act 1850* (Imp) s 14, which provides that the Tasmanian Parliament has the authority 'to make laws for the peace, welfare and good government of Tasmania': see *Strachan v Graves* (1997) 141 FLR 283, 289.

respect to an extremely wide range of matters, including matters of great controversy. Further, the content of these laws may be what many would regard as extreme.<sup>59</sup>

The *Commonwealth Constitution* also provides for an executive answerable to Parliament<sup>60</sup> but who, in executing laws, may do acts that, likewise, many would regard as extreme. In discussing legislative and executive matters, the *Commonwealth Constitution* provides for Parliamentary privilege.<sup>61</sup> This is because members of Parliament must be able to fully, frankly and robustly discuss all matters before Parliament.<sup>62</sup>

It follows that, as sovereign, the Australian people must *also* be free to discuss controversial matters, or indeed any matter, fully, frankly and robustly.<sup>63</sup>

Put another way, it borders on absurdity to say that, under the *Commonwealth Constitution*, Parliament may *pass* outrageous laws, the executive may *do* outrageous things, and members of Parliament may *say* outrageous things. However, the people from whom Parliament, members of Parliament and the executive derive their authority may *not* speak

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<sup>59</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 122.

<sup>60</sup> *Commonwealth Constitution* ss 61, 64.

<sup>61</sup> *Ibid* s 49.

<sup>62</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 122.

<sup>63</sup> *Ibid* 123. See also Lorraine Finlay, Augusto Zimmermann and Joshua Forrester, '18C is too broad and too vague, and should be repealed', *The Conversation* (online), 31 August 2016 <<https://theconversation.com/section-18c-is-too-broad-and-too-vague-and-should-be-repealed-64482>>.

outrageously.<sup>64</sup> If anything, in a democracy, a sovereign people must be free to speak even the unspeakable.<sup>65</sup>

To be clear, there are limits to freedom of expression. However, these limits are themselves strictly limited.<sup>66</sup> However, s 17(1) imposes a heavy restriction on freedom of expression, prohibiting even statements that offend another person or group of people on the basis of certain attributes.

*(b) The general nature of laws and discussions about them*

Legislative and executive action contemplated under the *Commonwealth Constitution* and respective State and Territory constitutions operates generally. That is, legislation rarely targets specific individuals.<sup>67</sup> Rather, legislation in all but rare cases concerns *groups* of people, ranging from small groups up to the entirety of Australia's population (or, in Tasmania's case, Tasmania's population). Executive action may concern individuals directly, but often concerns groups.<sup>68</sup>

Hence, when discussing matters that may be subject to government action, it is common to make general statements about an issue. It is also

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<sup>64</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 130.

<sup>65</sup> Ibid. See also Lorraine Finlay, Augusto Zimmermann and Joshua Forrester, '18C is too broad and too vague, and should be repealed', *The Conversation* (online), 31 August 2016 <<https://theconversation.com/section-18c-is-too-broad-and-too-vague-and-should-be-repealed-64482>>. Indeed, this must be so with respect to *any* idea that may influence, or be the subject of, legislative or executive action. This must also be so with respect to *any* person or group of people who may influence, or be the subject of, legislative or executive action.

<sup>66</sup> See Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 130.

<sup>67</sup> Although a Parliament can enact a law targeting a specific individual: see *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24; (1996) 189 CLR 51, 64 (Brennan CJ), 73-4 (Dawson J), 109, 121 (McHugh J), 125 (Gummow J).

<sup>68</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 121.

common to refer generally to groups of people. Statements concerning groups may not apply to individuals in that group. However, that lack of specificity is the inherent price of discussions about proposed or past legislative or executive action.<sup>69</sup>

The ‘chilling effect’ of a law that makes unlawful offending, insulting, humiliating or ridiculing another person based on an attribute must not be underestimated. Much has been made of the chilling effect of defamation law, and rightly so.<sup>70</sup> However, in defamation, one must only consider whether or not their comment affects *a particular individual’s own reputation*. Consequently, someone who wishes to comment on a political issue in which that particular person is involved may avoid mention of that person. By contrast, in our political system, it is far more difficult not to comment about *groups sharing certain attributes* in political issues. As noted above, in our system of representative and responsible government, there are often controversial issues concerning such things as race, colour, ethnicity, nationality and sexuality. Hence, making unlawful offending, humiliating, insulting or ridiculing another person based on an attribute has far more of a chilling effect.

Section 17(1) concerns acts that someone may find offensive, insulting, ridiculing or humiliating based on that person’s race, age, sexual orientation, lawful sexual activity, gender, gender identity, intersex status, marital status, relationship status, pregnancy status, position on breastfeeding, parental status or family responsibilities. Hence, s 17(1) affects political discussions about groups with these attributes.

(c) *The uncertainty of the terms used in s 17(1)*

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<sup>69</sup> Ibid 121-2.

<sup>70</sup> Australian Law Reform Commission, *Unfair Publication: Defamation and privacy*, Report No 11 (1979) 22-3 [37].



The terms ‘offend’, ‘insult’, ‘ridicule’ and ‘humiliation’ are not defined in the Act. We will assume for our analysis that they will be interpreted narrowly, that is, limited to serious instances of offence, insult, ridicule or humiliation.<sup>71</sup> However, even if they are interpreted narrowly, there is considerable uncertainty concerning their application to widely varied circumstances.<sup>72</sup> A statement that one person thinks is seriously offensive another may think is ‘merely’ offensive (or even inoffensive).

Further, s 17(1)’s use of an objective test (specifically, a reasonable person test) does not overcome these issues concerning uncertainty. This is because reasonable minds applying the same reasonable person test may come to different conclusions concerning whether or not a statement was seriously offensive as opposed to ‘merely’ offensive (or even inoffensive).

There are serious issues as to whether s 17(1) (either alone or in conjunction with s 55) is too broad and too vague to be constitutional. In *No Offence Intended*, we provided a detailed argument concerning the concept of vagueness.<sup>73</sup> What follows is a summary (and, where needed, a refinement) of our argument. We will include in our summary some observations about the concept of overbreadth that were not included in

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<sup>71</sup> We are assuming that the approach to interpreting these terms would be similar to the approach that Kiefel J took in *Creek v Cairns Post Pty Ltd*. That is, ‘To “offend, insult, humiliate or intimidate” are profound and serious effects, not to be likened to mere slights’: *Creek v Cairns Post Pty Ltd* [2001] FCA 1007; (2001) 112 FCR 352, 356 [16] (Kiefel J). French J in *Bropho v Human Rights and Equal Opportunity Commission* endorsed this view: see *Bropho v Human Rights and Equal Opportunity Commission* [2004] FCAFC 16; (2004) 135 FCR 105, 124 [69]-[70] (French J) (*‘Bropho’*). We would note, however, that unlike the RDA, the Act provides two civil provisions: ss 17(1) and 19. Section 19 covers more severe speech while s 17(1) covers less severe speech. The presence of s 19 may count against narrowly interpreting s 17(1).

<sup>72</sup> We assume that, were s 17(1) interpreted broadly, our arguments would apply with greater force.

<sup>73</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 192-7.

*No Offence Intended* but are relevant to the constitutional validity of s 17(1) and other hate speech provisions.

Now to the summary: first, certainty is critical to the rule of law. As McLachlin J (in dissent) noted in *R v Keegstra* regarding the concept of vagueness:

As a matter of due process, a law is void on its face if it is so vague that persons ‘of common intelligence must necessarily guess at its meaning and differ as to its application’. Such vagueness occurs when a legislature states its proscriptions in terms so indefinite that the line between innocent and condemned conduct becomes a matter of guesswork.<sup>74</sup>

As to the concept of overbreadth, her Honour noted, relevantly:

Statutes which open-endedly delegate to administering officials the power to decide how and when sanctions are applied or licenses issued are overbroad because they grant such officials the power to discriminate – to achieve indirectly through selective enforcement a censorship of communicative content that is clearly unconstitutional when achieved directly.<sup>75</sup>

Her Honour noted:

The rationale for invalidating statutes that are overbroad... or vague is that they have a chilling effect on legitimate speech. Protection of free speech is regarded as such a strong value that legislation aimed at legitimate ends may be struck down, if also tends to inhibit protected speech.<sup>76</sup>

Second, legal theorists such as Ronald Dworkin and Lon Fuller have spoken to the need for certainty. Dworkin noted that a vague law ‘places a citizen in an unfair position of either acting at his peril or accepting a

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<sup>74</sup> *R v Keegstra* [1990] 3 SCR 697, 818 (*‘Keegstra’*) quoting Laurence Tribe, *American Constitutional Law* (Foundation Press, 2<sup>nd</sup> ed, 1988) 1033-4.

<sup>75</sup> *Keegstra* [1990] 3 SCR 697, 818 quoting Laurence Tribe, *American Constitutional Law* (Foundation Press, 2<sup>nd</sup> ed, 1988) 1056.

<sup>76</sup> *Keegstra* [1990] 3 SCR 697, 819.

more stringent restriction on his life than the legislature may have authorized'.<sup>77</sup> Fuller noted that 'The desideratum of clarity represents one of the most essential ingredients of legality'.<sup>78</sup> Fuller warned that:

[I]t is a serious mistake – and a mistake made constantly – to assume that, though the busy legislative draftsman can find no way of converting his objective into clearly stated rules, he can always safely delegate this task to the courts or to special administrative tribunals'.<sup>79</sup>

Fuller further warned that some areas of the law were unsuited to creating rules on a case-by-case basis.<sup>80</sup> We noted that one such area was political discussion, given its range and complexity.<sup>81</sup>

Third, vagueness and overbreadth are concepts useful to determining whether a law impermissibly infringes the implied freedom of political communication. They are readily applicable to an analysis under the modified *Lange* test. The implied freedom of political communication is a restriction on lawmaking. It follows that laws that are too broad or too vague should be restricted.<sup>82</sup> Further, voiding laws for vagueness or overbreadth would create a "buffer zone" around the implied freedom of political communication as the concept of vagueness has around the First Amendment of the US Constitution.<sup>83</sup> This discourages vague or overbroad legislation being enacted.<sup>84</sup>

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<sup>77</sup> Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 1977) 221-2.

<sup>78</sup> Lon Fuller, *The Morality of Law* (Yale University Press, 1964) 63.

<sup>79</sup> *Ibid* 64.

<sup>80</sup> *Ibid*.

<sup>81</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 194.

<sup>82</sup> *Ibid*.

<sup>83</sup> See Note, 'The Void for Vagueness Doctrine in the Supreme Court' (1960) *University of Pennsylvania Law Review* 67, 75.

<sup>84</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 194-5.

Fourth, like freedom of expression at common law,<sup>85</sup> the common law principle of due process is of constitutional importance.<sup>86</sup> Common law due process includes the principle of certainty in the law. An individual must be certain what the law is in order to avoid unlawful conduct. Given that the common law informs the *Commonwealth Constitution*,<sup>87</sup> common law due process should inform whether a law impermissibly infringes the implied freedom of political communication.<sup>88</sup>

Fifth, vagueness and overbreadth have been employed with respect to both criminal and civil provisions. In *Taylor v Canadian Human Rights Commission*,<sup>89</sup> a Canadian Supreme Court case concerning a civil provision making unlawful communication likely to expose any person to hatred or contempt, McLachlin J noted:

[Hatred and contempt] are vague and subjective, capable of extension should the interpreter be so inclined. Where does dislike leave off and hatred or contempt begin? ... The phrase does not assist in sending a clear and precise

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<sup>85</sup> *Minister for Immigration & Citizenship v Haneef* [2007] FCAFC 203; (2007) 243 ALR 606 [113] (Black CJ, French and Weinberg JJ) ('*Haneef*'). See also *Evans v State of New South Wales* [2008] FCAFC 130; (2008) 168 FCR 576, 594 [72] (French, Branson and Stone JJ) ('*Evans*'); *Monis v The Queen* [2013] HCA 4; (2013) 249 CLR 92, 128 [60] (French CJ) ('*Monis*').

<sup>86</sup> Due process is one of the fundamental common law principles Australia has inherited. Its sources are not only 25 Edward I (1297) *Magna Carta* ch 29, but also 28 Edward III (1354), and 3 Charles I (1627) *Petition of Right*. As with the *Magna Carta*, the latter statutes are either received law in certain states, or applied by Imperial Acts legislation in other states.

<sup>87</sup> *Lange* [1997] HCA 25; (1997) 189 CLR 520, 564.

<sup>88</sup> This appears to be a situation that Brennan J described in *Re Bolton; Ex Parte Beane*: 'Many of our fundamental freedoms are guaranteed by ancient principles of the common law or by ancient statutes which are so much part of the accepted constitutional framework that their terms, if not their very existence, may be overlooked until a case arises which evokes their contemporary and undiminished force.': see *Re Bolton; Ex parte Beane* [1987] HCA 12; (1987) 162 CLR 514, 520-1 (Brennan J).

<sup>89</sup> [1990] 3 SCR 892 ('*Taylor*'). *Taylor* was decided along with *Keegstra* [1990] 3 SCR 697. Like *Keegstra*, the Canadian Supreme Court split 4:3, holding in *Taylor* that s 13 of the *Canadian Human Rights Act* did not violate the *Canadian Charter of Rights and Freedoms*.

indication to members of society as to what the limits of impugned speech are. In short, by using such vague, emotive terms without definition, the state necessarily incurs the risk of catching, within the ambit of the regulated area expression falling short of hatred.<sup>90</sup>

We suggest that her Honour's comments apply to s 17(1)'s use of 'offend', 'insult', 'ridicule' and 'humiliate'. Her Honour further noted:

[T]he chilling effect of leaving overbroad provisions "on the books" cannot be ignored. While the chilling effect of human rights legislation is likely to be less significant than that of criminal prohibition, the vagueness of the law means that it may well deter more conduct than can legitimately targeted, given its objectives.<sup>91</sup>

It is worth noting here another relevant Canadian Supreme Court case, *Saskatchewan Human Rights Commission v Whatcott*.<sup>92</sup> This case concerned s 14 of the *Saskatchewan Human Rights Code 1979* ('Code').<sup>93</sup> Section 14 in effect prohibited the publishing or display by various means material 'that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground'.<sup>94</sup> Section 3 of the Code listed prohibited grounds as including religion, creed, marital status, family status, sexual orientation, disability, age, colour, ancestry, nationality, place of origin, race or perceived race, receipt of public assistance, and gender identity.<sup>95</sup> As can be seen, there are similarities between s 14 and s 17(1).

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<sup>90</sup> *Taylor* [1990] SCR 892, 961-2.

<sup>91</sup> *Ibid.*

<sup>92</sup> [2013] SCC 11; [2013] 1 SCR 467 ('*Whatcott*').

<sup>93</sup> Subsequent mentions of s 14 of the Code will be to just 'section 14' or 's 14' as the case requires.

<sup>94</sup> *Saskatchewan Human Rights Code 1979* s 14(1)(b).

<sup>95</sup> Code s 2(1)(m.01) (definition of 'prohibited ground').

Writing for a unanimous Canadian Supreme Court, Rothstein J held that ‘ridicules, belittles or otherwise affronts the dignity of’ was overbroad.<sup>96</sup>

He remarked:

Restricting expression because it may offend or hurt feelings does not give sufficient weight to the role expression plays in individual self-fulfillment, the search for truth, and unfettered political discourse. Prohibiting any representation which “ridicules, belittles or otherwise affronts the dignity of” protected groups could capture a great deal of expression which, while offensive to most people, falls short of exposing its target group to the extreme detestation and vilification which risks provoking discriminatory activities against that group. Rather than being tailored to meet the particular requirements, such a broad prohibition would impair freedom of expression in a significant way.<sup>97</sup>

We suggest his Honour’s comments readily apply to s 17(1).

The sixth and final point in our summary is that US or Canadian concepts concerning vagueness or overbreadth need not be imported into the modified *Lange* test for s 17(1) to be held unconstitutional. Sections s 17(1) and s 55 may, in any event, be considered too complex, intrusive and/or uncertain to be considered reasonably appropriate and adapted to the end they serve.

Given that an individual may breach s 17(1) *by the mere act of speaking*, it must be certain in its application. Presently, it is not.

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<sup>96</sup> *Whatcott* [2013] SCC 11; [2013] 1 SCR 467, 519-20 [107]-[111] (Rothstein J).

<sup>97</sup> *Ibid* 519 [109].

*(d) The operation and effect of s 17(1)*

Section 17(1)'s operation and effect also burdens the implied freedom of political communication. Hence, it is necessary to review the conciliation process as well as the powers of Equal Opportunity Tasmania ('EOT').

The dispute resolution process is set out in Part 6 of the Act. The Office of the Anti-Discrimination Commissioner outlines the procedure for handling breaches of the Act on the EOT website.<sup>98</sup> This process is as follows:

- A complaint is lodged with EOT.
- The complaint is referred to the Commissioner.
- The Commissioner conducts a conference with the aim of conciliating the complaint.
- If the matter is not resolved early, the Commissioner will investigate it and decide whether the complaint should be dismissed, proceed to conciliation, or be referred to the Anti-Discrimination Tribunal (the 'Tribunal') for an inquiry.

If the Commissioner refers the complaint to the Tribunal then the proceedings in this jurisdiction are civil, not criminal, and a civil standard of proof applies. However, even civil proceedings impose serious burdens. Unlike criminal proceedings, there is no prosecutorial discretion to drop a case. Rather, a civil litigant can press what may be frivolous or vexatious proceedings.<sup>99</sup> Further, a lower standard of proof applies,

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<sup>98</sup> 'What Happens After a Complaint is Made', Equal Opportunity Tasmania, <[http://equalopportunity.tas.gov.au/complaints/what\\_happens\\_after\\_a\\_complaint\\_is\\_made](http://equalopportunity.tas.gov.au/complaints/what_happens_after_a_complaint_is_made)>.

<sup>99</sup> Act s 71(3).

meaning a breach of a law affecting freedom of expression is easier to establish. Finally, the respondent incurs costs in time, money and stress in meeting cases.<sup>100</sup> As Mason CJ, Toohey and Gaudron JJ noted in *Theophanous v Herald & Weekly Times Ltd*,<sup>101</sup> ‘a civil action is as great, if not a greater restriction than a criminal prosecution’.<sup>102</sup>

### 3 *A sweeping burden*

Section 17(1) imposes a sweeping burden on the implied freedom of political communication in two ways. First, s 17(1) may be breached in disputes over concepts that, largely or solely, are comprised of *ideas*.

For example, are ‘race’ and ‘ethnicity’ scientific facts or are they social, cultural and political constructs?<sup>103</sup> If race, ethnicity, or both, are social, cultural and political constructs then these constructs are, largely or solely, comprised of ideas.<sup>104</sup> Even supposing biology plays a role in the

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<sup>100</sup> See Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 176.

<sup>101</sup> [1994] HCA 46; (1994) 182 CLR 104 (*Theophanous*’).

<sup>102</sup> *City of Chicago v Tribune Co* (1923) 139 NE 86, 90 (Thompson CJ) cited in *Theophanous* [1994] HCA 46; (1994) 182 CLR 104, 130-1 (Mason CJ, Toohey and Gaudron JJ).

<sup>103</sup> Australian Law Reform Commission, *The Protection of Human Genetic Information*, Report No 96 (2003) 922 [36.42].

<sup>104</sup> The Explanatory Memorandum to the *Racial Discrimination Bill 1974* (Cth) stated that s 18C would use the definitions of ethnic origin in *King-Ansell v Police* [1979] 2 NZLR 531 (*King-Ansell*) and *Mandla v Dowell Lee* [1983] 2 AC 548 (*Mandla*): Explanatory Memorandum, *Racial Discrimination Bill 1974* (Cth) 2. In *King-Ansell*, Richardson J stated that ‘The real test is whether the individuals or the group regard themselves and are regarded by others in the community as having a particular historical identity in terms of their colour or their racial, national or ethnic origin’ and that ethnicity was defined as

a segment of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a common or presumed common past, even if not drawn from what in biological terms is a common racial stock. It is that combination which gives them an historically determined social identity in their own eyes and in the eyes of those outside the group.



determination of race or ethnicity, then the extent to which it influences law and policy are ideas open to dispute.

As to marriage, this is an institution that is solely comprised of ideas that are also open to dispute. For example, what are the spiritual aspects of marriage? What are its secular aspects? What are the rights and responsibilities of spouses? Who can marry? How many can marry? What are the consequences when a marriage fails?

If discussion about marriage or parental rights involves matters of gender or sexuality, then this raises further issues involving ideas. Is gender a social construct?<sup>105</sup> Is sexuality?<sup>106</sup> Is sexuality fluid, fixed, or some mix of the two?<sup>107</sup> What do different cultures and religions have to say about certain sexual practices? Should certain sexual practices be made

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See *King Ansell* [1979] 2 NZLR 531, 542-3 (Richardson J). In *Mandla*, markers of ethnicity were (among other things) a long shared history of the group; a cultural tradition of the group's own; and a common religion: see *Mandla* [1983] 2 AC 548, 562 (Lord Fraser of Tullybelton). However, as we noted in *No Offence Intended*:

[t]he issue with incorporating religious, cultural, and historical factors is that each of these factors involves *ideas*. Put broadly, religion involves ideas concerning spirituality; culture involves ideas about how people should conduct themselves individually and socially; the history of a people involves ideas concerning their collective heritage and experiences. All of these ideas may be, and often are, contested.'

See Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 135.

<sup>105</sup> See, for example, Candace West and Don H Zimmerman, 'Doing Gender' (1987) 1(2) *Gender & Society* 125.

<sup>106</sup> See, for example, Steven Seidman, *The Social Construction of Sexuality* (WW Norton & Company, 2003); Pepper Schwatz, 'The Social Construction of Heterosexuality' in Michael Kimmel (ed), *The Sexual Self: The Construction of Sexual Scripts* (Vanderbilt University Press, 2007) 80.

<sup>107</sup> For example, the Kinsey Scale posits that sexuality exists on a continuum, see Kinsey Institute, 'The Kinsey Scale', *Kinsey Institute* (online) <<https://www.kinseyinstitute.org/research/publications/kinsey-scale.php>>.

unlawful? Should others be encouraged? When should children be taught about matters of sexuality? And who should teach them?

In discussions amongst electors about these matters, views will differ sharply. Feelings will run high, and robust, heated discussion will occur. Positions will be attacked with all the logical and rhetorical weapons that opponents can muster, exposing them to withering critical scrutiny if not outright scorn. Arguments will be lost, and lost badly. Feelings will be hurt and pride will be wounded. Offence and insult, and even ridicule and humiliation, are inevitable incidents of such discussion in a democracy.

However, s 17(1) purports to limit discussion of concepts that are, largely or solely, comprised of ideas by imposing legal liability for offence, insult, ridicule and humiliation. This is a sweeping intrusion into the implied freedom of political communication.

Second, s 17(1) is sweeping because it burdens the implied freedom of political communication of *everyone in Tasmania*. Similarly, the law restricts common law freedom of expression – a freedom which itself has constitutional significance –<sup>108</sup> of *everyone in the Tasmania*. The law is not confined to time or place. Indeed, s 17(1) affects even private acts. This leads to an important question in the proportionality test: does s 17(1)'s purpose justify restricting a *fundamental freedom* held by *every Tasmanian*, even considering the alternatives available? This is a question to which we will return.

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<sup>108</sup> *Haneef* [2007] FCAFC 203; (2007) 243 ALR 606 [113] (Black CJ, French and Weinberg JJ). See also *Evans* [2008] FCAFC 130; (2008) 168 FCR 576, 594 [72] (French, Branson and Stone JJ); *Monis* [2013] HCA 4; (2013) 249 CLR 92, 128 [60] (French CJ).

### B *Is s 17(1)'s purpose legitimate?*

Section 17(1)'s purpose is not compatible with Australia's system of representative and responsive government. In this system:

The provisions of the Constitution mandate a system of representative and responsible government with a universal adult franchise, and s 128 establishes a system for amendment of the Constitution in which the proposed law to effect the amendment is to be submitted to the electors. Communication between electors and legislators and the officers of the executive, and between electors themselves, on matters of government and politics is 'an indispensable incident' of that constitutional system.<sup>109</sup>

Applying the principles of statutory construction,<sup>110</sup> it appears that s 17(1)'s purpose is to prohibit, amongst other things, offence, insult, ridicule and humiliation<sup>111</sup> in pursuit of the Act's overall purpose of prohibiting discrimination.<sup>112</sup> However, this purpose is not an end compatible with Australia's constitutionally prescribed system of representative and responsible government.<sup>113</sup>

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<sup>109</sup> *Aid/Watch Incorporated v Federal Commissioner v Taxation* [2010] HCA 42; (2010) 241 CLR 539, 556 [44] (emphasis and citations omitted) cited in *Wotton v Queensland* [2012] HCA 2; (2012) 246 CLR 1, 13 [20] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

<sup>110</sup> In *Saeed v Minister for Immigration & Citizenship* [2010] HCA 23; (2010) 241 CLR 252, 264-5 [31] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ) it was noted 'Statements as to legislative intention made in explanatory memoranda or by Ministers, however clear or emphatic, cannot overcome the need to carefully consider the words of the statute to ascertain its meaning'.

<sup>111</sup> Act s 17(1).

<sup>112</sup> Act Long Title.

<sup>113</sup> Section 17(1) makes unlawful intimidation on the grounds specified: see Act s 17(1). Given that intimidation contains an element of threat, making unlawful such conduct is compatible with Australia's constitutionally prescribed system of representative and responsible government. See also Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 115, 211.

To reiterate and summarise what we argued in *No Offence Intended*,<sup>114</sup> in *Coleman v Power*,<sup>115</sup> McHugh J noted that insults can be used as weapons of intimidation that may have a chilling effect.<sup>116</sup> However, McHugh J also stated that '[t]he use of insulting words is a common enough technique in political discussion and debates'<sup>117</sup> and '...insults are a legitimate part of the political discussion protected by the Constitution. An unqualified prohibition on their use cannot be justified as compatible with the constitutional freedom.'<sup>118</sup> Gummow and Hayne JJ stated '[i]nsult and invective have been employed in political communication at least since the time of Demosthenes.'<sup>119</sup> Kirby J stated:

One might wish for more rationality, less superficiality, diminished invective and increased logic and persuasion in political discourse. But those of that view must find another homeland. From its earliest history, Australian politics has regularly included insult and emotion, calumny and invective, in its armoury of persuasion. They are part and parcel of the struggle of ideas.<sup>120</sup>

In *Monis*, Hayne J stated:

History, not only recent history, teaches that abuse and invective are an inevitable part of political discourse. Abuse and invective are designed to drive a point home by inflicting the pain of humiliation and insult. And the greater the humiliation, the greater the insult, the more effective the attack may be. The giving of really serious offence is neither incidental nor accidental. The communication is designed and intended to cause the greatest possible offence to its target no matter whether that target is a person, a group, a government or an opposition, or a particular political policy or proposal and those who

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<sup>114</sup> Ibid 126-30.

<sup>115</sup> [2004] HCA 25; (2004) 220 CLR 1 ('*Coleman*').

<sup>116</sup> Ibid 54 [105] (McHugh J).

<sup>117</sup> Ibid.

<sup>118</sup> Ibid.

<sup>119</sup> Ibid 78 [197] (Gummow and Hayne JJ).

<sup>120</sup> Ibid 91 [239] (Kirby J).

propound it.<sup>121</sup>

Offence, insult, ridicule and humiliation are inevitable incidents of discussion about government and political matters in Australia's constitutionally prescribed system of representative and responsible government. Section 17(1)'s purpose in making unlawful of such conduct fails this step of the modified *Lange* test. We will, however, analyse the third step of the modified *Lange* test.

*C Is s 17(1) reasonably appropriate and adapted to its purpose?*

As the majority noted in *McCloy*, to meet the third step in the modified *Lange* test the law must be 'proportionate' to its purpose.<sup>122</sup> This means that the law must be suitable, necessary and adequate in its balance.<sup>123</sup>

1 *Suitability*

All that is required is that there be a rational connection between the means used in s 17(1) and its purpose.<sup>124</sup> This requirement is met: prohibiting offence, insult, ridicule and humiliation has at the very least a minimal rational connection to the purpose of prohibiting discrimination.

2 *Necessity*

This step requires that there is no obvious and compelling alternative and reasonably practicable means of achieving the same purpose that has a less restrictive effect on the freedom.<sup>125</sup>

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<sup>121</sup> *Monis* [2013] HCA 4; (2013) 249 CLR 92, 136-7 [85]-[86] (Hayne J).

<sup>122</sup> *McCloy* [2015] HCA 34 [2] (French CJ, Kiefel, Bell and Keane JJ) (citations omitted).

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid* [80] (French CJ, Kiefel, Bell and Keane JJ) (citations omitted).

<sup>125</sup> *Ibid* [2] (French CJ, Kiefel, Bell and Keane JJ) (citations omitted).

Here, we submit that, in assessing the necessity requirement, it is a mistake to focus on alternative drafting of the provision in question, or on one alternative law. Instead, when assessing a law of s 17(1)'s nature it is necessary to look at the following:

1. Whether one or more laws serve the purpose that s 17(1) serves in a way less intrusive to the implied freedom of political communication; and
2. Whether one or more alternative measures (not necessarily laws) serve the purpose that s 17(1) serves.

Hence, in the case of s 17(1), it is relevant to look at:

1. Existing criminal laws;
2. Existing anti-discrimination laws; and
3. Measures that may be undertaken in civil society.

*(a) Existing criminal laws*

There are already criminal laws that serve the purpose of protecting people from harassment and abuse. These are laws of equal application, that is, they apply to all in Tasmania and are not limited to those who have a listed attribute.

A common complaint is that minorities are subjected to bigoted abuse as they walk down the street or otherwise go about their business. However, s 12 of the *Police Offences Act 1935* (Tas) already prohibits the use of

threatening, abusive or insulting words calculated to cause a breach of the peace or whereby a breach of the peace may be occasioned.<sup>126</sup>

Another common complaint is harassment of minorities in local neighbourhoods, where neighbours repeatedly abuse minorities at or near their home. This in turn causes the victim to feel intimidated or otherwise fear for their safety. In such instances, s 192 of the *Criminal Code 1924* (Tas) prohibits stalking, which can readily be applied in these kinds of situations.

*(b) Existing anti-discrimination laws*

Another common complaint is discrimination or harassment occurs in environments such as in the workplace, in places of education, or when trying to obtain accommodation or goods or services. However, present laws already cover such instances, not least including a suite of Commonwealth anti-discrimination laws.<sup>127</sup>

*(c) Measures that can be undertaken in civil society*

In *No Offence Intended*, we noted that just because a government does nothing does *not* mean nothing is done.<sup>128</sup> Civil society itself provides measures to combat racism. According to Martin Krygier, civil society is:

... comprised of multitudes of independent actors, going about their individual or freely chosen cooperative affairs, able to choose to associate and participate (or not) in an independent public realm, with an economy of disbursed actors

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<sup>126</sup> *Police Offences Act 1935* (Tas) s 12.

<sup>127</sup> See, for example, Act ss 14, 15. As far as Commonwealth legislation is concerned, see RDA ss 11, 12, 13, 15; *Disability Discrimination Act 1992* (Cth) ss 35, 37, 39; *Sex Discrimination Act 1984* (Cth) pt II div 3.

<sup>128</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 204.

and markets, undergirded by a socially embedded legal order, which grants and enforces legal rights.<sup>129</sup>

As regards offensive speech, non-state actors may challenge that speech by their own speech. Further, they may organise by free assembly to magnify their voice and to speak out on behalf of those who cannot speak for themselves. That is, in a common law system such as Australia's, those exercising their common law freedoms of speech and association counter others exercising their common law freedom of speech to make offensive remarks.<sup>130</sup>

People who are harassed may also pursue more direct, cheaper and faster private solutions. For example, online debates, such as those on news or opinion websites, often become heated. If bigoted slurs are used, then the best response (apart from a sharp response by the person slurred) is to report the slur to the website's moderators. However, if there is sustained online harassment, then there is recourse to the law against stalking, which covers a wide range of conduct, including online conduct.<sup>131</sup>

*(d) Enforcement of existing laws*

It could be argued that present laws are not enforced often enough, and s 17(1) must supplement them. However, if these laws are not adequately enforced then the appropriate response is to ensure the authorities responsible for the enforcing the law do their job. Here, individuals can work with representative organisations to monitor enforcement and encourage authorities to actually enforce the law. Justifying new laws by

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<sup>129</sup> Martin Krygier, 'Virtuous Circles: Antipodean Reflections on Power, Institutions, and Civil Society' (1997) 11(1) *East European Politics and Societies* 36, 75.

<sup>130</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 154.

<sup>131</sup> *Criminal Code 1924* (Tas) s 192.



reference to the failure to enforce existing laws is an entirely circular argument. Further, if existing laws aren't actually being enforced, this in itself gives rise to rule of law implications beyond the scope of this particular article.

Ultimately, there are existing laws (either alone or combined with measures in civil society) that already adequately achieve 17(1)'s purpose.

### 3 *Adequacy in its balance*

This criterion requires a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.<sup>132</sup> It should be noted here that the implied freedom of political communication is a strong freedom.<sup>133</sup> We will turn to assessing the nature and extent of the burden. After this, we will turn to the purpose s 17(1) serves, which will include an assessing the nature and extent of the harm s 17(1) addresses.

#### (a) *The nature of the burden*

As demonstrated above, the burden that s 17(1) imposes on the implied freedom of political communication is direct, heavy, and sweeping. Section 17(1) affects a wide range of discussion relevant to government and political matters in Australia. It creates uncertainty about how it may be applied, leading to the chilling of debate where debate must occur. Unlike the law of defamation, s 17(1) restricts the discussion of groups

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<sup>132</sup> *McCloy* [2015] HCA 34 [2] (French CJ, Kiefel, Bell and Keane JJ) (citations omitted).

<sup>133</sup> See *Monis* [2013] HCA 4; (2013) 249 CLR 92, 141 [103]-[104] (Hayne J). See also *Coleman* [2004] HCA 25; (2004) 220 CLR 1, 49-50 [91] (McHugh J), 77 [195] (Gummow and Hayne JJ).

rather than particular individuals. This means its potential chilling effect is far greater than that of defamation law. Section 17(1) also restricts discussion of ideas relevant to government and political matters. It purports to limit the freedom of expression of all Tasmanians who, as Australians and part of a sovereign people, must be able to discuss government and political matters fully, frankly and robustly. For the reasons given below, s 55 does not adequately alleviate s 17(1)'s burden and, indeed, creates burdens of its own.

*(b) The purpose that s 17(1) serves*

Section 17(1)'s purpose of prohibiting discrimination is laudable. It is clear that s 17(1) was enacted to prevent certain harms. In *No Offence Intended*, we made a number of points concerning 'hate speech' laws, and the harms that they address, which we will summarise (and where needed, add to or refine) here:

First, the onus is on those justifying s 17(1) to demonstrate that the harm caused is to such an extent that it justifies *restricting the freedom of expression of every Tasmanian, even given the alternatives available*. As noted above, freedom of expression is a fundamental freedom, and one with constitutional significance. Freedom of expression must never be infringed lightly, and evidence for its restriction must be clear, if not overwhelming.<sup>134</sup>

Second, a justification for broadly drafted and applied laws is that minorities covered by such laws are protected from the harm that offence, insult, humiliation or ridicule may cause. However, offence, insult, ridicule and even humiliation are necessary incidents of a democracy

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<sup>134</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 130.

such as Australia's, where views sharply differ, feelings run high, and robust debate must occur.<sup>135</sup>

Third, there have been a number of important reports concerning racism in Australia. These include the Royal Commission into Aboriginal Deaths in Custody in 1991;<sup>136</sup> the Human Rights and Equal Opportunity Commission's *National Inquiry into Racist Violence* in 1991 ('Inquiry');<sup>137</sup> and the Australian Law Reform Commission's ('ALRC's) report, *Multiculturalism and the Law*.<sup>138</sup> However, *none* of these reports recommended that speech that offended, insulted, ridiculed or even humiliated be made unlawful.<sup>139</sup> Indeed, the Inquiry noted:

The threshold for prohibited conduct needs to be higher than expressions of mere ill will to prevent the situation in New Zealand, where legislation produced a host of trivial complaints. The Inquiry is of the opinion that the term "incitement to racial hostility" conveys the level and degree of conduct with which the legislation would be concerned.<sup>140</sup>

Fourth, authors who have written on the harmful effects of racism do not argue for laws as extensive as s 17(1). For example, Richard Delgado proposed a cause of action where the plaintiff would need to prove that:

Language was addressed to him or her by the defendant that was intended to demean through reference to race; that the plaintiff understood as intended to

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<sup>135</sup> See *ibid* 101-2.

<sup>136</sup> Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991).

<sup>137</sup> Human Rights and Equal Opportunity Commission, *National Enquiry into Racist Violence* (Australian Government Publishing Service, 1991).

<sup>138</sup> Australian Law Reform Commission, *Multiculturalism and the Law*, Report No 57 (1992).

<sup>139</sup> For the full discussion see Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 96-9.

<sup>140</sup> Inquiry 300.

demean through reference to race; and that a reasonable person would recognise as a racial insult.<sup>141</sup>

Note here the requirement for intent, something that s 17(1) lacks. Mari Matsuda's proposed law would have the following elements:

1. The message is of racial superiority;
2. The message is directed against a historically oppressed group;  
and
3. The message is persecutorial, hateful, and degrading.<sup>142</sup>

The measures in s 17(1) are far wider than what Matsuda proposes. In her work, Matsuda provided a moving account of the effects of racism.<sup>143</sup>

However, her research is not without its faults. Warren Sandmann noted the following with respect to Matsuda's work:

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<sup>141</sup> Richard Delgado, 'Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling' in Mari J Matsuda, Charles R Lawrence III, Richard Delgado and Kimberlé Williams Crenshaw (eds), *Words That Wound: Critical Race Theory, Assaultive Speech and the First Amendment* (Westview Press, 1993) 109.

<sup>142</sup> Mari Matsuda, 'Public Response to Racist Speech: Considering the Victim's Story' (1989) 87 *Michigan Law Review* 2320, 2357. See also Mari Matsuda 'Public Response to Racist Speech: Considering the Victim's Story' in Mari J Matsuda, Charles R Lawrence III, Richard Delgado and Kimberlé Williams Crenshaw (eds), *Words That Wound: Critical Race Theory, Assaultive Speech and the First Amendment* (Westview Press, 1993) 36.

<sup>143</sup> Mari Matsuda, 'Public Response to Racist Speech: Considering the Victim's Story' (1989) 87 *Michigan Law Review* 2320, 2337-8: 'As much as one may try to resist a piece of hate propaganda, the effect on one's self-esteem and sense of personal security is devastating. To be hated, despised, and alone is the ultimate fear of all human beings. However irrational racist speech may be, it hits right at the emotional place where we feel the most pain. The aloneness comes not only from the hate message itself, but also from the government response of tolerance'. See also Mari Matsuda 'Public Response to Racist Speech: Considering the Victim's Story' in Mari J Matsuda, Charles R Lawrence III, Richard Delgado and Kimberlé Williams Crenshaw (eds), *Words That Wound: Critical Race Theory, Assaultive Speech and the First Amendment* (Westview Press, 1993) 25.

Matsuda utilizes personal experience, narratives and oral histories as evidence to support a claim. While Matsuda also uses more traditional evidential sources (government reports and statistical findings), the heart of her argument – that hate speech causes real harm to individuals – is bolstered mainly by anecdotal evidence and behavioristic studies showing a relationship between hate speech and psychological and physiological harm. While there is no question that some targets of hate-speech suffer from these symptoms, nor that this suffering is great, there is a question concerning the strength of the relationship between the speech and the harm. ... [Matsuda] offers little evidence that even the majority of recipients will respond to hate speech in the same way.<sup>144</sup>

Sandmann further noted:

[M]ore importantly than the lack of evidence to support her claim is her dependence on the notion of a virtual cause-effect relationship between word and deed. ... Contemporary theorists have strongly questioned the possibility of showing a direct link between word and response. To propose a restriction on certain forms of speech that have been shown only anecdotally and questionably to ‘cause’ harm is, at best, an overreach on Matsuda’s part.<sup>145</sup>

We will return to Sandmann’s criticisms shortly, as they are relevant to the next point.

Fifth, and lastly, the Australian Human Rights Commission has noted that there has been very little qualitative research on the lived experience of racism in Australia.<sup>146</sup> That said, Katherine Gelber and Luke McNamara have attempted to address this in their recent work concerning hate speech, its harms, and the need for broadly-drafted legislation to combat

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<sup>144</sup> Warren Sandmann, ‘Three Ifs and a Maybe: Mari Matsuda’s Approach to Restricting Hate Speech Laws’ (1994) 45 (3-4) *Communication Studies* 241, 250 (citations omitted).

<sup>145</sup> Ibid (citations omitted). See 249-254 for Sandmann’s other criticisms of Matsuda’s approach.

<sup>146</sup> Australian Human Rights Commission, *Freedom from Discrimination: Report on the 40<sup>th</sup> Anniversary of the Racial Discrimination Act* (Australian Human Rights Commission, 2015) 6 [2.1] (‘40<sup>th</sup> Anniversary Report’).

it.<sup>147</sup> In particular, they aim to provide empirical evidence of the harms of hate speech.<sup>148</sup> However, and with the greatest of respect, Gelber and McNamara's analysis is unsatisfactory. Space precludes us from a detailed critique. However, we make the following points.

First, Gelber and McNamara interviewed 101 people across various racial, ethnic and religious groups concerning their experience of racism in Australia.<sup>149</sup> While the sample size is statistically significant, it is nevertheless relatively small, and thus prone to a substantial margin of error when extrapolated to Australia's population as a whole.<sup>150</sup>

Second, of the people interviewed, 32 were community spokespeople and 69 were ordinary community members.<sup>151</sup> A better sample would be randomly selected. This is because the 32 community spokespeople may skew the results. In fairness, community spokespeople may be more aware of what is going on in their community. However, it cannot be

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<sup>147</sup> Katherine Gelber and Luke McNamara, 'Evidencing the harms of hate speech' (2016) 22(3) *Social Identities* 324; Katherine Gelber and Luke McNamara, 'Anti-Vilification Laws and Public Racism in Australia: Mapping the Gaps Between Harms Occasioned and the Remedies Provided' (2016) 39(2) *UNSW Law Journal* 488.

<sup>148</sup> Katherine Gelber and Luke McNamara, 'Evidencing the harms of hate speech' (2016) 22(3) *Social Identities* 324, 324; Katherine Gelber and Luke McNamara, 'Anti-Vilification Laws and Public Racism in Australia: Mapping the Gaps Between Harms Occasioned and the Remedies Provided' (2016) 39(2) *UNSW Law Journal* 488, 488.

<sup>149</sup> Katherine Gelber and Luke McNamara, 'Evidencing the harms of hate speech' (2016) 22(3) *Social Identities* 324, 326.

<sup>150</sup> There appear to be a number of sampling and non-sampling errors in Gelber and McNamara's work. For an overview of such errors see, for example, Australian Bureau of Statistics, 'Types of error', *Australian Bureau of Statistics* (online) <<http://www.abs.gov.au/websitedbs/a3121120.nsf/home/statistical+language++types+of+error>>; Queensland Government Statistician's Office, 'Survey methods', *Queensland Government Statistician's Office* (online) <<http://www.qgso.qld.gov.au/about-statistics/survey-methods/>>.

<sup>151</sup> Katherine Gelber and Luke McNamara, 'Evidencing the harms of hate speech' (2016) 22(3) *Social Identities* 324, 326.

discounted that some may be motivated to describe an incident as racist when in fact it is not.

Third, Gelber and McNamara identify the rationale for the groups selected as follows:

We drew on the available evidence regarding racism in Australia to identify the groups most likely to be subjected to racist hate speech. Relevant factors in identifying the groups included the historical and enduring racism experienced by Indigenous people, post 9/11 anxieties about terrorism, controversies over asylum-seekers and visibility of recently arrived immigrant communities. Interviews were conducted with Aboriginal and Torres Strait Islander, Afghani, Australian-born Arabic-speaking Muslim, Australian-born Arabic-speaking Christian, Chinese, Indian, Jewish, Lebanese-born Christian, Lebanese-born Muslim, Sudanese, Turkish Alevi, Turkish Muslim and Vietnamese people.<sup>152</sup>

Again, a better approach would have been to use a random cross-section of various racial, ethnic and religious groups.<sup>153</sup> The criteria that Gelber and McNamara used would skew the results. This is because the group selection appears, at least in part, to depend on whether or not there is a controversy associated with group. Matters such as Aboriginal welfare, terrorism and the level of refugee intake are matters that are, rightly, the subject of vigorous political debate. However, this also increases the likelihood of things being said about the racial, ethnic or religious group involved that may be taken as unflattering. The method used to create the sample risks portraying racism in Australia as a greater problem than it is.

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<sup>152</sup> Ibid 326-7.

<sup>153</sup> The sample could have included (for example), immigrants from Great Britain, Greece and Italy (in order to get a perspective of second and subsequent generations of immigrants). The sample could also have included other immigrant communities such as Kurds, Yazidis, Druze and Zoroastrians. These communities tend not to have controversies associated with them in Australia.

Fourth (and recalling Sandmann's criticism of Matsuda), the evidence that Gelber and McNamara collected is anecdotal. As we noted in *No Offence Intended*, from a legal standpoint, such evidence may be speculative, conclusory or hearsay.<sup>154</sup> There also may be issues whether the evidence is too vague, or makes sweeping generalisations.

Fifth, some of the evidence that Gelber and McNamara use to support their claims about hate speech do not meet the definition of hate speech that they provide. Gelber and McNamara use the following definition of hate speech:

[W]e follow Parekh in emphasizing three defining characteristics. First, it is 'directed against a specified or easily identifiable individual or... a group of individuals based on an arbitrary and normatively irrelevant feature'. Secondly, 'hate speech stigmatizes the target group by implicitly or explicitly ascribing to it qualities widely regarded as highly undesirable'. Thirdly, 'the target group is viewed as an undesirable presence and a legitimate object of hostility'.<sup>155</sup>

However, while some statements they cite clearly meet the definition they provided, they also cite the following statements as evidence of 'hate speech':

'I've been called names and like that when I was at school, those sorts of things'

When celebrating cultural and religious days and wearing national costumes, some people 'looked very strangely' at community members, who said the audience was 'even using some bad and unnecessary words'

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<sup>154</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 85.

<sup>155</sup> Katherine Gelber and Luke McNamara, 'Evidencing the harms of hate speech' (2016) 22(3) *Social Identities* 324, 324 (citations omitted). The source that Gelber and McNamara cite is Bhikhu Parekh, 'Is there a case for banning hate speech?' in Michael Herz and Peter Molnar (eds), *The content and context of hate speech: Rethinking regulation and responses* (Cambridge University Press, 2012) 40-1.



Check out operators at the supermarket, ‘they will talk to the people and say, “Good morning”, to the person in front of you or the three people in front of you, and they come to you, and say nothing.’

A university newspaper contained a ‘star sign guide’ that included ‘this interpretation that was derogatory of Aboriginal culture and dreaming’

‘It’s just a negative picture that you see in [the media] which actually portrays just the bad things about India. It never portrays the good things’,<sup>156</sup>

Readers will note that the statements are vague, and some are conclusory. No specifics are given. There is simply no basis for concluding that the conduct described in these statements meet Gelber and McNamara’s definition of hate speech.

Especially concerning is the way that Gelber and McNamara treat evidence of the media, of politicians and of children. As to the media, they as cite examples of ‘hate speech’ the following:

‘Look, any time I pick up the paper and there’s a story in there about Aboriginal people, it’s nearly always negative. That hasn’t changed and I don’t know whether it will’

‘we’re portrayed right across the media as Aboriginal people in general being destructive’

‘We feel very disappointed about the media’s interest in reporting the negative side of China while there is so much... good news worth telling. There is a strong hostility and prejudice towards China behind the media reporting.’

‘what danger is a mosque where people are going to go and pray in anyone’s community? Would they object if there was a church?’

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<sup>156</sup> This is a selection of quotes from Katherine Gelber and Luke McNamara, ‘Evidencing the harms of hate speech’ (2016) 22(3) *Social Identities* 324, 329, 331. We should note that we could have cited more instances of problematic statements than those we have selected for this article.

‘if an individual does something negative, that’s it, the whole community cops it’<sup>157</sup>

Once again, these are vague and conclusory statements. The reader is left guessing as to the evidence that forms the basis of these conclusions. As to statements of politicians, the statements cited include:

‘Mr Howard stands there in parliament, “We don’t want those kinds of people”. I have been in Australia 30 years by then’

‘So there always has to be the other and he has to be hated and he has be made aware of, be careful, be alert. Back to the... time when John Howard said to be careful, be alert and call up this number in case your neighbour is a Muslim’<sup>158</sup>

As to the first statement, it is vague. We guess that it is referring to Mr Howard’s comments about the issue of asylum seekers gaining entry to Australia by boat and, in particular, his comments about the events regarding SIEV 4 (which later became known as the ‘children overboard affair’). However, that’s the point: we are guessing. As to the second comment, we are fairly certain (although, again, we are guessing) that they refer to the Commonwealth government’s ‘be alert but not alarmed’ campaign in response to the September 11 terrorist attacks. However, if this is the case, the statement that Gelber and McNamara quote as evidence of hate speech is simply wrong. The ‘be alert but not alarmed’ campaign was not encouraging the reporting of Muslims, but the reporting of suspicious behaviour.<sup>159</sup> These issues aside, immigration and terrorism are clearly matters of public interest and debate, and are

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<sup>157</sup> This is a selection of quotes from *ibid* 331, 332.

<sup>158</sup> This is a selection of quotes from *ibid* 331.

<sup>159</sup> Clips from the ‘be alert but not alarmed’ campaign can be found on YouTube. See, for example: CheesyTV, ‘*Be alert, but not alarmed*’ – Australian govt anti-terrorism TV ad (2002), *YouTube* (online), 28 August 2013 <<https://www.youtube.com/watch?v=HWwJThlHqjs>>; see also actualperson34, *Howard government anti-terrorism ad (2004)*, *YouTube* (online), 27 July 2014 <<https://www.youtube.com/watch?v=tJDalHxp2i4>>.

contentious. Vigorous debate is to be expected. In any event, it is unlikely that what Mr Howard actually said about these issues meet Gelber and McNamara's definition of 'hate speech'.<sup>160</sup>

As to the statements of children, Gelber and McNamara cite the following:

Australian Indigenous Footballer Adam Goodes was called an 'ape' by a 13 year old girl in the crowd

A teacher was giving a student a direction and the student replied 'Go back where you belong'

Interviewee's child at school was told by another child 'The fucking Indians, you can go back to your country'

Interviewee attended school where other students believed the stereotype that every woman in Afghanistan is uneducated and illiterate. When she told them she had been in Australia for two years, they expressed surprise at her level of education which they believed to have been achieved in only two years<sup>161</sup>

We'll put aside other problems with the cited evidence and focus on this one: in our view it is deeply problematic to cite evidence of what children say. This is because children are, rightly, recognised in law as having

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<sup>160</sup> Mr Howard's remarks concerning SIEV 4 were 'I don't want in Australia people who would throw their own children into the sea. I don't.': samplenukes, 'John Howard Children Overboard...remember this?' *YouTube* (online), 23 November 2007 <<https://www.youtube.com/watch?v=E3WJ10xGkas>>. It was later found that those aboard SIEV 4 did not throw children into the sea: see Senate Select Committee on a Certain Maritime Incident, Parliament of Australia, *Report – Select Committee for an inquiry into a certain maritime incident* (2002) xxiii-iv, chs 3-6. However, despite being wrong factually, Mr Howard's comments were nevertheless made in the context of a public debate about illegal immigration, and expressed an opinion, not about any particular race, ethnicity or nationality, but about the type of person who should not be admitted into Australia as an immigrant or as a refugee.

<sup>161</sup> This is a selection of quotes from Katherine Gelber and Luke McNamara, 'Evidencing the harms of hate speech' (2016) 22(3) *Social Identities* 324, 329, 330.

diminished capacity. They are prone to say and do things that adults would not. Further, it cannot safely be assumed that what children say reflect what their parents have taught them or broader societal trends. Finally, such evidence is of minimal value when justifying laws that would restrict the freedom of every person in the relevant jurisdiction (be it Tasmania, or Australia). As regards children specifically, the better response is to educate them in the context of the particular environment in which the offending remark was made. So, for example, if the offending remark is made at school, then the school is best placed to handle it. This alternative is faster and more productive than bringing the child before the Tribunal.

Sixth, it is no answer to say that the quoted statements reflect the ‘lived experience’ of those saying them and thus should be excused from evidential standards that would otherwise apply.<sup>162</sup> ‘Lived experience’ does not render testimony immune from the infirmities that may attend testimony from any person. It is a conceit – and a dangerous one at that – to assume otherwise.

Seventh, some of the interviewees reported the effects of hate speech as follows:

To me the saddest thing is [there] not a recognition of the special status of what we add to this country. We don’t take away from; we add ... but it’s always put up there as a negative, that Aboriginals don’t add to the fabric of this country, that we don’t – and ... I think that it is painful ... Yes, it does hurt and it strikes at your very being.

When you see the infection of that kind of hate, that’s scary stuff.

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<sup>162</sup> See *ibid* 337; see also Katherine Gelber and Luke McNamara, ‘Anti-Vilification Laws and Public Racism in Australia: Mapping the Gaps Between Harms Occasioned and the Remedies Provided’ (2016) 39(2) *UNSW Law Journal* 488, 489, 501, 507.

We were worried about talking to girls, because it got to the stage where if you were to approach a girl, she could turn around and say, ‘Lebanese, they are trying to rape me, go away’ ... it created paranoia.

The media hate our community. They want South Sudanese to be frustrated and feel as if they are not Australians.

If I’m in a busy train, I wouldn’t read my Arabic newspaper, so people would not recognise me as a Middle Eastern.

The media ... has reinforced a lot of stereotypes that we’re trying to break down.<sup>163</sup>

Gelber and McNamara state that ‘The interviews powerfully document the range of harms experienced in public expressions of racist hate speech’.<sup>164</sup> However, Gelber and McNamara are begging the question.<sup>165</sup> That is, they assume these harms result from actions constituting hate speech.<sup>166</sup> However, they do not establish that these actions in fact meet their own (or any other) definition of hate speech.

Further, recalling Sandmann’s criticism of Matsuda’s work, Gelber and McNamara depend on a virtual cause-effect relationship between word and deed. As to the quoted statements, Gelber and McNamara fail to

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<sup>163</sup> This is a selection of quotes from Katherine Gelber and Luke McNamara, ‘Evidencing the harms of hate speech’ (2016) 22(3) *Social Identities* 324, 333-5.

<sup>164</sup> Ibid 336.

<sup>165</sup> To avoid doubt, we use ‘beg the question’ in its traditional sense, that is, the logical fallacy where one makes an argument using a premise that has not been proved. We do not use it as it is now often used, as suggesting that a given statement ‘raises a question’.

<sup>166</sup> Gelber and McNamara distinguish between ‘constitutive harm’ and ‘consequential harm; ‘Constitutive harm’ is the harm caused in the saying of hate speech; and ‘consequential’ harm caused in the saying of hate speech and ‘consequential harm’ is the harm resulting from hate speech; *ibid* 325. Gelber and McNamara further distinguish between face-to-face hate speech and hate speech that is genuinely circulated ‘such as by the media’; *ibid* 325-6.

demonstrate the conduct resulted in the adverse effect.<sup>167</sup> Once again, the statements concerning the effect of the conduct (whatever that conduct is) are vague, speculative and conclusory.

Finally, Gelber and McNamara take a broad view of harm. They use this view to justify s 18C's broad approach to hate speech.<sup>168</sup> However, a broad approach to harm encounters problems with 'concept creep'. What do we mean by 'concept creep'? Psychology Professor Nick Haslam has noted that a number of psychological concepts have expanded 'horizontally' and 'vertically'.<sup>169</sup> 'Horizontal' expansion means a concept expands to include qualitatively different phenomena.<sup>170</sup> 'Vertical' expansion means a concept expands to include quantitatively different phenomena, and usually less severe phenomena.<sup>171</sup>

For example, in psychology, a traditional view of an event causing *trauma* would be one that would evoke 'intense fear, terror and helplessness'.<sup>172</sup> It would also be 'outside the range of usual human experience'<sup>173</sup> and 'would evoke significant symptoms of distress in

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<sup>167</sup> In fairness, there are certain statements in Gelber and McNamara's work that do meet their definition of hate speech and from which harm can be readily inferred. However, and with respect, Gelber and McNamara should have only cited such clear instances and not the more questionable instances.

<sup>168</sup> Katherine Gelber and Luke McNamara, 'Anti-Vilification Laws and Public Racism in Australia: Mapping the Gaps Between Harms Occasioned and the Remedies Provided' (2016) 39(2) *UNSW Law Journal* 488, 506-7.

<sup>169</sup> Nick Haslam, 'Concept Creep: Psychology's Expanding Concepts of Harm and Pathology' (2016) 27(1) *Psychological Inquiry* 1, 2.

<sup>170</sup> *Ibid.*

<sup>171</sup> *Ibid.*

<sup>172</sup> American Psychiatric Association, *Diagnostic and statistical manual of mental disorders* (American Psychiatric Association, 3<sup>rd</sup> revised ed, 1987) 250 cited in Nick Haslam, 'Concept Creep: Psychology's Expanding Concepts of Harm and Pathology' (2016) 27(1) *Psychological Inquiry* 1, 6.

<sup>173</sup> American Psychiatric Association, *Diagnostic and statistical manual of mental disorders* (American Psychiatric Association, 3<sup>rd</sup> ed, 1980) 238 cited in Nick Haslam, 'Concept Creep: Psychology's Expanding Concepts of Harm and Pathology' (2016) 27(1) *Psychological Inquiry* 1, 6.

almost everyone'.<sup>174</sup> However, Haslam noted that the definition of trauma had expanded 'vertically downward' so that now:

A traumatic event need not be a discrete event, need not involve serious threats to life or limb, need not be outside normal experience, need not be likely to create marked distress in almost everyone, and need not even produce marked distress in the traumatized person, who must merely experience it as 'harmful'. Under this definition the concept of trauma is rendered much broader and more subjective than it was even three decades ago.<sup>175</sup>

While noting that expanding certain psychological concepts had beneficial effects,<sup>176</sup> Haslam also noted:

[A]pplying concepts of abuse, bullying, and trauma to less severe and clearly defined actions and events, and by increasingly including subjective elements into them, concept creep may release a flood of unjustified accusations and litigation, as well as excessive and disproportionate enforcement regimes.<sup>177</sup>

In liberal democracies, John Stuart Mill's 'harm principle'<sup>178</sup> has long been influential in determining when it is appropriate for a government to

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<sup>174</sup> American Psychiatric Association, *Diagnostic and statistical manual of mental disorders* (American Psychiatric Association, 3<sup>rd</sup> ed, 1987) 238 cited in Nick Haslam, 'Concept Creep: Psychology's Expanding Concepts of Harm and Pathology' (2016) 27(1) *Psychological Inquiry* 1, 6.

<sup>175</sup> Ibid 7.

<sup>176</sup> Haslam noted benefits such as 'sensitizing people to harm and suffering': see ibid 14.

<sup>177</sup> Ibid. See also Jonathan Haidt and Nick Haslam, 'Campuses are places for open minds – not where debate is closed down', *The Guardian* (online), 10 April 2016 <<https://www.theguardian.com/commentisfree/2016/apr/10/students-censorship-safe-places-platforming-free-speech>>; Conor Friedersdorf, 'How Americans Became So Sensitive to Harm', *The Atlantic* (online), 19 April 2016 <<http://www.theatlantic.com/politics/archive/2016/04/concept-creep/477939/>>.

<sup>178</sup> The harm principle is stated thus:

[T]he sole end for which mankind are warranted, individually and collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.

make laws. However, Mill formulated this principle when ‘harm’ did not have the expanded meaning that some would give it today. A government protecting against these expanded harms may undermine its liberal democratic basis. For example, a government may purport to protect people against expanded harms by prohibiting offensive speech. However, doing so may well choke the freedom of expression necessary for effective liberal democratic government.

Likewise, Commonwealth, State or Territory laws purporting to protect against expanded harms may impede communications necessary to Australia’s constitutionally-prescribed system of representative and responsible government. Hence, when determining whether or not a law impermissibly infringes the implied freedom of political communication requires assessing the *type* of harm that the law addresses. Laws prohibiting physical harm to people and property are more justifiable than laws prohibiting acts that offend, insult, ridicule or humiliate.

Eighth, and to conclude on Gelber and McNamara, we are *not* saying that racist incidents do not occur in Australia. Nor are we saying that people subject to racism are not adversely affected. As we stated in *No Offence Intended*, we believe that racism must be combatted.<sup>179</sup> We also believe that other forms of bigotry must be combatted. The issue is how best to combat bigotry. Our point remains this: does the harm rise to the level that it justifies restricting the freedom of expression of *every Tasmanian*, even given the alternatives available? In our view, the evidence fails to demonstrate this.

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John Stuart Mill, *On Liberty* (Penguin Classics, first published 1859, 1985 ed) 68.

<sup>179</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 13-4.



Putting aside Gelber and McNamara's work, we'll be blunt about the concept of 'hate speech' overall. 'Hate speech' is next to useless as an analytic tool or as a descriptor. It is a vague, subjective, emotive term that is frequently used as an *ad hominem* slur in order to stop or forestall an argument. Laws, and courts interpreting the law, should avoid it. However, and regrettably, some courts – perhaps most notably the Canadian Supreme Court in *Whatcott* – have not. *Whatcott's* interpretation of hate speech, while admirably narrow,<sup>180</sup> is simply not how the term 'hate speech' is used in public discourse.<sup>181</sup> 'Hate speech' has become what George Orwell once said of 'fascism': a term that now

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<sup>180</sup> *Whatcott* [2013] SCC 11; [2013] 1 SCR 467, 497 [44] (Rothstein J). To be clear, *Whatcott's* definition of 'hate speech' include (what it describes as) the 'hallmarks of hate'. In particular, certain groups are blamed for society's problems; that these groups conspire for global control; or plot to destroy Western Civilization: *ibid.* 'Hate speech' also suggests certain groups engage in unlawful activity, including conduct preying on children; or otherwise suggests that certain groups are less than human: *ibid* 497-8 [45].

<sup>181</sup> So for example, Jonathan Haidt and Nick Haslam recounted the following event at Emory University in Atlanta:

Students woke up to find that someone had written, in chalk, the words "Trump 2016" on various pavements and walls around campus. "I think it was an act of violence," said one student. "I legitimately feared for my life," said another; "I thought we were having a KKK rally on campus". Dozens of students met the university president that day to demand that he take action to repudiate Trump and to find and punish the perpetrators.

Jonathan Haidt and Nick Haslam, 'Campuses are places for open minds – not where debate is closed down', *The Guardian* (online), 10 April 2016 <<https://www.theguardian.com/commentisfree/2016/apr/10/students-censorship-safe-places-platforming-free-speech>>. To avoid doubt, student groups expressly stated that chalking "Trump 2016" amounted to hate speech: see Susan Svrluga, 'Someone wrote "Trump 2016" on Emory's campus in chalk. Some students said they no longer feel safe', *The Washington Post* (online), 24 March 2016 <<https://www.washingtonpost.com/news/grade-point/wp/2016/03/24/someone-wrote-trump-2016-on-emorys-campus-in-chalk-some-students-said-they-no-longer-feel-safe/>>. With due respect to these students, they appear unable or unwilling to grasp the nature of discourse in democracies, or the fact that reasonable minds can differ over such issues as illegal immigration. However, they appear altogether *too* willing to deploy a term that will silence debate.

has no meaning except for signifying ‘something not desirable’.<sup>182</sup> We fear that the Canadian Supreme Court in *Whatcott*, while meaning well, has inadvertently lent its prestige to a deeply problematic and increasingly pernicious term.

Issues concerning the term “hate speech” aside, we will return to our analysis of the constitutional validity of s 17(1). Ultimately, for the reasons noted above, that s 17(1) makes unlawful acts that offend, insult, ridicule or humiliate appears greatly disproportionate to the purpose it serves. Hence, these parts of s 17(1) impermissibly infringes the implied freedom of political communication.<sup>183</sup>

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<sup>182</sup> George Orwell, ‘Politics and the English Language’, *George Orwell* (online) <[http://www.orwell.ru/library/essays/politics/english/e\\_polit/](http://www.orwell.ru/library/essays/politics/english/e_polit/)>. Orwell noted elsewhere the uses of the word ‘fascist’:

It will be seen that, as used, the word ‘Fascism’ is almost entirely meaningless. In conversation, of course, it is used even more wildly than in print. I have heard it applied to farmers, shopkeepers, Social Credit, corporal punishment, fox-hunting, bull-fighting, the 1922 Committee, the 1941 Committee, Kipling, Gandhi, Chiang Kai-Shek, homosexuality, Priestley's broadcasts, Youth Hostels, astrology, women, dogs and I do not know what else.

Orwell did, however, go on to note, that people did appear to attach an emotional significance to it, saying ‘By “Fascism” they mean, roughly speaking, something cruel, unscrupulous, arrogant, obscurantist, anti-liberal and anti-working-class.’ However, he then noted ‘almost any English person would accept ‘bully’ as a synonym for ‘Fascist’. That is about as near to a definition as this much-abused word has come.’: George Orwell, ‘What is Fascism’, *George Orwell* (online) <[http://www.orwell.ru/library/articles/As\\_I\\_Please/english/efasc](http://www.orwell.ru/library/articles/As_I_Please/english/efasc/)>. As ‘fascist’ suggests that someone is a bully, ‘hate speech’ suggests speech that bullies someone. However, also like ‘fascist’, ‘hate speech’ has become an emotive, imprecise term deployed in a wide range of circumstances that is frequently (ab)used as an ‘argument stopper’. Just as no decent person likes being called a fascist, no decent person likes being called (in effect) a hater.

<sup>183</sup> We should note, however, that s 17(1) also makes unlawful acts that intimidate on specified grounds: Act s17(1). As noted above, because intimidation contains an element of threat, making unlawful such acts does not impermissibly infringe the implied freedom of political communication.

## V SECTION 55

Section 55 provides:

The provisions of section 17(1) and section 19 do not apply if the person's conduct is –

- (a) a fair report of a public act; or
- (b) a communication or dissemination of a matter that is subject to a defence of absolute privilege in proceedings for defamation; or
- (c) a public act done in good faith for –
  - (i) academic, artistic, scientific or research purposes; or
  - (ii) any purpose in the public interest.

Section 55 does not remedy those parts of s 17(1) that are constitutional invalidity. Indeed, s 55 contains critical defects which, if anything, compound their constitutional invalidity. Further, these defects raise issues about the constitutional validity of s 55 itself. As presently drafted, s 55 contains the following critical defects:

1. Truth is not an exception to s 17(1).
2. Fair comment is not an exception to s 17(1).
3. It imposes a 'good faith' requirement on exceptions.
4. It purports to extend a greater range of free speech protections to certain vocations or 'classes'.

We now turn to examining these issues.

### 1 *Truth is not an exception*

This is a fundamental defect in s 55. Any law that directly affects freedom of expression, over the range which s 17(1) covers, *must* have truth as a defence. Truth (or facts, or correct information, or however one conceptualises verity) is absolutely critical to the functioning of any democracy, including Australia's. The ALRC noted the following with respect to the defence of truth in defamation that are also relevant to s 17(1).

The very fact of self government, of individual responsibility for community affairs, imposes a greater need for freedom of speech. But there is no value in falsehood; intelligent participation in civic affairs depends upon correct information.<sup>184</sup>

Defamation law provides a defence of truth for good reason. A defamatory statement against a person, no matter how demeaning or how hurtful, cannot be remedied if it is true. The same principle should apply to s 17(1). This is especially so given, as noted above, in Australia's political system, discussions about contentious issues involving groups are common.

In *Whatcott*, the Canadian Supreme Court held that the absence of a defence of truth was not fatal to s 14. The crux of Rothstein J's reasoning was as follows:

As Dickson C.J. stated in *Keegstra*, at p. 763, there is "very little chance that statements *intended to* promote hatred against an identifiable group are true, or that their vision of society will lead to a better world". To the extent that truthful statements are used in a manner or context that exposes a vulnerable group to hatred, their use risks the same potential harmful effects on the vulnerable groups that false statements can provoke. The vulnerable group is no

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<sup>184</sup> Australian Law Reform Commission, *Unfair Publication: Defamation and privacy*, Report No 11 (1979) 19 [33].

less worthy of protection because the publisher *has succeeded* in turning true statements into a hateful message. In not providing for a defence of truth, the legislature has said that even truthful statements may be expressed in language or context that exposes a vulnerable group to hatred.<sup>185</sup>

However, with the greatest of respect to Rothstein J and the Canadian Supreme Court, this reasoning contains grave errors. First, Rothstein J applied Dickson CJ's reasoning in *Keegstra*. However, *Keegstra* concerned a law that *did* contain an element of intent to incite hatred.<sup>186</sup> It is one thing to use truth in a manner intended to incite hatred. It is quite another for a tribunal or court to 'deem' a true statement as inciting hatred *despite* the speaker's intentions.

Second, Rothstein's use of this phrase is concerning: 'The vulnerable group is no less worthy of protection because the publisher *has succeeded* in turning true statements into a hateful message.' The phrase 'has succeeded' suggests that the speaker *wanted* to turn a true statement into a hateful message. Again, this suggests an element of intent on the part of the speaker. Once again, with respect to a law like s 14, a speaker may not have intended a truthful statement to expose anyone to hate. Further, it should not be assumed that, because a court has held that a true statement was hateful, the speaker had a malevolent motive.

Third, the logic that Rothstein J employs is problematic. He endorses Dickson CJ's view in *Keegstra* that statements intending to incite hatred have little chance of being true in the first place, or of leading to lead to a

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<sup>185</sup> *Whatcott* [2013] SCC 11; [2013] 1 SCR 467, 531 [141] (emphasis ours).

<sup>186</sup> Section 319(2) of Canada's *Criminal Code* (the provision under scrutiny in *Keegstra*) provides that 'Every one who, by communicating statements, other than by private conversation, *wilfully* promotes hatred against an identifiable group is guilty of (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or (b) an offence punishable on summary conviction' (emphasis ours).

better world. Hence, there is little lost in deeming true statements as hateful. However, when applied the operation of s 14, Rothstein J is in effect saying with respect to truth: ‘When a court deems a statement to be hateful, the statement is unlikely to be true even if the statement is true.’

In defamation, the defence of truth assists defendants where they did not intend make a defamatory statement, but a court later holds that the statement did in fact expose the plaintiff to hatred, contempt or ridicule by ordinary, reasonable members of society.<sup>187</sup> The law of defamation is perhaps the closest analogue to hate speech laws. Once again, if a person defamed must bear the hurt of a truthful statement, the same applies to a group.<sup>188</sup>

## 2 *Fair comment is not an exception*

Compounding s 55 problems is the fact that fair comment is not an exception. This is a defect that even s 18D of the RDA does not have.<sup>189</sup>

Fair comment is an important defence in defamation. ‘The right of fair comment is one of the fundamental rights of free speech and writing ... it is of vital importance to the rule of law on which we depend for our personal freedom’.<sup>190</sup> The scope of what can be considered ‘fair’ is wide: ‘it can be “fair” however exaggerated or even prejudiced be the language of the criticism’.<sup>191</sup>

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<sup>187</sup> *Parmiter v Coupland* (1840) 151 ER 340, 352.

<sup>188</sup> For further exploration of defamation’s comparison with hate speech laws see Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 186-9.

<sup>189</sup> And there are significant problems with s 18D as regards the implied freedom of political communication. See *ibid* 159-73.

<sup>190</sup> *Lyon v Daily Telegraph* [1943] 1 KB 746, 753 (Scott LJ) quoted in Patrick Milmo and WVH Rogers (eds), *Gatley on Libel and Slander* (Sweet & Maxwell, 9<sup>th</sup> ed, 1998) [12.1].

<sup>191</sup> *Ibid* [12.22].

We should note here that *Lange* examined how defences affect a law's burden on the implied freedom of political communication. In *Lange*, the High Court held that the *Defamation Act 1974* (NSW) ('the NSW Defamation Act') was consistent with the implied freedom of political communication. It noted that the NSW Defamation Act had defences of truth and fair comment in a matter of public interest, fair comment about parliamentary and similar proceedings, and both common law and statutory qualified privilege.<sup>192</sup> The High Court noted, however:

Without the statutory defence of qualified privilege, it is clear enough that the law of defamation, as it has traditionally been understood in New South Wales, would impose an undue burden on the required freedom of communication under the Constitution.<sup>193</sup>

The High Court further noted that, once the common law was developed to incorporate '*Lange* qualified privilege',<sup>194</sup> the NSW Defamation Act did not unduly burden the implied freedom of political communication.<sup>195</sup>

Section 17(1)'s scope is wider than defamation's, protecting groups as well as individuals. Unlike the NSW Defamation Act<sup>196</sup> examined in *Lange*, it does *not* have truth or fair comment (or, we might add, common law or statutory qualified privilege or *Lange* qualified privilege) as exceptions. Given the High Court's comments that the NSW Defamation Act would have been constitutionally invalid were it not for the range of defences available, there is some precedent for suggesting that s 17(1) is constitutionally invalid.

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<sup>192</sup> *Lange* [1997] HCA 25; (1997) 189 CLR 520, 569.

<sup>193</sup> *Ibid.*

<sup>194</sup> Which is developed in *ibid* 571-4.

<sup>195</sup> *Ibid* 575. The High Court went on to note that, even if *Lange* qualified privilege did not apply, the operation of s 22 of the NSW Defamation Act would mean that NSW's defamation law was constitutional.

<sup>196</sup> The NSW Defamation Act has now been repealed.

### 3 *The 'good faith' requirement*

'Good faith' is a vague term. It is used in a number of statutory and general law contexts, but has been considered in the context of anti-discrimination legislation. In *Delaney v Liberal Party of Australia (Tas)*,<sup>197</sup> the Tribunal appeared to endorse the view that good faith 'implies the absence of spite, ill will or other improper motive'.<sup>198</sup>

However, apart from *Delaney*, senior appellate courts in other Australian jurisdictions have considered what 'good faith' means in equivalent legislation. In *Bropho*, the Full Court of the Federal Court considered good faith in the context of s 18D of the RDA.<sup>199</sup> French J noted that a good faith exercise of the exemptions provided in s 18D 'will honestly and conscientiously endeavour to have regard to and minimise the harm it will, by definition, inflict.'<sup>200</sup> In the same case, Lee J was prepared to go further:

The words 'in good faith' as used in s 18D import a requirement that the person doing the act exercise prudence, caution and diligence, which, in the context of the Act would mean due care to avoid or minimize consequences identified by s 18C.<sup>201</sup>

In *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc*,<sup>202</sup> the Victorian Court of Appeal took a different approach. In the context of whether or not an exception applied under s 11 of the Victorian Act, Nettle JA (with whom Neave JA agreed) held that good faith required no

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<sup>197</sup> [2008] TASADT 2 ('*Delaney*').

<sup>198</sup> *Ibid* [22].

<sup>199</sup> Subsequent mentions of s 18D of the RDA will be to just 'section 18D' or 's 18D' as the case requires.

<sup>200</sup> *Bropho* [2004] FCAFC 16; (2004) 135 FCR 105, 131-2 [95] (French J).

<sup>201</sup> *Ibid* 143 [144] (Lee J).

<sup>202</sup> *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VSCA 284; (2006) 15 VR 207 ('*Catch the Fire*').



more than ‘a “broad subjective assessment” of the defendant’s intentions’.<sup>203</sup> Further, good faith would be established where the defendant ‘engaged in the conduct with the subjectively honest belief that it was necessary or desirable to achieve the genuine [purpose]’.<sup>204</sup> In *Sunol and Collier (No 2)*,<sup>205</sup> Bathurst CJ of the New South Wales Court of Appeal agreed with Nettle JA’s interpretation of good faith.<sup>206</sup>

Hence, a Tasmanian faces a dilemma if they want to speak about a contentious matter involving a person or group that s 17(1) protects. If a complaint went to the Tribunal, would it follow *Delaney*? Or would it follow *Bropho*, which is a very persuasive authority from a senior appellate court? Or would the Tribunal follow *Catch the Fire*, a very persuasive authority from another appellate court? Presently, good faith in *Bropho* requires considerably more of a respondent than the good faith of *Delaney* or *Catch the Fire*. Specifically, ‘*Bropho* good faith’ requires a harm minimisation approach, that is, the respondent must conscientiously endeavour to minimise harm. By contrast, ‘*Delaney* good faith’ requires only that the respondent not be motivated by ill will, spite or improper motive; and ‘*Catch the Fire* good faith’ only that the respondent have the subjective honest belief that their act is necessary or desirable to achieve the excepted purpose. The split in senior appellate authorities over this issue creates considerable uncertainty. What’s a Tasmanian to do?

Of course, the High Court would provide authoritative guidance on what constitutes ‘good faith’ were this issue litigated before it with respect to s 55 or a similar provision. However, three points should be made here.

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<sup>203</sup> Ibid 240 [92] (Nettle JA), 262 [197] (Neave JA).

<sup>204</sup> Ibid. The purpose Nettle JA was referring to was a religious purpose. It should be noted that the exception under the Victorian Act s 11(1)(b)(i) applies to ‘any genuine academic, artistic, religious or scientific purpose’.

<sup>205</sup> *Sunol v Collier (No 2)* [2012] NSWCA 44; (2012) 289 ALR 128 (‘*Sunol*’).

<sup>206</sup> Ibid 137 [36]-[40] (Bathurst CJ).

First, the High Court's determination will only be binding with respect to the provision before it. It will be highly persuasive with respect to similar provisions. However, similar provisions may nevertheless have text, origins, purpose, or structure relevantly different to the provision the High Court interprets. Hence, the High Court's interpretation of one provision is not necessarily definitive for all similar provisions. Second, and in any event, it is patently unreasonable to expect people to litigate matters all the way to the High Court to get final determinations on such issues.<sup>207</sup> Third, given the different uses of good faith in legislation,<sup>208</sup> it should be for Parliament to decide what it means when it uses this term in a particular provision. We will return to this last point when we consider below the issue of courts 'reading in' terms to legislation.

#### 4 *Expanded free speech protections for certain 'classes'*

Section 55 presently provides exception to s 17(1) regarding public acts done in good faith for 'academic, artistic, scientific or research purposes'.<sup>209</sup> The problem here is that these exemptions tend to benefit those routinely engaged in such work. Those not so engaged must rely on more uncertain exemptions, such as whether their act is done for 'any purpose in the public interest'.<sup>210</sup> The effect of the law is that certain

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<sup>207</sup> Indeed, following Fuller (noted above), it is unreasonable to expect any people to litigate *at any level* in order to determine the meaning of terms. Parliament should provide such meaning when a law is enacted. This not only provides certainty in the law, it also minimises the risk that a matter will be litigated (thereby incurring costs in time and money to all concerned).

<sup>208</sup> In *Bropho*, French J noted that the term 'good faith' is used in 154 Commonwealth statutes: *Bropho* [2004] FCAFC 16; (2004) 135 FCR 105, 129 [84] (French J).

<sup>209</sup> Act s 55(c)(i).

<sup>210</sup> *Ibid* s 55(c)(ii).

vocations or ‘classes’ of people enjoy greater free speech protections than those falling outside these classes.<sup>211</sup>

In *No Offence Intended*, we argued that the *Commonwealth Constitution* implies an *equality* of communication about government or political matters (which we refer to below as ‘the implied equality of political communication’).<sup>212</sup> What follows is a summary of this argument.

First, the implied equality of political communication means that Australian electors are equal concerning (i) the *range of issues* they may discuss concerning government and political matters, and (ii) the *range of language* they may employ when discussing these issues.<sup>213</sup>

Second, the implied equality of political communication arises from the same provisions in the *Commonwealth Constitution* giving rise to the implied freedom of political communication.<sup>214</sup> These sections

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<sup>211</sup> Dan Meagher quotes Michael Chesterman in noting that the interpretation of the term ‘reasonably’ in s 18D is concerned with incivility in style and content, and not so much with racist content itself. This leads to ‘a two-tier approach: chilling of blue-collar muck and preservation of upper-class mud’: Dan Meagher, ‘So Far So Good?: A Critical Evaluation of Racial Vilification Laws in Australia’ (2004) 32(2) *Federal Law Review* 225, 249 quoting Michael Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (Ashgate, 2000) 226. Meagher goes on to note ‘In other words, protection is accorded to racist communications so long as it is made articulately, using scholarly language or socially acceptable conventions’: see Dan Meagher, ‘So Far So Good?: A Critical Evaluation of Racial Vilification Laws in Australia’ (2004) 32(2) *Federal Law Review* 225, 249.

<sup>212</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 164-9.

<sup>213</sup> Ibid 164.

<sup>214</sup> *Lange* [1997] HCA 25; (1997) 189 CLR 520, 567. These sections are *Commonwealth Constitution* ss 7, 24, 64 and 128. We also noted that ss 51 and 52 provide for the matters in respect to which the Commonwealth may legislate. This necessarily implies that Australian electors must have an equal range of issues and range of language to discuss these matters: see Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 164. We would add that the plenary powers conferred by the various State and Territory constitutions on their respective Parliaments means Australians may communicate about a very wide range of

necessarily imply that, in addition to the freedom to communicate about their representatives and about Commonwealth executive government, Australian electors must have an equal range of political issues they can discuss and an equal range of language to discuss these issues.

In addition, equality of opportunity to participate in the exercise of political sovereignty is an aspect of the representative democracy guaranteed by the *Commonwealth Constitution*.<sup>215</sup> In *McCloy*, Gageler J endorsed Harrison Moore's observation that the 'great underlying principle' of the *Commonwealth Constitution* was 'that the rights of individuals are sufficiently secured by ensuring, as far as possible, to each a share, and an equal share, in political power'.<sup>216</sup> The equality of opportunity to participate in the exercise of political sovereignty, plus each person's equal share in political power, further support the implied equality of political communication.

Third, the implied equality of political communication extends beyond Australian electors to others in the Australian community. This is because political matters not only affect Australian electors but those members of the Australian community who cannot vote, such as children, people disqualified from voting, corporations, unions and other entities.<sup>217</sup>

Fourth, the implied equality of political communication does *not* include equality in the *means* by which views may be communicated or the

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issues. Indeed, Australians may speak about *any* matter with respect to which a Parliament may legislate (which is, in effect, anything and everything).

<sup>215</sup> *McCloy* [2015] HCA 34, [45] (French CJ, Kiefel, Bell and Keane JJ).

<sup>216</sup> Harrison Moore, *The Constitution of the Commonwealth of Australia* (John Murray, 1902) 329 cited in *McCloy* [2015] HCA 34, [110] (Gageler J). See also *McCloy* [2015] HCA 34, [27] (French CJ, Kiefel, Bell and Keane JJ), [219] (Nettle J), [318] (Gordon J).

<sup>217</sup> *Lange* [1997] HCA 25; (1997) 189 CLR 520, 571. See also *Unions NSW* [2013] HCA 58; (2013) 252 CLR 530, 551-2 [30] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). See also 580-1 [145] (Keane J).

*capacity* to express those views. The means by which Australian electors may broadcast their views, and the capacity to express those views, may differ greatly. However, whatever means adopted or capacity for expression, from the editorial of a broadsheet newspaper to discussion at the pub, the range of issues and range of language that may be employed should be equal.<sup>218</sup>

Fifth, the implied equality of political communication is perhaps already foreshadowed in ‘*Lange* qualified privilege’,<sup>219</sup> which applies to all equally no matter whether they are a natural person or a major media company. Further, the common law<sup>220</sup> defences for defamation apply to all equally,<sup>221</sup> as do the statutory defences to defamation.<sup>222</sup>

Excepting members of Australian Parliaments,<sup>223</sup> there is no reason to grant greater legal protection to members of certain classes when discussing government or political matters affecting Australia.<sup>224</sup> In such matters, the perspectives of electricians, nurses or architects are as valuable as those of artists, academics or scientists. Indeed, each person will have *their own* perspective on government or political matters. Each person should be equal regarding the range of issues they may discuss,

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<sup>218</sup> See Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 166.

<sup>219</sup> *Lange* [1997] HCA 25; (1997) 189 CLR 520, 574.

<sup>220</sup> Which, it should be recalled, informs the Commonwealth Constitution: *ibid* 564.

<sup>221</sup> See, for example, *Silkin v Beaverbrook Newspapers* [1958] 1 WLR 743, 746 (Diplock J): ‘Who is entitled to comment? The answer to that is “everyone”. A newspaper reporter or a newspaper editor has exactly the same rights, neither more or less, than every other citizen’.

<sup>222</sup> See, for example, *Defamation Act 2005* (WA) pt 4 div 2. Australia now has uniform defamation laws in its States and Territories.

<sup>223</sup> Members of Australian Parliaments should, as law-makers and the people’s representatives, be free to robustly discuss proposed laws. They should be entitled to the highest possible free speech protections while doing so, particularly when they are actually in the parliamentary chamber.

<sup>224</sup> See Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 167-8.

and the language they may use to discuss these issues.<sup>225</sup> Put another way, unless there is very good reason,<sup>226</sup> either all Australians are bound by the same restriction on freedom of expression, or none of them are.<sup>227</sup>

## VI THE PROPOSED REFORMS

The proposed reforms make s 55 *worse*. This is because:

1. It adds ‘religious purposes’ to the vocations or ‘classes’ that enjoy a greater range of free speech protections.<sup>228</sup>
2. The proposed reforms to s 64 do not go far enough to protect people in the complaints process.

We will examine these issues in turn. However, as noted above, we will also consider issues arising from inserting a ‘reasonableness requirement’.

### A *Adding ‘religious purposes’ as a protected ‘class’ to s 55*

Adding an additional protected ‘class’ does not overcome the problems noted above with respect to those classes that s 55 presently covers. If anything, adding a class compounds the problems. In addition, determining what constitutes a ‘religious belief’<sup>229</sup> may create further uncertainties about the scope of the law.

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<sup>225</sup> For further discussion see *ibid* 168-9.

<sup>226</sup> Such the protection of secrets vital to national security.

<sup>227</sup> We would note that if s 17(1)’s prohibition on intimidation is constitutionally valid, then s 55 creates an absurd result. That is, certain classes of Australians may be able to intimidate minorities whereas others would be prohibited. Such a prohibition on intimidation should apply to all Australians equally.

<sup>228</sup> *Ibid*.

<sup>229</sup> See, for example, *Adelaide Company of Jehovah’s Witnesses Incorporated v Commonwealth* (1943) 67 CLR 116, 124 (Latham CJ) (*‘Jehova’s Witnesses Case’*); *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983)

## B Section 64

As noted above, the proposed reforms amend s 64 to require the Commissioner to reject a complaint in certain circumstances.<sup>230</sup> We have two points here. First, the reform is a step in the right direction. The Commissioner should not be able to ‘punt’ a doubtful case to the Tribunal on basis that an applicant might be able to prove their case. The cost of Tribunal proceedings in time, money and stress is considerable.

However, it is exactly for this reason that we make our second point. There appear to be no consequences to the Commissioner for breaching their obligations under s 64 as amended. This proposed amendment therefore provides cold comfort to a respondent who has had to incur costs in meeting a case that the Commissioner should have dismissed earlier.

Hence, we suggest that, where the Tribunal finds under s 99 of the Act as amended that the Commissioner ought to have dismissed a complaint, then the Commissioner should be liable to pay the costs of all parties to the complaint. This recommendation is similar to that proposed by Tony Morris QC with respect to s 18C.<sup>231</sup>

## C *Should a ‘reasonableness requirement’ be added to s 55?*

Amending s 55 to include a ‘reasonableness requirement’ would create further difficulties. As with ‘good faith’, senior appellate courts are split

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154 CLR 120, 136 (Mason ACJ, Brennan J), 150-1 (Murphy J), 173-4 (Wilson and Deane JJ).

<sup>230</sup> Bill cl 5.

<sup>231</sup> Tony Morris, ‘There will never be winners under s 18C as it stands’, *The Australian* (online), 24 August 2016 <<http://www.theaustralian.com.au/opinion/there-will-never-be-winners-under-section-18c-as-it-stands/news-story/1bacb30956b99217e34116f222196ff2?login=1>>.

concerning what ‘reasonable’ means in similar legislation. In *Bropho*, French J stated the term ‘reasonably’ means an objective assessment of whether an act bears a ‘rational relationship’ to a protected activity and whether the act is ‘not disproportionate’ to what is necessary to carry out the activity.<sup>232</sup> This assessment, however, allows for the possibility that there was more than one way of doing things ‘reasonably’.<sup>233</sup> In *Sunol*, it appears that Bathurst CJ (with whom Basten JA concurred) agreed with French J’ approach.<sup>234</sup> Allsop P noted that “‘reasonably and good faith are sufficiently elastic to encompass “trenchant, robust, passionate, indecorous even rancorous” communications’.”<sup>235</sup>

In *Catch the Fire*, Nettle JA adopted a different approach. His Honour held that determining what is reasonable ‘must be decided according to whether it would be so regarded by reasonable persons in general judged by the standards of an open and just multicultural society’.<sup>236</sup> Nettle JA elaborated:

[O]ne is entitled to assume that a fair and just multicultural society is a moderately intelligent society. Its members allow for the possibility that others may be right. Equally, I think, one is entitled to assume that it is a tolerant society. Its members acknowledge that what appears to some as ignorant, misguided or bigoted may sometimes appear to others as inspired. Above all, however, one is entitled to assume that it is a free society and so, therefore, one which insists upon the right of each of its members to seek to persuade others to his or her point of view, even if it is anathema to them. But of course there are limits. Tolerance cuts both ways. Members of a tolerant society are as much entitled to expect tolerance as they are bound to extend it to each other. And, in

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<sup>232</sup> *Bropho* [2004] FCAFC 16; (2004) 135 FCR 105, 128 [79] (French J).

<sup>233</sup> *Ibid.*

<sup>234</sup> *Sunol* [2012] NSWCA 44; (2012) 289 ALR 128, 138 [41] (Bathurst CJ), 145 [79] (Basten JA).

<sup>235</sup> *Ibid* 143 [71] (Allsop P) (citation omitted).

<sup>236</sup> *Catch the Fire* [2006] VSCA 284; (2006) 15 VR 207, 241 [94] (Nettle JA).



the scheme of human affairs, tolerance can extend each way only so far. When something goes beyond that boundary an open and just multicultural society will perceive it to be intolerable despite its apparent purpose, and so judge it to be unreasonable for the purpose for which it was said.<sup>237</sup>

In Nettle JA's view:

It is only when what is said is so ill-informed or misconceived or ignorant and so hurtful as to go beyond the bounds of what tolerance should accommodate that it may be regarded as unreasonable.<sup>238</sup>

Once again, what's a Tasmanian to do? Which approach is to be followed? In any event, no matter which approach is followed, there is additional uncertainty. As to '*Bropho* reasonableness', there is considerable uncertainty about what 'reasonably' means when applied to various circumstances. One person's idea of reasonableness may vary substantially with another's, even when a 'reasonable person' test is used. In any event, the freedom of political communication extends to speech that is done *unreasonably and in bad faith*. 'Cheap shots' and 'hits below the belt' are common.<sup>239</sup> As noted above, in political argument all logical and rhetorical weapons are brought to bear on an opponent's position. In such arguments, a person may think they are simply presenting their side of the argument. By contrast, their opponent may think that person is being hyperbolic, disingenuous or tendentious, and hence advancing their purpose in a 'disproportionate' way.<sup>240</sup>

'*Catch the Fire* reasonableness' creates its own uncertainties. Reasonable minds may well differ about whether a particular statement is so ill-

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<sup>237</sup> Ibid 241 [96] (Nettle JA) (citation omitted).

<sup>238</sup> Ibid 242 (Nettle JA) [98].

<sup>239</sup> See Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 50.

<sup>240</sup> Ibid 162.

informed or misconceived or ignorant as to be regarded as unreasonable in an open and just multicultural society. Further, this test encounters a difficulty we noted in *No Offence Intended*. Specifically, multiculturalism is a longstanding (and largely successful) policy of the Commonwealth government. However, multiculturalism is, nevertheless, *still a policy*.<sup>241</sup> The policy, and the laws and executive actions by which it is implemented, is subject to debate – and to change – in Australia’s constitutionally prescribed system of representative and responsible government.

Consequently, any reasonable person tests in legislation affecting the implied freedom of political communication should account only for those things presently ‘hard wired’ into the *Commonwealth Constitution*. The reasonable person we proposed in *No Offence Intended* was as follows:

[A] citizen of Australia who is aware that Australia has a constitutionally prescribed system of representative and responsible government and the need to communicate about matters related to politics and government fully, frankly and robustly.<sup>242</sup>

The test we proposed reflects the High Court’s observation in *Lange* that ‘The Constitution, the federal, State and territorial laws, and the common law in Australia together constitute the law of this country and form ‘one system of jurisprudence’’,<sup>243</sup> and that the Commonwealth Constitution influences, and is influenced by, the common law.<sup>244</sup> The *Commonwealth Constitution* therefore influences the construal of statutes and common law principles affecting the implied freedom of political communication.

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<sup>241</sup> Ibid 207.

<sup>242</sup> Ibid 224.

<sup>243</sup> *Lange* [1997] HCA 25; (1997) 189 CLR 520, 564 (citations omitted).

<sup>244</sup> Ibid.

Reasonable person tests affecting the implied freedom of political communication – no matter whether in statute or common law – should be modified so they, as far as possible, do not infringe upon the implied freedom of political communication.

Of course, were the *Commonwealth Constitution* amended to (like Canada's Constitution) include multiculturalism, then it may influence reasonable person tests in the manner Nettle JA described.

Ultimately, however, the proposed 'reasonableness' requirement creates difficulties in a manner similar to the present 'good faith' requirement. Parliament must provide more clarity concerning how the term 'reasonably' is to be interpreted.<sup>245</sup> Otherwise any such requirement creates a real risk of chilling discussion and debate.

## VII SECTION 19

Section 19 of the Act is entitled 'Inciting hatred' and presently provides:

A person, by a public act, must not incite hatred towards, serious contempt for, or severe ridicule of, a person or a group of persons on the ground of –

- (a) the race of the person or any member of the group; or
- (b) any disability of the person or any member of the group; or
- (c) the sexual orientation or lawful sexual activity of the person or any member of the group; or

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<sup>245</sup> Bill cl 4.

(d) the religious belief or affiliation or religious activity of the person or any member of the group.<sup>246</sup>

Section 19 appears modelled closely on equivalent provisions of the NSW Act and, in particular, ss 20C<sup>247</sup> and 49ZT<sup>248</sup> of the NSW Act.<sup>249</sup> It is also similar to ss 7(1) and 8(1)<sup>250</sup> of the Victorian Act.<sup>251</sup> It is also worth noting that NSW's racial vilification legislation served as the model for s 18C.<sup>252</sup> Hence, case law relevant to ss 20C, 49ZT, 8(1) and 18C will be referred to in this Part as well as case law concerning s 19. As with s 17(1), we will apply the modified *Lange* test.

#### A *The burden on the implied freedom of political communication*

Like s 17(1), s 19 burdens the implied freedom of political communication. Section 19 is more tightly drafted than s 17(1), being confined to prohibiting 'public acts'<sup>253</sup> that incite 'hatred', 'serious contempt', and 'severe ridicule'.<sup>254</sup> However, even so drafted, s 19 burdens the implied freedom of political communication in a way that is direct, heavy, and sweeping.

<sup>246</sup> Act s 19.

<sup>247</sup> Subsequent mentions of s 20C of the NSW Act will be to just 'section 20C' or 's 20C' as the case requires.

<sup>248</sup> Subsequent mentions of s 49ZT of the NSW Act will be to just 'section 49ZT' or 's 49ZT' as the case requires.

<sup>249</sup> We should note, however, that unlike s 19, the NSW Act has no provisions for vilification on the grounds of disability, or of religious belief, affiliation or activity.

<sup>250</sup> Subsequent mentions of s 8(1) of the Victorian Act will be to just 'section 8(1)' or 's 8(1)' as the case requires.

<sup>251</sup> See also *Discrimination Act 1991* (ACT) s 67A; *Anti-Discrimination Act 1991* (Qld) s 124A.

<sup>252</sup> Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 15 November 1994, 3341 (Michael Lavarch).

<sup>253</sup> Act s 3 (definition of public act') provides that 'public act' includes – (a) any form of communication to the public; or (b) any conduct observable by the public; or (c) the distribution or dissemination of any matter to the public

<sup>254</sup> Act s 19.

## 1 *A direct burden*

Similarly, to s 17(1) as noted above, s 19 imposes a direct burden on the implied freedom of political communication as regards race and sexuality. In addition, s 19 imposes a direct burden as regards to religion and disability.

As to religion, the Full Court of the Federal Court noted in *Evans* that ‘Religious beliefs and doctrines frequently attract public debate and sometimes have political consequences reflected in government laws and policies’.<sup>255</sup> The political character of religious belief has long been recognised. In the *Jehovah’s Witnesses Case Incorporated*,<sup>256</sup> after observing that early Christians, as well as Anabaptists and Jehovah’s Witnesses, refused to participate in civil government, Latham CJ went on to observe:

It cannot be said that beliefs upon such matters founded upon Biblical authority (as understood by those who held them) are not religious in character. Such beliefs are concerned with the relation between man and the God whom he worships, although they are also concerned with the relation between man and the civil government under which he lives. *They are political in character, but they are none the less religious on that account.*<sup>257</sup>

Those whose political positions are informed by their religious views may express those religious/political views and, in turn, have them subject to criticism.

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<sup>255</sup> *Evans* [2008] FCAFC 130; (2008) 168 FCR 576, 578 [2] (French, Branson and Stone JJ).

<sup>256</sup> [1943] HCA 12; (1943) 67 CLR 116.

<sup>257</sup> *Ibid* 125 (Latham CJ) (emphasis ours). It should be noted that, while he added his own brief reasons, McTiernan J agreed with the Latham CJ’s reasons overall: see *ibid* 156 (McTiernan J).

As to disability, communications about government and political matters may involve discussing the physical or mental capacity of persons directly involved with government. Alternatively, such communications may involve laws or policies affecting the mentally or physically disabled. Of course, it cannot be overlooked that arguments about government or political matters may involve epithets about mental capacity being thrown about freely. For example, it may be said of an advocate of a law, policy, position or idea that they are ‘crazy’, ‘insane’, ‘bonkers’ or ‘nuts’. While these descriptors have long been used, to some they may be regarded as ableist slurs.<sup>258</sup>

## 2 *A heavy burden*

The issues we noted with respect to s 17(1) apply here.

### *(a) Popular sovereignty*

Again, the Australian people as sovereign must be able to discuss any matter that may be the subject of Commonwealth or State legislative or executive action fully, frankly and robustly. This may include discussing matters in a way that incites hate, serious contempt or severe ridicule towards an idea, a position, or even a person or group of people. Such discussion is an inevitable incident of Australia’s constitutionally prescribed system of representative and responsible government. As noted above, in this system ideas, positions, or particular persons or groups of people are the subject of (at times) withering public scrutiny.

### *(b) The general nature of laws and discussions about them*

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<sup>258</sup> For further discussion of about this particular issue see Eric Heinze, ‘Viewpoint Absolutism and Hate Speech’ (2006) 69(4) *Modern Law Review* 543, 566-9.

As with s 17(1), s 19 ultimately may involve discussing groups. This entails the same kind of chilling effect as noted with s 17(1).

(c) *The uncertainty of the terms used in s 19*

The uncertainty of the terms used in s 19 raises serious concerns about its constitutional validity. Presently, s 19 is interpreted as follows:

- It is not necessary to prove that there was an intention to ‘incite’ or that people were actually incited to hatred, serious contempt or severe ridicule. Rather the test is whether the public act was capable of inciting others to feel hatred or serious contempt or severe ridicule. Merely engaging in conduct that conveys hatred or expresses serious contempt or severe ridicule is not unlawful.
- The words ‘hatred’, ‘contempt’ and ‘ridicule’ are to be given their ordinary meaning noting that the latter two are qualified by the adjectives ‘serious’ and ‘severe’ respectively. Thus the public act must be capable of inciting intense dislike or hostility towards a person or group of persons or grave scorn for a person or extreme derision of a person or group of persons. The conduct must be capable of arousing reactions at the extreme end of the scale.
- The aspect of the conduct complained of must be assessed within the context of the entire statement or publication.
- It must be established that the offending public act must incite hatred towards, serious contempt for or severe ridicule of a person or a group of persons *on the ground of* one of the attributes listed in sub-paragraphs (a) - (d) of s19 of the Act. The phrase ‘on the ground of’ means a ‘significant factor’, ‘a substantially contributing factor’ and ‘a casually operative effect’ or ‘an

operative ground'. There must be a causal connection between the attribute and the feelings of hatred, serious contempt or severe ridicule that are incited by the public act."<sup>259</sup>

We will focus on two particular problems with s 19:

- Does s 19 apply to public acts that *actually* incite, or public acts that *could* incite?
- The meaning of 'hate', 'serious contempt' and 'severe ridicule'

We will now examine each of these problems in turn.

(i) *Does s 19 apply to acts that actually incite, or could incite?*

The definition of incite is uncontroversial. The word 'incite', given its ordinary and plain meaning, means '[T]o urge on; stimulate or prompt to action.'<sup>260</sup> Case law has employed a similar definition.<sup>261</sup> However, when used in the context of s 19 an ambiguity appears. Specifically, s 19 provides that 'A person, by a public act, must not incite hatred towards, serious contempt for, or severe ridicule of, a person or a group of persons'. In this context, does 'incite' mean public acts that:

- *Actually* incite hatred, serious contempt or severe ridicule; or
- *Could* incite hatred, serious contempt, or severe ridicule?

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<sup>259</sup> *Wood v Gerke* [2007] TASADT 3 [85] ('*Wood*') (emphasis in original).

<sup>260</sup> Butler, Susan (ed), *Macquarie Concise Dictionary* (Macquarie Dictionary Publishers, 6<sup>th</sup> ed, 2013) 750.

<sup>261</sup> See, for example, *Kazak v John Fairfax Publications Ltd* [2000] NSWADT 77 [23] ('*Kazak*'); *Catch the Fire* [2006] VSCA 284; (2006) 15 VR 207, 211 [13] (Nettle JA); *Sunol* [2012] NSWCA 44; (2012) 289 ALR 128, 135 [26]-[27] (Bathurst CJ).



Case law suggests the latter interpretation. That is, ‘incite’ means public acts that *could* incite hatred, serious contempt or severe ridicule. However, the cases that hold this appear to demonstrate a common – and critical – error of law, specifically the failure to account for the principle of legality.

The principle of legality is a principle of statutory interpretation. Under this principle, there is a presumption that Parliament does not intend to invade fundamental rights, freedoms and immunities.<sup>262</sup> This presumption ‘can be displaced by *clear* and *specific* provision to the contrary’.<sup>263</sup>

Section 19 indeed invades a fundamental freedom: freedom of expression. As noted above, it is a freedom of constitutional importance. However, s 19’s use of ‘incite’ is neither clear nor specific. As shown above, incite may be interpreted two ways.

Interpreting ‘incite’ to include public acts that *could* incite hatred, serious contempt and severe ridicule is a far more sweeping intrusion into freedom of expression than interpreting ‘incite’ to mean public acts that *actually* do these things. Had Parliament wanted ‘incite’ to have this wider operation, it could have easily included a phrase like ‘reasonably

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<sup>262</sup> *Bropho v Western Australia* [1990] HCA 24; (1990) 171 CLR 1, 17-8 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Coco v The Queen* [1994] HCA 15; (1994) 179 CLR 427, 436-7 (Mason CJ, Brennan, Gaudron and McHugh JJ); *Electrolux Home Products Pty Ltd v Australian Workers’ Union* [2004] HCA 40; (2004) 221 CLR 309, 329 [21] (Gleeson CJ); *K-Generation Pty Ltd v Liquor Licensing Court* [2009] HCA 4; (2009) 237 CLR 501, 520 [47] (French CJ); *South Australia v Totani* [2010] HCA 39 [31] (French CJ); *Harrison v Melham* [2008] NSWCA 67 [7] (Spigelman J).

<sup>263</sup> *R v Secretary of State to the Home Department; Ex parte Pierson* [1998] AC 539, 587 (Lord Steyn) (emphasis ours).

likely to incite'.<sup>264</sup> However, it did not. Hence, in the absence of such words, the narrow interpretation of 'incite' should be preferred.

It is no answer to say (as certain cases have) that, in criminal law, incitement includes acts that could incite criminal activity. In criminal law, the basis for making incitement unlawful is to prevent others being exhorted to undertake an unlawful activity.<sup>265</sup> Further, the person doing the inciting would be aware that what was being incited was unlawful.<sup>266</sup>

However, hate, serious contempt and severe ridicule – even on the basis of those attributes described in s 19 – are *not* themselves crimes or otherwise unlawful. Rather, they are emotional states. Again, it must be noted that freedom of expression – a freedom with constitutional importance – is being infringed. It is one thing to limit a person's freedom to speak when that person would be aware they are encouraging criminal activity (an assault, a theft, or the like). It is quite another to limit it on the basis that the person may create emotional states that are not themselves unlawful. Further, a person making the public act may not even be aware

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<sup>264</sup> A revised s 19 could read 'A person must not engage in a public act reasonably likely to incite hatred ...'. The use of 'reasonably likely' is based on s 18C's use of this phrase to cover acts that could offend, insult, humiliate or intimidate: see RDA s 18C(1)(a). Of course, the use of this phrase in 18C creates problems of its own: see Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 156-7, 191-2.

<sup>265</sup> Hence, in *R v Quail* (1866) 176 ER 914, 915 there was incitement to rob; in *R v Krause* (1902) 18 TLR 238, 247-8 there was incitement to murder; in *R v Assistant Recorder of Kingston-Upon-Hull; Ex parte Morgan* [1969] 2 QB 58, 62 there was incitement to gross indecency with a child; in *R v Dimozantos* (1991) 56 A Crim R 345, 349-50 there was incitement to murder; and in *R v Eade* (2002) 131 A Crim R 390, 401-2 there was incitement to supply drugs. In all cases what was being incited was a criminal offence.

<sup>266</sup> This is an application of the principle that ignorance of the law is no excuse. The defendants in the cases cited in the previous footnote would have been aware that the actions being incited were criminal offences.

that their act could create such emotional states.<sup>267</sup> Finally, even if a person was aware that their act may incite such emotional states, the uncertainty concerning the relevant tests used to determine incitement (examined further below) means that they could not confidently predict whether or not their conduct would be held to be incitement.

However, narrowly interpreting ‘incite’ in s 19 creates problems of its own regarding certainty. It will, of course, be necessary to prove that the public act resulted in someone hating a person or group of people on the ground of the protected attribute, or otherwise holding that person or group of people in serious contempt or severe ridicule. However, the legal liability of a speaker would then depend on the subjective reactions of their audience. This means the operation of this law would be greatly uncertain. People would have great difficulty predicting whether their public act would inspire hatred, serious contempt or severe ridicule in certain members of their audience. Hence, the narrow interpretation of ‘incite’ is too vague. It would therefore impermissibly infringe the implied freedom of political communication.

Before going further, we would note that the narrow interpretation of s 19 would be saved if s 19 had an intent requirement. Relevant case law has (rightly) held that, as presently drafted, s 19 and similar provisions do *not*

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<sup>267</sup> As we noted in *No Offence Intended*, ‘[i]t is one thing to attach legal liability on a state of mind that the accused has consciously created, like knowledge or volition. It is another to attach legal liability to an emotion: a state of mind whose origins may not be conscious but visceral. Of course, individuals are responsible for controlling their own emotions. Hence, a law could (but not necessarily *should*) impose liability for expression *manifesting* an emotion. However, it is legitimate to ask whether the law should impose liability on expression that *creates* an emotional response in *other* people.’: See Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 39 (citation omitted, emphasis in original).

require intent to incite.<sup>268</sup> However, were an intent requirement be included in s 19, then it would sufficiently narrow its scope despite the subjective response of the audience. That is, if someone *intended* to incite hatred, severe contempt or severe ridicule, and the audience (whatever its composition) *was* incited, then a breach could be determined.<sup>269</sup> That said, even if s 19 did expressly include an intent requirement, other issues remain concerning its constitutional validity, such as whether terms ‘hate’, ‘severe contempt’ and ‘severe ridicule’ are sufficiently certain (see below).

This then leaves the alternative, wide interpretation of ‘incite’, meaning public acts that *could* incite hate, serious contempt or severe ridicule.<sup>270</sup> However, there are significant difficulties with this interpretation. The first is that it, in effect, ‘reads words into’ s 19. As Lord Mersey observed in *Thompson v Gould & Co*<sup>271</sup> ‘It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do.’<sup>272</sup>

The case law concerning s 19 and similarly worded provisions bear out Lord Mersey’s observation. In these cases, ‘incite’ has been taken to mean public acts that:

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<sup>268</sup> *Wood* [2007] TASADT 3 [85]; *Sunol* [2012] NSWCA 44; (2012) 289 ALR 128, 135-6 [30]-[31], 137 [41] (Bathurst CJ), 140 [55] (Allsop P), 145 [79] (Basten JA); *Jones v Trad* [2013] NSWCA 389; (2013) NSWLR 241, 253 [49]-[52] (Ward JA), 270-1 [155] (Emmett JA), 274 [175] (Gleeson JA).

<sup>269</sup> This would, of course, require proof of intent (which may require employing a test), and proof of incitement.

<sup>270</sup> This interpretation would be open on the principle that a provision should be interpreted so that it is not inconsistent with the *Commonwealth Constitution*: see *Monis* [2013] HCA 4; (2013) 249 CLR 92, 208 [327] (Crennan, Kiefel and Bell JJ) and the cases referred to in this paragraph.

<sup>271</sup> [1910] AC 409.

<sup>272</sup> *Ibid* 420 (Lord Mersey).

- Are *capable of* inciting.<sup>273</sup>
- *Could* incite.<sup>274</sup>
- Have a *tendency* to incite.<sup>275</sup>
- Are *likely* to incite.<sup>276</sup>
- *Would* incite.<sup>277</sup>
- That the ordinary reasonable reader *could understand* that he/she is being incited.<sup>278</sup>

These phrases give rise to markedly different ‘incitement thresholds’. For example:

- *Would* incite suggests that the public act be near certain to incite.
- *Likely* to incite or *tendency to incite* suggests that the public act have a greater than 50% possibility of inciting.
- *Could* incite or *capable of* inciting suggests that the public act need not have a greater than 50% probability of happening, but nevertheless be a real possibility.
- An ordinary reasonable reader *could understand* that they are being incited suggests that all that is needed is that such a reader have an

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<sup>273</sup> *Williams v ‘Threewisemonkeys’ and Durston* [2015] TASADT 4 [32]. See also *Catch the Fire* [2006] VSCA 284; (2006) 15 VR 207, 254 [154] (Neave JA).

<sup>274</sup> *Sunol* [2012] NSWCA 44; (2012) 289 ALR 128, 135 [28] (Bathurst CJ).

<sup>275</sup> *Catch the Fire* [2006] VSCA 284; (2006) 15 VR 207, 255 [160] (Neave JA).

<sup>276</sup> *Ibid* 255 [161] (Neave JA).

<sup>277</sup> *Sunol* [2012] NSWCA 44; (2012) 289 ALR 128, 136 [32] (Bathurst CJ).

<sup>278</sup> *Veloskey & Anor v Karagiannakis & Ors* (EOD) [2002] NSWADTAP 18, [28] (‘*Veloskey*’).

understanding that they are being incited (despite the possibility that they will be incited).

In *Burns v Laws (No 2)*,<sup>279</sup> the NSW Anti Discrimination Tribunal ('NSW Tribunal') noted that the use of the terms 'capacity' and 'capable' 'have the potential to understate what must be proved'.<sup>280</sup> The NSW Tribunal noted that

A test that required no more than proof that the relevant public act had the potential or possible effect of urging an ordinary reasonable person to experience one or more of the relevant reactions would in our view be unduly broad.<sup>281</sup>

It stated an alternative test:

[W]ould the relevant 'public act' have had the 'effect' of inciting, *in the sense of urging or prompting*, a hypothetical "ordinary reasonable person" to experience one or more of the relevant reactions [hatred, serious contempt or severe ridicule] on the [specified ground]?<sup>282</sup>

Unfortunately, the NSW Tribunal's views appear to have been largely overlooked in favour of the 'unduly broad approach'.

Ultimately, Parliament must determine the standard by which a law is breached. This is especially important in laws that invade a constitutionally important and fundamental freedom, and which may be breached *by the mere act of speaking in public*. For all of s 18C's many faults, at least the Commonwealth Parliament gave the courts some level

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<sup>279</sup> [2007] NSWADT 47 ('*Laws*').

<sup>280</sup> *Ibid* [110].

<sup>281</sup> *Ibid* [112].

<sup>282</sup> *Ibid* [111] (emphasis ours). The NSW Tribunal's comments were in relation to s 49ZT, but is applicable to equivalent provisions. See also *Brinkley v Davis Bros Ltd* [2008] TASADT 07 [210].

of guidance by including in s 18C the phrase ‘reasonably likely’.<sup>283</sup> Stephen J in *Marshall v Watson*<sup>284</sup> said:

[I]t is no power of the judicial function to fill gaps disclosed in legislation; as Lord Simonds said in *Magor and St. Mellons R.D.C. v. Newport Corporation* (1952) AC 189, at p 191, ‘If a gap is disclosed, the remedy lies in an amending Act’ and not in a ‘usurpation of the legislative function under the thin disguise of interpretation’.<sup>285</sup>

However, the uncertainties do not stop at ‘reading in’ words to s 19 and similar provisions regarding the ‘incitement threshold’. Courts have, in turn, created tests based on these words. Hence, with regards to s 19, in determining ‘whether the public act *is capable of* inciting others to feel hatred’.<sup>286</sup>

The proper approach is to consider the impact upon an ordinary, reasonable person. The range of people captured by this test includes people who are not immune from susceptibility to incitement but excludes those who hold prejudiced views or are malevolently inclined.<sup>287</sup>

However, and once again, views about this test differ at the senior appellate level. In *Catch the Fire*, Nettle JA stated the test should not use an ‘ordinary, reasonable reader’ test.<sup>288</sup> Rather, the test should assess ‘the effect of [the] conduct on a reasonable member of the class of persons to

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<sup>283</sup> Although, once again, there are significant problems with this phrase: Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 156-7, 191-2.

<sup>284</sup> [1972] HCA 27; (1972) 124 CLR 640 (*‘Marshall’*).

<sup>285</sup> *Ibid* 649 (Stephen J).

<sup>286</sup> *Wood* [2007] TASADT 3 [85] (emphasis ours). The point of our emphasis is to make clear that the test is being built upon words being ‘read into’ s 19.

<sup>287</sup> *Ibid*.

<sup>288</sup> *Catch the Fire* [2006] VSCA 284; (2006) 15 VR 207, 212 [15] (Nettle JA).

whom the conduct is directed'.<sup>289</sup> That is, the particular audience is to be taken into account.<sup>290</sup>

By contrast, in the same case, Neave JA (with whom Ashley JA agreed) stated that the test should assess 'the effect of the words or conduct on an "ordinary" member of the class to which it is directed, taking into account the circumstances in which the conduct occurs'.<sup>291</sup> Ultimately, the test was 'whether the natural or ordinary effect of the conduct is to incite hatred or other relevant emotions [in an ordinary member of the class to which the conduct is directed] in the circumstances of the case.'<sup>292</sup> In *Sunol*, Bathurst CJ (with whom Allsop P and Basten JA agreed) endorsed the approach of Neave JA and Ashley JA in *Catch the Fire*.<sup>293</sup>

Hence, when assessing whether or not conduct (depending on the authority applied) could/would/is likely to incite, or otherwise is capable of/could be understood as inciting, the effect is judged by either:

- The ordinary, reasonable person; or
- A reasonable member of the class of persons to whom the conduct is directed;<sup>294</sup> or
- An ordinary member of the class to which the conduct is directed.<sup>295</sup>

As regards all three approaches, the effect is also judged in the circumstances of the case.<sup>296</sup>

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<sup>289</sup> Ibid 212 [18] (Nettle JA).

<sup>290</sup> Ibid 212 [16]-[18] (Nettle JA).

<sup>291</sup> Ibid 255 [158] (Neave JA), 249 [132] (Ashley JA).

<sup>292</sup> Ibid.

<sup>293</sup> *Sunol* [2012] NSWCA 44; (2012) 289 ALR 128, 136-7 [34] (Bathurst CJ), 140 [55] (Allsop P), 145 [79] (Basten JA).

<sup>294</sup> *Catch the Fire* [2006] VSCA 284; (2006) 15 VR 207, 212 [18] (Nettle JA).

<sup>295</sup> Ibid 249 [132] (Ashley JA), 255 [158] (Neave JA).



We'll no longer ask 'What's a Tasmanian to do?' because, at this point, they've probably concluded that it's safer to just be quiet. But we'll plough on.

There is no certainty as to which approach the Tribunal would follow. Would it follow previous Tribunal decisions, or one of the approaches of senior appellate courts? As with 'good faith', with the 'incitement threshold', and potentially with 'reasonably', there are a number of approaches to the appropriate 'hypothetical person'.

Again, Parliament must determine the 'incitement threshold' and the appropriate 'hypothetical person'. Lest it be thought that this is asking too much of Parliament, recall that, for all its faults, at least s 17(1) provides this:

A person must not engage in any conduct... in circumstances in which a *reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.*<sup>297</sup>

That Parliament has not provided such guidance for s 19 gives especial force to the remarks of Stephen J, noted above, regarding leaving to courts to 'fill the gaps'. This is because Parliament's failure to provide an 'incitement threshold' has meant that the courts have 'read in' one. Further, courts have then 'read in' a 'hypothetical person' test to determine whether or not the 'incitement threshold' has been met. Again recalling Stephen J's remarks, it appears that gaps in the legislation have resulted in courts (and tribunals) being engaged in (albeit unwittingly) the

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<sup>296</sup> Ibid; see also *ibid* 213 [19] (Nettle JA). This also appears to be the approach when using the ordinary, reasonable person test: see *Kazak* [2000] NSWADT 77 [71], but see *Veloskey* [2002] NSWADTAP 18 [32]-[35].

<sup>297</sup> Act 17(1) (emphasis ours).

‘usurpation of the legislative function under the thin disguise of interpretation’.<sup>298</sup> Such usurpation, at the very least, is prone to cause uncertainty concerning how the law may be applied in particular circumstances.

However, State Parliaments ultimately having courts develop ‘incitement thresholds’ and ‘hypothetical person’ tests may also create an issue under Chapter III of the *Commonwealth Constitution*.<sup>299</sup> As noted above, in *Catch the Fire* and *Sunol*, the Victorian and NSW Courts of Appeal respectively ‘read in’ words and then based tests on these ‘read in’ words. This could be taken as an exercise of legislative power that Chapter III courts (as these Courts of Appeal no doubt are) should not be exercising. As was noted in *Western Australia v Commonwealth*.<sup>300</sup>

Under the Constitution, the Parliament cannot delegate to the Courts the power to make law involving, as that power does, a discretion or, at least, a choice as to what that law should be.<sup>301</sup>

As also noted above, an ‘incitement threshold’ that must demonstrate a member of the audience is being urged to experience hatred is far different from one that need only demonstrate that a statement is capable of inciting hatred. The latter threshold has a far more limiting effect on freedom of expression than the former. Such determinations are better left to Parliaments.

Overall, we express no firm conclusion on the ‘Chapter III issue’. Ultimately, it is the uncertainties generated by Parliaments leaving to courts the task of defining terms that is our principal concern.

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<sup>298</sup> *Marshall* [1972] HCA 27; (1972) 124 CLR 640, 649 (Stephen J).

<sup>299</sup> The same issue arises for Territory Parliaments.

<sup>300</sup> [1995] HCA 47; (1995) 183 CLR 373.

<sup>301</sup> *Ibid* 486 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

(ii) *The meaning of ‘hatred’, ‘serious contempt’ and ‘severe ridicule’*

In *Wood*, the Tribunal held that conduct said to incite hatred, serious contempt and severe ridicule ‘must be capable of arousing reactions at the extreme end of the scale’.<sup>302</sup> This is an approach similar to that taken by the Canadian Supreme Court in *Whatcott* to the terms ‘hatred’ and ‘contempt’:

[T]he legislative term “hatred” or “hatred or contempt” is to be interpreted as being restricted to those extreme manifestations of the emotion described by the words “detestation” and “vilification”. This filters out expression which, while repugnant and offensive, does not incite the level of abhorrence, delegitimization and rejection that risks causing discrimination or other harmful effects.<sup>303</sup>

However, and once again, senior appellate authorities as well as the practice of Anti-Discrimination Tribunals in other Australian jurisdictions appear to adopt a less strict approach to what constitutes hatred, severe contempt or severe ridicule. In any event, reasonable minds may differ about what constitutes ‘mere’ dislike, contempt or ridicule on the one hand, and hatred, severe contempt and severe ridicule on the other, even when using a ‘reasonable person’ test or the like.<sup>304</sup> Even if the test is confined to the ‘extreme end of the scale’, reasonable minds may differ about what is or is not ‘extreme’. Again, this creates an unacceptable amount of uncertainty in the law. People do not know in advance where the line is drawn so they can avoid crossing it. We will illustrate this last point with two examples from case law.

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<sup>302</sup> *Wood* [2007] TASADT 3 [85].

<sup>303</sup> *Whatcott* [2013] SCC 11; [2013] 1 SCR 467, 502 [57] (Rothstein J).

<sup>304</sup> As we noted above, there are a number of ‘hypothetical person tests’ identified in case law.

In *Burns v Dye*,<sup>305</sup> a case concerning homosexual vilification under s 49ZT, the NSW Tribunal recounted an incident as follows:

Mr Dye, throughout the evening of September 1 1999, kicked Mr Burns' front door and in a loud voice repeatedly abused Mr Burns using offensive names including 'cocksucker', 'faggot cunt' and other abusive names.<sup>306</sup>

The majority of the NSW Tribunal held that this incident did *not* constitute incitement to hatred, serious contempt or severe ridicule, stating:

[W]e are not comfortably satisfied that this abuse would have incited [hatred, serious contempt or severe ridicule] in third parties, including those not immune from susceptibility to incitement or prejudice. In our view, an observably drunk Mr Dye who, from the evidence available, from outward appearances would not appear to enjoy any position of respect or influence, would be unlikely to influence, urge on or prompt, any witness to this assault to feelings of ill will towards Mr Burns. This is not to suggest that it is necessary to establish that the vilifier commands a position of influence or power over the victim or his/her audience (or potential audience) but rather that in certain situations this may be a relevant consideration.<sup>307</sup>

The majority's view was not shared by fellow NSW Tribunal member Tony Silva, who reasoned:

I believe use of the words "cocksucker", "faggot cunt", "you're a fucking faggot aren't you", "Faggot Burns come out and talk to me." Etc, especially the first two are of such extreme ridiculing nature that an ordinary reasonable person not immune from susceptibility to incitement nor holding prejudicial view about homosexuals would be incited to serious ridicule. I believe this incitement to serious ridicule could take place independent of whatever unpleasant feeling or even ridicule, they may have for Mr. Dye, the abuser. I believe people react to

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<sup>305</sup> [2002] NSWADT 32.

<sup>306</sup> Ibid [54]. We note that this incident was one of a number covered in this case.

<sup>307</sup> Ibid [65].

what they see and hear, straightaway and though they may have second thoughts about their feelings later. Being late evening/late night it adds to the incitement to serious ridicule.

Our point is this: members of the NSW Tribunal came to different conclusions about whether the use of vile epithets constituted incitement to hatred, serious contempt or severe ridicule.

In *Burns v Corbett*,<sup>308</sup> a local newspaper, the *Hamilton Spectator*, published a story about Tess Corbett, who was standing as a candidate for Bob Katter's Australia Party. The story referred to a number of issues about which Ms Corbett had commented, including 'the Labor Government's controversial Anti-Discrimination Bill'.<sup>309</sup> The NSW Tribunal then stated:

Immediately following a quoted statement by Ms Corbett that people 'should be able to discriminate', the following passage then appeared in the article:-

"I don't want gays, lesbians or paedophiles to be working in my kindergarten.

"If you don't like it, go to another kindergarten."

When asked if she considered homosexuals to be in the same category as paedophiles, Ms Corbett replied "yes".

"Paedophiles will be next in line to be recognised in the same way as gays and lesbians and get rights," she said.<sup>310</sup>

In holding that Ms Corbett's comments constituted incitement to hatred, serious contempt or severe ridicule in breach of s 49ZT, the NSW Tribunal reasoned:

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<sup>308</sup> [2013] NSWADT 227.

<sup>309</sup> Ibid [18].

<sup>310</sup> Ibid [19].

The main consideration underlying these conclusions is that, as Mr Burns pointed out, Ms Corbett encouraged people to regard homosexuals as ‘in the same category as’ paedophiles. For highly distressing reasons, the Australian public at the present day is being made particularly aware of the serious and long-lasting psychological damage suffered by victims of paedophilia. At any time, and especially at this time, any pronouncement that ‘brackets’ (for want of a better term) homosexual people with paedophiles is ‘capable of’, or has the effect of, ‘urging or ‘spurring on an ‘ordinary member of the class to whom it is directed’ to treat homosexuals as deserving to be hated or to be regarded with ‘serious contempt’. Ms Corbett’s claims that these two groups are ‘in the same category’ and that in due course the latter group will ‘be recognised in the same way as’ the former group and will ‘get rights’ are pronouncements of this kind. They do not merely offend or insult: they ‘incite’ these negative reactions.<sup>311</sup>

Before going further, we wish to make it absolutely clear that we each personally strongly object to equating homosexuality with paedophilia. However, with the greatest of respect to the NSW Tribunal, Ms Corbett’s remarks consisted of:

1. A brief statement about who she did not want working at a kindergarten; and
2. A one word reply to a question followed by a brief elaboration.

The ‘bracketing’ of homosexuals with paedophiles is hardly a new phenomenon, and even today is not uncommon. To a not inconsiderable number of people, homosexuality, paedophilia and bestiality are all abnormal sexualities, and are grouped together as such. Further, Ms Corbett’s remarks related to issues of public concern, specifically who should teach children, and to whom rights should be extended. Given all this, along with the brief nature of Ms Corbett’s comments, even an

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<sup>311</sup> Ibid [37].

‘ordinary member of the audience’ would have difficulty being incited to hatred, severe contempt or ridicule. This is so even if the ‘incitement threshold’ is a public act ‘being capable of’ inciting (which is the threshold the NSW Tribunal used in this case).

Overall, however, our point again is this: reasonable minds will differ concerning whether Ms Corbett’s comments breached s 49ZT. This is an unacceptable level of uncertainty. As the ALRC noted with respect to defamation law, while the law ‘defies simplicity it nonetheless demands it’.<sup>312</sup> The same can be said for ‘hate speech’ laws.

### 3 *A sweeping burden*

Again, the issues we noted with respect to s 17(1) apply here. In addition to race and sexuality involving ideas, religion itself concerns ideas concerning spirituality.<sup>313</sup> As to disability, mental infirmities often consist of a conflict between a person’s perception of reality (that is, their idea (or ideas) of reality) and actual reality.<sup>314</sup>

#### B *Is s 19’s purpose legitimate?*

Applying the principles of statutory construction noted above, s 19’s purpose appears to be to prohibit hatred on the grounds of race, disability, sexual activity or religion, to reduce discrimination, or both. The issue is whether these purposes are legitimate: that is, consistent with Australia’s

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<sup>312</sup> Australian Law Reform Commission, *Unfair Publication: Defamation and privacy, Report No 11* (1979) 28 [49].

<sup>313</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 135.

<sup>314</sup> Mark Leary observed that ‘virtually every theory of mental health assumes that having an accurate view of reality is a hallmark of psychological adjustment.’: Mark R Leary, *The curse of the self: Self-awareness, egotism, and the quality of human life* (Oxford University Press, 2004) 72.

constitutionally prescribed system of representative and responsible government.

We will assume for the purposes of this analysis that prohibiting hatred, serious contempt and severe ridicule on the grounds of race, disability, sexual activity or religion and reducing discrimination are legitimate ends. However, it is beyond the scope of this article to fully explore the issue.<sup>315</sup>

### C *Is s 19 reasonably appropriate and adapted to its purpose?*

#### 1 *Suitability*

This requirement is met. As with s 17(1), there is at the very least a minimal rational connection between making unlawful incitement to hatred, serious contempt and severe ridicule and the purpose of prohibiting discrimination.

#### 2 *Necessity*

As with s 17(1), there are alternative measures in existing legislation and in civil society that can address the problems that s 19 addresses.

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<sup>315</sup> We noted above that offence, insult, ridicule and humiliation are inevitable incidents of Australia's system of representative and responsible government. A question arises as to whether hatred, serious contempt and severe ridicule are also inevitable incidents. It is not uncommon in our political system for people to hate or hold in serious contempt their political opponents, or to mock them mercilessly. Further, the effect of *Commonwealth Constitution* s 116, which provides for the free exercise of religion – including expressing beliefs about practices that a religion may find abhorrent – may have an effect on the implied freedom of political communication. Further, as we note below, discriminatory laws may be enacted under the *Commonwealth Constitution* and the Australian people must be free to discuss such laws. However, as we noted, a full examination of these issues is beyond the scope of this article.



### 3 Adequacy in its balance

Once again, s 19 purports to restrict the freedom of expression of every person in Tasmania. It is legitimate to ask whether the harm of hate speech justifies such a restriction. For the reasons we gave with respect to s 17(1), the answer with respect to s 19 is no.

Section 19 has an admirable purpose: to prevent racial vilification and reduce discrimination. However, as noted above, s 19's burden on the implied freedom of political communication is direct, heavy and sweeping. There is considerable uncertainty regarding s 19's operation. Section 19 is too vague, and thus impermissibly infringes the implied freedom of political communication.

There are a number of justifications for sections like s 19 that we should address at this stage. First, it is argued that laws like s 19 can prevent 'climates' being created that make people feel unsafe. However, as we noted in *No Offence Intended*:

[A]rguments justifying restrictions on freedom of expression on the basis that its exercise creates a "climate" where people feel unsafe must be treated with caution. Restricting freedom of expression requires a clear-eyed risk analysis of the perceived threat. What is the source of the perceived threat? Is it a direct threat against an identified person or group of people? Or (at the other end of the spectrum) does the perceived threat stem from someone hearing comments they simply don't like? A person's emotional reaction can be disproportionate to the conduct about which they complain. Care must be taken to ensure that claimed threats are not vague, speculative, exaggerated, or contrived.<sup>316</sup>

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<sup>316</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 85.

Second, in *Whatcott*, Rothstein J noted that hate speech<sup>317</sup> may reduce the standing of groups in society:

Hate speech, therefore, rises beyond causing emotional distress to individual group members. It can have a societal impact. If a group of people are considered inferior, subhuman, or lawless, it is easier to justify denying the group and its members equal rights or status. As observed by this Court... the findings in *Keegstra* suggest “that hate speech always denies fundamental rights”. As the majority becomes desensitized by the effects of hate speech, the concern is that some members of society will demonstrate their rejection of the vulnerable group through conduct. Hate speech lays the groundwork for later, broad attacks on vulnerable groups. These attacks can range from discrimination, to ostracism, segregation, deportation, violence and, in the most extreme cases, to genocide....<sup>318</sup>

To Rothstein J, the effect of hate speech was relevant to the question of whether a law restricting hate speech was proportional to its objective:

[T]he focus must be on the likely effect of the hate speech on how individuals external to the group might reconsider the social standing of the group. Ultimately, it is the need to protect the societal standing of vulnerable groups that is the objective of legislation restricting hate speech.<sup>319</sup>

Rothstein J’s focus was on the effect of hate speech. That is, hate speech may create a climate where discrimination could occur.

In *No Offence Intended*, we noted that Canada’s Constitution has provisions concerning multiculturalism and equality.<sup>320</sup> For example, s 27

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<sup>317</sup> Once again, it should be noted that Rothstein J uses “hate speech” in a narrowly confined way: see *Whatcott* [2013] SCC 11; [2013] 1 SCR 467, 497-8 [44]-[46] (Rothstein J). We reiterate the overall conceptual problems with “hate speech” that we noted above.

<sup>318</sup> Ibid 506-7 [74] (Rothstein J) (citations omitted).

<sup>319</sup> Ibid 510 [82] (Rothstein J).

<sup>320</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 79.

of Canada's *Charter of Rights of Freedoms* ('Charter') provides that it 'shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians'.<sup>321</sup> Section 15(1) of the Charter provides that:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.<sup>322</sup>

There are no provisions equivalent to these in Australia's Constitution. In *No Offence Intended*, we noted that:

Unlike Canada, there is no need to 'read down' freedom of expression in Australia with reference to constitutionally-prescribed values. Indeed, if anything, the implied freedom of political communication... appears directed to ensuring the free and robust exchange of information concerning government and political matters in order to effect Australia's constitutionally-prescribed system representative and responsible government.<sup>323</sup>

We will now expand on this statement. As we noted above, under the *Commonwealth Constitution*, the Commonwealth Parliament has plenary powers to legislate under its various heads of power. Provided a matter falls under a head of power, the Commonwealth Parliament can pass laws that discriminate on virtually any basis. Commonwealth laws presently discriminate on bases such as age and mental capacity.<sup>324</sup> However, there

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<sup>321</sup> Charter s 27. Ibid s 25 also recognises rights and freedoms conferred on aboriginal peoples provided by treaty or land claim agreement.

<sup>322</sup> Ibid s 15(1). Ibid s 28 also guarantees rights and freedoms to males and females equally.

<sup>323</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 79.

<sup>324</sup> See, for example, the *Commonwealth Electoral Act 1918* (Cth) s 93(1)(a) regarding the age qualification for voting; *Criminal Code* (Cth) div 7 regarding legal capacity to commit a crime.

is nothing stopping the Commonwealth Parliament passing laws that discriminate on bases such as race,<sup>325</sup> sex<sup>326</sup> or sexuality.<sup>327</sup> As also noted above, State and Territory Parliaments also have the plenary powers to make laws subject to the *Commonwealth Constitution* and manner and form provisions. Unless so restrained, State and Territory Parliaments may also pass laws that discriminate on bases such as age, mental capacity, race, sex, sexuality and religion.

Given this, and given that the Australian people are sovereign, the implied freedom of political communication extends to matters where Australian Parliaments may pass discriminatory laws. That is, Australians may discuss, and indeed may advocate, discriminatory views, policies and laws. The fact that Australians can do this is relevant to whether s 19 (and similar hate speech laws) impermissibly infringe the implied freedom of political communication.

It is no answer to say that treaties like the *Convention on the Elimination of All Forms of Racial Discrimination* ('Convention') prohibits Australia from passing discriminatory laws. This is because, while Australia is a signatory to these treaties, it remains a sovereign state in the international system. Australia may therefore make laws that (say) breach the Convention, but are nevertheless constitutionally valid and enforceable

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<sup>325</sup> *Commonwealth Constitution* s 51(xxvi), providing for special laws for people of any race, makes this explicit. Historically, the laws and policies implementing the White Australia Policy can be taken as an example of the Commonwealth Parliament enacting (and the Commonwealth executive enforcing) racially discriminatory laws.

<sup>326</sup> For example, the historical restrictions on women serving in certain roles in the military.

<sup>327</sup> *Ibid* s 116 may prohibit laws being passed that discriminate on the basis of religion.

upon Australians.<sup>328</sup> That Australia breaches the Convention by doing this entails no consequence for it other than sanctions from other states in the international system and from international bodies. In any event, even if the Australian government complies with the Convention, the implied freedom of political communication extends to the Australian *people* advocating discriminatory views, policies and laws. By such advocacy, and the democratic processes which the *Commonwealth Constitution* provides, the Australian government may ‘change course’ on the Convention and other treaties.

To be absolutely clear, we are *not* saying that Australians *should* advocate discriminatory views, policies and laws. We are saying that, given the lawmaking powers of Commonwealth, State and Territory Parliaments and the principles of popular sovereignty, Australians *can* do this. No doubt many will feel uncomfortable that the *Commonwealth Constitution* and State and Territory constitutions allow this. The solution is to amend these constitutions. Ultimately, however, the differences between the Canadian and Australian Constitutions mean that this justification of hate speech laws in *Whatcott* cannot be readily applied to Australia.

Third, in *Whatcott*, Rothstein J noted that hate speech<sup>329</sup> could silence groups affected by it:

[H]ate propaganda opposes the targeted group’s ability to find self-fulfillment by articulating their thoughts and ideas. It impacts on that group’s ability to

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<sup>328</sup> Whatever the effect of international law on the development of the common law or on constitutional interpretation (and we venture no view here), the power to make laws binding on Australians ultimately resides in the Commonwealth Parliament under the *Commonwealth Constitution*. Hence, the Commonwealth Parliament may, by express provision, override the common law and inconsistent international law.

<sup>329</sup> Once again, it should be noted that Rothstein J uses ‘hate speech’ in a narrowly confined way: see *Whatcott* [2013] SCC 11; [2013] 1 SCR 467, 497-8 [44]-[46] (Rothstein J).

respond to the substantive ideas under debate, thereby placing a serious barrier to their full participation in our democracy. Indeed, a particularly insidious aspect of hate speech is that it acts to cut off any path of reply by the group under attack. It does this not only by attempting to marginalize the group so that their reply will be ignored: it also forces the group to argue for their basic humanity or social standing, as a precondition to participating in the deliberative aspects of our democracy.<sup>330</sup>

Rothstein J repeatedly refers to the silencing effect of hate speech.<sup>331</sup> However, while this effect is repeatedly asserted, it is not demonstrated: Rothstein J does not offer any evidence supporting this claim. This is a problem that has been repeated in Australia where, in *Sunol*, Basten J asserted the following without providing evidence:

Conduct by which one faction monopolises a debate or, by rowdy behaviour, prevents the other faction being heard, burdens political discourse as effectively as a statutory prohibition on speaking. A law which prohibits such conduct may constrain the behaviour of the first faction, but not effectively burden political discourse; on the contrary, it may promote such discourse.<sup>332</sup>

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<sup>330</sup> Ibid 507 [75] (Rothstein J) (citation omitted).

<sup>331</sup> Ibid; see also ibid 517 [104], 522 [117] (Rothstein J).

<sup>332</sup> *Sunol* [2012] NSWCA 44; (2012) 289 ALR 128, 146-7 [86] (Basten JA) (citation omitted). Arguments to the effect that ‘regulating’ freedom of expression enhances public debate must be treated with extreme caution. While superficially appealing, such arguments encounter the same difficulties with uncertainty as arguments against ‘hate speech’. Once again, reasonable minds may differ concerning whether a particular statement was a forthright opinion on the one hand, or a coarse or unseemly statement that detracts from public debate on the other. Forcing a speaker to state their position more politely may in fact rob them of their freedom of expression. As Daniel Ward observed such a position ‘ignores the extent to which one’s sentiments are inseparable from the manner in which they are expressed ‘F\*\*k war’ is simply not the same as ‘Down with war’’: Daniel Ward ‘Scepticism, human dignity and the freedom to offend’ (2013) 29(3) *Policy* 15, 19 citing *Cohen v California* 403 US 15 (1971). Cass Sunstein has spoken in favour of a regulated “marketplaces of ideas”: see Cass Sunstein, *Democracy and the Problem of Free Speech* (Free Press, 1993) 18-9, 251-2. With respect, Sunstein’s arguments do not overcome the difficulties we have noted concerning uncertainty. Indeed, his belief in the

We grant that the silencing effect of hate speech is plausible, and that hate speech no doubt *has* silenced individuals. However, the onus is on those supporting the law that infringes the implied freedom of political communication to establish that the infringement is permissible. Further, with laws like s 19, they must establish that the infringement is permissible even though the law restricts the freedom of expression of *everyone in the jurisdiction*. Repeatedly asserting there is a silencing effect does not overcome the apparent paucity of evidence that this effect happens to a significant extent,<sup>333</sup> let alone to the extent that it justifies universally restricting freedom of expression of everyone in (in s 19's case) Tasmania.<sup>334</sup>

Finally, Canada and Australia are liberal democracies with common law legal traditions. Each has well-developed civil societies. Each also have numerous groups organised by such attributes as race, colour, ethnicity, nationality, sex, sexuality, disability and religion whose purpose is to defend their members' interests and advocate on their behalf.<sup>335</sup> The fact

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capacity of government to effectively regulate freedom of expression demonstrates a naivety only a technocrat could have.

<sup>333</sup> This contrasts with the 'chilling effect' of defamation law, for which there is evidence from media outlets: see Australian Law Reform Commission, *Unfair Publication: Defamation and privacy*, Report No 11 (1979) 22-3 [37].

<sup>334</sup> Rothstein J did note that the Saskatchewan legislature was entitled to make the law based on a 'reasonable apprehension of societal harm as a result of hate speech': see *Whatcott* [2013] SCC 11; [2013] 1 SCR 467, 529 [135] (Rothstein J); for Rothstein J's discussion of reasonable apprehension of harm more generally see *ibid* 526-9 [128]-[135] (Rothstein J). However, once again, the Australian Constitution does not contain the prohibitions on discrimination that are found in the Canadian Constitution. Further, as noted above, care must be taken concerning what constitutes 'hate speech' and harm.

<sup>335</sup> *In No Offence Intended*, we noted that a large number of groups participated in AHRC hearings leading up to the publication of the 40<sup>th</sup> Anniversary Report: see 40<sup>th</sup> Anniversary Report 55-8 cited in Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 141 fn 522.

that these organisations regularly and unflinchingly engage in public debate counts against the suggestion that minorities are silenced.

Fourth, in *Whatcott*, Rothstein J noted the following:

The majority in *Keegstra* and *Taylor* reviewed evidence detailing the potential risks of harm from the dissemination of messages of hate, including the 1966 *Report of the Special Committee on Hate Propaganda in Canada*, commonly known as the Cohen Committee. The Cohen Committee wrote at a time when the experiences of fascism in Italy and National Socialism in Germany were in recent memory. Almost 50 years later, I cannot say that those examples have proven to be isolated and unrepeated at our current point in history. One need only look to the former Yugoslavia, Cambodia, Rwanda, Darfur, or Uganda to see more recent examples of attempted cleansing or genocide on the basis of religion, ethnicity or sexual orientation. In terms of the effects of disseminating hateful messages, there is today the added impact of the Internet.<sup>336</sup>

In *No Offence Intended*, we noted the following about comparing Canada to Nazi Germany:

We'll be blunt: the remarks of the Cohen Committee and Dickson CJ [in *Keegstra*] are astonishingly condescending to Canada's citizenry. They engage in speculation, 'slippery slope' reasoning and a *reductio ad Hitlerum*, all of which are historically suspect when applied to Canada. In the lead-up to the Second World War, with dire economic circumstances and fascism on the rise in Europe and elsewhere, *Canada did not go fascist*. Indeed, Canada, along with other nations with a common law legal tradition, fought to defeat fascism. In addition, after the Second World War the horrific results of fascism were widely known. With that experience, why was it a sound assumption that Canada (of all places) may well go backwards?<sup>337</sup>

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<sup>336</sup> *Whatcott* [2013] SCC 11; [2013] 1 SCR 467, 505-6 [72] (Rothstein J).

<sup>337</sup> Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 83-4 (emphasis in original).



Our point is this: there were substantial social, cultural, political and philosophical differences between Canada and Nazi Germany even in the 1930's.<sup>338</sup> Such differences also exist between Canada and the former Yugoslavia, Cambodia, Rwanda, Darfur, and Uganda. It should be noted that Canada's civil 'hate speech' law, s 13 of Canada's *Human Rights Act*, was repealed in November 2014. Since the repeal, Canada has not become a racist hellhole, to the complete surprise of absolutely no one.

Canada and Australia are both liberal democracies with common law legal traditions. As to Australia, it should be noted that, like Canada, it has fought against totalitarian ideologies such as fascism and communism. It should also be noted that, since Federation, Australia has done the following:

- Extended the franchise to women and Aboriginals;
- Amended the *Commonwealth Constitution* so the Commonwealth Parliament could legislate with respect to Aborigines;
- Abolished the White Australia Policy;
- Decriminalised homosexuality in all States and Territories;

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<sup>338</sup> It appears that social, cultural, political and philosophical differences between Canada and other members of the British Empire on the one hand, and Germany on the other, had been emerging for some time. Mervyn Bendle gives a fascinating account of the ideological dimension behind the First World War. In short, during the 19<sup>th</sup> century an anti-liberal 'Germanic ideology' had emerged in Germany. This ideology contained a narrative of Germanic supremacy and grievance, and was fundamentally at odds with the British Empire's predominantly liberal philosophy. These differences came to a head in the lead up to the First World War. After the First World War, this 'Germanic ideology' formed the basis of Nazi ideology. See Mervyn F Bendle, 'Beyond Good and Evil: Germany, 1914', *Quadrant* (online), 28 July 2014 <<https://quadrant.org.au/magazine/2014/07-08/beyond-good-evil-german-mind-1914/>>.

- Enacted a range of anti-discrimination legislation at the State and Commonwealth level;
- Pursued a largely successful policy of multicultural immigration.

Each of these successes were achieved without ‘hate speech’ legislation.<sup>339</sup> They speak to the strength of the arguments supporting them. They also speak to the political and philosophical ability of the Australian people to debate and enact them. Given this, the claim that ‘hate speech’ laws are necessary to prevent Australia from sliding into fascism is suspect given the historical evidence. (It is also, well, offensive to the Australian people.)

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<sup>339</sup> Indeed, it should be noted that Weimar Germany *did* have ‘hate speech’ laws (specifically laws against ‘insulting religious communities’) and prosecuted members of the Nazi Party (including Joseph Goebbels) under them. The Nazis turned their prosecutions to their advantage, painting themselves as political victims: see Brendan O’Neill, ‘How a Ban on Hate Speech Helped the Nazis’, *The Weekend Australian*, 29 March 2014, 16 cited in Augusto Zimmermann and Lorraine Finlay, ‘A Forgotten Freedom: Protecting Freedom of Speech in an Age of Political Correctness’ (2014) 14 *Macquarie Law Journal* 185, 191. It also cannot be discounted that passing laws forbidding insulting religious communities encouraged intellectual laziness in Weimar Germany. That is, citizens of Weimar Germany relied on the law to stop extremists like the Nazis, instead of challenging them in debate. As we noted in *No Offence Intended*, one of the advantages of the ‘marketplace of ideas’ is the *discipline of competition*: That is, the need to respond to criticism and/or other perspectives keeps ideas alive and vital: see Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 81. To give an example of an effective alternative approach, Great Britain’s tradition of freedom of expression allowed Nazi ideas to be *ridiculed*: see Mark Steyn, *Lights Out: Islam, free speech and the twilight of the west* (Stockade Books, 2009) 196. As Steyn noted

[I]f Adolf Hitler were to return from wherever he is right now, what would he be most steamed about? That in some countries there are laws banning Nazi symbols and making Holocaust denial a crime? No, that wouldn’t bother him: that would testify to the force and endurance of his ideas – that 60 years on they’re still so potent the state has to suppress them. What would bug him most is that on Broadway and in the West End Mel Brooks is peddling Nazi shtick in *The Producers* and audiences are howling with laughter: *ibid* 195.

As a final point, we are aware that in *Catch the Fire* and *Sunol*, the Victorian and NSW Courts of Appeal respectively held that the relevant vilification provisions did not impermissibly infringe the implied freedom of political communication.<sup>340</sup> However, these Courts of Appeal considered the issue prior to the development of the modified *Lange* test in *McCloy*. Further, and with the greatest of respect to these Courts of Appeal, they did not consider the following:

1. The principle of legality when interpreting the relevant provision;
2. Whether or not it was permissible for the relevant Tribunal, or Court of Appeal, to ‘read in’ words to the relevant provision, and then base tests on the words ‘read in’;
3. The concepts of vagueness or overbreadth (or otherwise issues concerning uncertainty) with respect to the following:
  - a. The ‘incitement threshold’ of the relevant provision;
  - b. The ‘hypothetical person’ test used in the relevant provision;
  - c. The terms ‘hatred’, ‘serious contempt’ or ‘severe ridicule’;
  - d. What comprises ‘good faith’; and
  - e. What comprises ‘reasonableness’.
4. The effect of the absence of defences such as truth and fair comment on the constitutional validity of the relevant provision.
5. With respect to the issues noted in points 1 to 4:

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<sup>340</sup> *Catch the Fire* [2006] VSCA 284; (2006) 15 VR 207; *Sunol* [2012] NSWCA 44; (2012) 289 ALR 128.

- a. The direct, heavy and sweeping burden placed on the implied freedom of political communication;
- b. Whether alternative legislative and other mechanisms perform the same role as the relevant provision but with less burden on the implied freedom of political communication; and
- c. Whether the nature of the harm that the relevant provision addresses rises to the level that it justifies restricting the freedom of expression of every person in the relevant jurisdiction.

## VIII SECTION 20

According to section 20(1) ‘[a] person must not publish or display, or cause or permit to be published or displayed, any sign, notice or advertising matter that promotes, expresses or depicts discrimination or prohibited conduct.’

Essentially, there are two aspects of s 20(1): the first is making unlawful promoting discrimination, the second is making unlawful promoting prohibited conduct. As to the second aspect, assuming that ‘prohibited conduct’ includes that provided in ss 17(1) and 19, then s 20 encounters the same constitutional difficulties as ss 17(1) and 19.

This leaves the first aspect. Running through the modified *Lange* test briefly, making unlawful the promotion of discrimination burdens the implied freedom of communication. The end of prohibiting

discrimination<sup>341</sup> is an end compatible with Australia's system of representative and responsible government.

However, the first aspect of s 20(1) fails the third step of the modified *Lange* test. Making unlawful promoting, expressing or depicting discrimination is a broad, and vague prohibition. What comprises discrimination? If s 14 of the Act is taken as a guide, then discrimination is treating someone less favourably on the ground of a particular attribute. However, political discussion and debate often involve making unfavourable comparisons on bases such as race, colour, ethnicity, nationality, sexuality or religion. If s 15 of the Act is taken as a guide as to what constitutes indirect discrimination, advocating particular policies may have an indirectly discriminatory effect. For example, advocating laws applying equally to all may be taken as 'indirectly discriminatory' because they affect unequally certain groups identifying by race, colour, ethnicity, nationality, sexuality, gender, or religion.

In any event, and as noted above, Australia's system of representative and responsible government allows for the advocacy of discriminatory views, policies and laws. To prohibit the expression or advocacy of such views, without more, impermissibly infringes the implied freedom of political communication.

## IX RECOMMENDED REFORMS

In light of our analysis, we recommend that ss 17(1), 19, 20, and 55 be repealed. In place of these sections, there should be a criminal law provision against the incitement to enmity. This provision has two essential elements. First, that there be intent to incite enmity or violence.

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<sup>341</sup> As opposed to prohibiting the *advocacy* of discriminatory views, policies or laws.

Second, that enmity be defined as either hatred or contempt ‘creating an imminent danger of violence’ against persons or property.<sup>342</sup> The provision could be drafted with respect to not only race and ethnicity but sexuality and other matters covered by s 17(1) and s 19.

The reform we suggest applies to a narrower range of language. However, we suggest that this reform would survive constitutional challenge. The proposed provision, combined with other legislative and non-legislative measures already available in Tasmania, will provide sufficient protection against conduct that should properly be the subject of prohibition by law.

## X CONCLUSION

Unfortunately, the proposed reforms to Tasmania’s ‘hate speech’ laws appear to be a missed opportunity. They will not fix the vulnerabilities to constitutional challenge presently found in s 17(1), 19, 20, and 55. Further, the proposed reforms pose no real consequences for a Commissioner who refers a complaint to the Tribunal when they should not have. We hope that, if Tasmania does not reform its laws to remove constitutionally invalid restrictions on freedom of expression, another State or Territory will take the initiative.

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<sup>342</sup> See Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 214.