

**Submission
No 7**

MEASURES TO PROHIBIT SLOGANS THAT INCITE HATRED

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Submission to Inquiry on Measures to Prohibit Slogans That Incite Hatred

Please accept this submission to your inquiry. It focuses on the constitutional validity of proposed measures to prohibit political slogans that may incite hatred. To aid the committee, below is a summary of relevant points for the Committee's consideration, followed by a more detailed legal analysis which provides the reasoning and the authorities to support the legal points made.

Summary of points for consideration

1. The constitutional validity of a measure will depend upon its terms, including its connection to a legitimate purpose, the degree and nature of its burden on political communication and any exceptions, exemptions and defences provided. In the absence of a Bill, all this submission can do is point to the potential constitutional problems which the policy-maker and drafter will need to seek to avoid.
2. While politicians may take particular views as to the meaning of political slogans and chants, a court, having received evidence, may take a different view. See, for example, *University of Toronto (Governing Council) v Doe* 2024 ONSC 3755 (<https://canlii.ca/t/k5l9q>), for an analysis of the contested meaning of certain slogans and chants.
3. The approach taken in the United Kingdom to such slogans and chants is not relevant in Australia, because the United Kingdom does not have a constitutionally entrenched implied freedom of political communication.
4. In general, a law that prohibits the use of political slogans or chants will burden the implied freedom of political communication. It will be invalid unless it is justified as reasonably appropriate and adapted to achieve a 'legitimate purpose' by legitimate means, where both the purpose and the means are compatible with the constitutionally prescribed system of representatives government.
5. A purpose of protecting the community from offence, hurt feelings, insult, and the damage to social cohesion that may be caused by disagreement and debate, is not a legitimate purpose, as it would prevent robust political communication. However, a law directed at preventing the incitement of violence, intimidation, and harmful dissension and strife in the community is for a legitimate purpose. Accordingly, a law that bans certain political slogans will need to be tied to the

achievement of one or more legitimate purposes which protect against serious harm to the community in order to be valid.

6. The purpose of a law is what the law is designed to achieve in fact. If the law bans particular political slogans, it may be argued that its purpose is to restrict political communication. If so, at least one judge would contend that this is an illegitimate purpose and the law is invalid. If there are additional incidental purposes, such as protection from harm, then another judge would hold the law valid as long as one of the purposes is legitimate. There is uncertainty about how the rest of the court would treat a law with mixed purposes of this kind.
7. A law that is directed at the political content of the communication, such as a law banning particular political slogans or chants, will be much harder to justify than a content-neutral law that is directed at the time, place and manner of communication. If a content-based law favours or disfavors one political view over another, it distorts the free flow of political communication, and a compelling justification will be needed for it to be valid.
8. A law banning particular political slogans or chants may not be regarded as ‘reasonably necessary’ as part of a structured proportionality test, if there are existing laws that achieve the same purpose but are less burdensome on the implied freedom. Accordingly, any proposed new law should be considered in the context of the operation of existing State and Commonwealth laws.
9. A law that prohibits an act which is already unlawful under another law that is not part of the same scheme, does not burden the implied freedom of political communication, because there is no freedom to burden. Hence, the validity of any new law would have to be considered in the context of existing laws and their validity. Equally, any challenger of a new law would have to consider whether he or she would also need to challenge other prior laws which already prohibit the political communication, albeit not in such express terms.
10. The current proposal to enact a law that bans particular political slogans and chants raises difficult constitutional issues in areas that have not yet been fully developed. A constitutionally safer course would be to stick with content-neutral laws that are closely tied to preventing serious harm, as they are most likely to survive scrutiny.

A more detailed analysis

In order to understand the context in which a proposed law to ban political slogans sits, one must first note the relevant existing laws and their relationship with the proposed new law.

Existing measures

There are at least six existing State measures that could affect the use of political slogans that incite hatred (assuming that a slogan may include a symbol).

Anti-Discrimination Act 1977 (NSW)

Section 20C provides that it is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group. This is not a criminal offence and complaints about such actions are dealt with by the Anti-Discrimination Board (known since 2019 as Anti-Discrimination NSW), which may also refer complaints to the NSW Civil and Administrative Tribunal.

Summary Offences Act 1988 (NSW)

Section 4 provides that it is a criminal offence for a person to conduct himself or herself in an offensive manner in or near, or within view or hearing from, a public place or a school. As discussed below, the term ‘offensive’ is likely to be read down to the extent that it applies to political communication, so that it only applies to very serious forms of offence that are likely to provoke violence – see *Coleman v Power* (2004) 220 CLR 1.

Crimes Act 1900 (NSW)

Inciting violence: Section 93Z provides that it is a criminal offence for a person by public act, intentionally or recklessly, to threaten or incite violence towards another person or group, on the ground of race, religious belief or affiliation, sexual orientation, gender identity, intersex status, or HIV or AIDS status. It is irrelevant whether anyone responded with violence.

Inciting hatred: Section 93ZAA provides that it is a criminal offence for a person, by public act, intentionally to incite hatred towards another person or group on the ground of race, if it would cause a reasonable person who was the target to fear harassment, intimidation or violence or to fear for their safety. It does not extend to quoting from or referencing a religious text for the purpose of religious teaching or discussion.

Nazi symbols: Section 93ZA provides that it is a criminal offence for a person to display, by public act and without reasonable excuse, a Nazi symbol on or near a synagogue, a Jewish school or the Sydney Jewish Museum, or elsewhere.

Terrorist symbols: Section 93ZB provides that it is a criminal offence for a person to display, by public act and without reasonable excuse, a prohibited terrorist organisation symbol.

I have not listed the various exceptions or defences in relation to these provisions, but they commonly include acts done reasonably and in good faith for an academic, artistic or educational purpose or another purpose in the public interest.

Note, there are also Commonwealth legislative provisions that may also affect the use of political chants or slogans. The Commonwealth Government has also announced two proposed new offences – aggravated hate speech and serious vilification based on race – but has not yet exposed the proposed terms of such laws.

Proposed Measures

Crimes and Summary Offences Amendment Bill 2025 (NSW)

The Bill would substitute a new s 93ZA in the *Crimes Act 1900*. It maintains the existing offences concerning the public display of Nazi symbols, and inserts a power for police to direct a person to remove suspected Nazi symbols from display. Failure to comply is an offence. It also inserts new sub-sections 93ZA(3) and (4), which establish offences of knowingly engaging in conduct, by public act and without reasonable excuse, that indicates support for Nazi ideology by invoking imagery or characteristics that a reasonable person would consider to be associated with Nazi ideology and which would cause a reasonable person to fear harassment, intimidation or violence, or fear for the person's safety. Different penalties apply depending upon whether it is near a Jewish place.

The example given in a note below the sub-sections states that it would cover 'reciting Nazi chants or using Nazi slogans'. As a matter of plain English, I find it difficult to interpret 'invoking imagery or characteristics' associated with Nazi ideology as meaning 'reciting Nazi chants or using Nazi slogans'. While in some jurisdictions, examples set out in statutes form part of the Act, this is not the case in New South Wales. Examples that are included in the smaller text beneath a section in a NSW statute are treated as extrinsic material that may be used in the course of statutory interpretation (see *Interpretation Act 1987* (NSW), s 34(2)(a)). Examples may be used to clarify the meaning of a statutory provision, but they cannot be used to fill a gap in it.

At the very least, the provision should be made clearer about what is intended, rather than relying on extrinsic material. If part of the role of prohibition is to educate the public as to what is permissible and what is prohibited, then the wording should be clear for ordinary people to understand, rather than being opaque, as it currently is.

Proposal to ban slogans

It has been proposed that certain political slogans used in pro-Palestinian marches be expressly banned on the ground that they incite violence or incite hatred. If these slogans do incite violence or hatred, then existing ss 93Z and 93ZAA would appear already to apply.

It appears that the impetus for additional legislation banning specific chants or slogans is a concern that it could not be established that the person chanting such a slogan intends to incite violence or hatred and that prosecutions would therefore fail. It seems that there is a desire to ban these slogans and make it a criminal act to chant them, without needing to establish any intention to cause harm, such as inciting violence or inciting hatred. This may lead to difficulties, discussed below, in connecting the impugned provision with a legitimate purpose, in a way that satisfies the relevant test for constitutional validity.

The test for the constitutionally implied freedom of political communication

As the Committee will be well aware, the High Court identified an implied freedom of political communication in the Commonwealth Constitution in 1992. That implied freedom is not a personal right. Instead, it operates as a restriction upon legislative and executive power at both the Commonwealth and State levels. It operates with respect to a wide field of political communication, including matters of ‘international political or social controversy’ (*Farmer v Minister for Home Affairs* [2025] HCA 38, [180]).

The test, as applied by the High Court when assessing the validity of a law, is:

1. Does the law effectively burden the freedom in its terms, operation or effect?
2. If “yes”, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?
3. If “yes”, is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

A law is invalid if the answer to question 1 is ‘Yes’ and the answer to either questions 2 or 3 is ‘No’.

In applying the third limb of the test, some judges apply a structured proportionality test, which involves asking whether the law is justified as: (a) suitable; (b) necessary; and (c) adequate in its balance.

For a period of time, a majority of the High Court applied that test of structured proportionality uniformly to all implied freedom cases, but more recently in *Babet v Commonwealth* [2025] HCA 21, a majority of the Court held that the structured proportionality test is merely a ‘tool’ of analysis. Justices who do not use structured proportionality tend to apply a calibrated scrutiny test, taking into account a range of factors (see further *Tajjour v NSW* (2014) 254 CLR 508, [151]).

Gageler CJ and Jagot J recently summarised the overall test by saying:

A law, the legal or practical operation of which is to impose an effective burden on freedom of political communication, will infringe that limitation unless the burden imposed by the law is similarly shown to be justified as “reasonably appropriate and adapted” to achieve a legitimate purpose by legitimate means requiring that both the purpose and the means of achieving it are “compatible with the system of representatives government for which the *Constitution* provides”. (*Babet v Commonwealth* [2025] HCA 21 [38].)

Burden

A law which bans the chanting of particular political slogans, or unspecified slogans that are associated with a particular political ideology, would burden the implied freedom of political communication (subject to prior prohibition by a separate law, as discussed below). It would not make a difference that the law is a State law or that the slogan concerned overseas political issues, as it may still influence how electors form their voting decisions.

Legitimate purpose

The ‘purpose of a law is what the law is designed to achieve in fact, which is akin to the mischief the law is designed to address’ (*Farmer*, [54]).

A purpose of protecting the ability of people to live peacefully and with dignity has been accepted as a legitimate purpose (see *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 169; and *Clubb v Edwards* (2019) 267 CLR 171, [60], [197], [258]). In *Faruqi v Hanson* [2024] FCA 1264 (which is currently on appeal), Stewart J accepted at [345] the Commonwealth’s argument that the legitimate purpose of s 18C of the *Racial Discrimination Act 1975* (Cth) was to deter and eliminate racial hatred and discrimination.

A legitimate purpose must address harm beyond offence, insult and disagreement

Keeping public places free from violence, preventing breaches of the peace and preventing the intimidation of participants in political debates have also been accepted as legitimate purposes that are compatible with the constitutionally prescribed system of government. But merely ensuring the civility of public discourse is not (*Coleman*, [102], [104], [198]-[199]).

Prohibiting incitement of ‘discord’ in the Australian community was accepted in *Farmer* as a legitimate purpose, to the extent that this meant preventing harmful dissension or strife (including intimidation, vilification or victimisation) on a large scale in the Australian community or within or amongst segments of the community (*Farmer*, [27]-[30], [106], [120], [168], [221], [244]-[245]). But ‘it would not be sufficient if only the feelings or sensitivities of the Australian community or a segment of the community would be hurt or adversely affected’ [30]. Parliament cannot use its legislative power ‘for the purpose of curbing political disagreement and debate inside Australia’ (*Farmer*, [55] and [221]-[224]). The purpose must be directed at preventing ‘material harm to the Australian community or a segment of that community’, rather than merely eroding social cohesion through disagreement and debate [245].

The High Court has accepted that the implied freedom protects political communications, even when they include ‘insult and emotion, calumny and invective’ (*Coleman*, [239]). In order to preserve the constitutional validity of a law that prohibited the use of ‘insulting’ words in public, the High Court read it narrowly as meaning words which are intended to provoke unlawful physical retaliation, or are

reasonably likely to provoke unlawful physical retaliation (*Coleman*, [102], [183], [193] and [226].)

In assessing the constitutional validity of a law that prohibited sending ‘offensive’ material by post, the High Court read the term ‘offensive’ narrowly to mean ‘calculated or likely to arouse significant anger, significant resentment, outrage, disgust or hatred in the mind of a reasonable person in all the circumstances’. But even then, three of the six Justices considered that preventing people from receiving such seriously offensive material by post did not amount to a legitimate purpose that was consistent with the constitutionally prescribed system of government (*Monis v The Queen* [2013] 249 CLR 92, [73], [97] and [236]).

A purpose of limiting political communication is not a legitimate purpose

To be a ‘legitimate’ purpose, the purpose of the law must be compatible with the constitutionally prescribed system of representative and responsible government. If the purpose of the law is to limit freedom of political communication, rather than another purpose such as protecting the community from material harm, then Edelman J would find the law invalid, even if there were some other, additional, valid purpose (*Ravbar v Commonwealth* [2025] HCA 25, [177]-[179]; *Farmer*, [107]). In his view, the Court has no power to disregard an unconstitutional purpose. All of Parliament’s purposes for a law must be compatible with the constitutionally prescribed system of representative and responsible government (*Farmer*, [107]). Further, a court cannot ‘read down’ a purpose to remove any illegitimacy (*Ravbar*, [180]).

Jagot J, however, considered the possibility of mixed purposes. Her Honour held that if the sole substantial or material purpose of a law was preventing a group from engaging in political communications, this is not compatible with the constitutionally prescribed system of government and therefore not a legitimate purpose. Such a law would be invalid (*Ravbar*, [387]). But if a law has more than one purpose, one of which is compatible with the constitutionally prescribed system of government, this is enough for the validity of the law, even though there is another non-legitimate purpose (*Ravbar*, [392]).

Gordon J noted that she did not need to express a concluded view on whether a law which has an illegitimate purpose will not infringe the implied freedom provided that one or more of its substantial or material ends is legitimate (*Ravbar*, [140]). However, her Honour appeared to be sceptical of the validity of a law with a purpose of curtailing freedom of political communication, where reliance was placed upon a subsidiary or incidental purpose to justify it (*Ravbar*, [140]).

If a law expressly banned the communication of specific political content, such as banning the use of a particular political slogan, there is a risk that the purpose of the law could be characterised as preventing a particular political communication. This risk would be heightened if the law simply banned the use of a political slogan, without including a requirement, such as that in proposed revised s 93ZA of the *Crimes Act*

1900, that the act of making the political communication would cause a reasonable person to fear harassment, intimidation or violence, or fear for the person's safety.

It is this condition which connects the act of making the political communication with a legitimate purpose. Without it, there is a greater risk that the purpose of the law will be found to be preventing political communication, and the law will be held invalid, subject to any identification of mixed purposes and how to deal with them. This remains an uncertain field which has not yet been fully explored, and is best avoided if possible.

The application of the test to laws directed at content, rather than the manner, timing and means of communication

Judges have found it more difficult to justify a law that directly, rather than incidentally, restricts political communication (*Australian Capital Television*, 169; *Hogan v Hinch* (2011) 243 CLR 506, [95]). It is even more difficult to justify a law that is directed to particular political content, rather than the manner, timing or means of political communication.

Chief Justice Mason, in *Australian Capital Television* at 143, drew a distinction between laws that target the ideas or information in communications and those directed to the mode of communication. He considered that only a 'compelling justification' would warrant content-based restrictions. He concluded: 'Generally speaking, it will be extremely difficult to justify restrictions imposed on free communication which operate by reference to the character of the ideas or information.' McHugh J came to the same conclusion at 235.

While Mason CJ's use of the test of 'compelling justification' and the 'calibration of the level of scrutiny' was overtaken by the 'structured proportionality' test, some Justices of the High Court have in recent times preferred the calibrated scrutiny approach (eg Gageler CJ, Gordon J and Jagot J).

Reference was made in *Farmer* to the need for a greater justification for content-based restrictions. The case concerned the validity of a provision in the migration law which allowed the Minister to deny a visa to Candace Owens Farmer. A number of judges stressed that the law about excluding persons who risked 'inciting discord' in the Australian community was more justifiable because it was, as they variously described it, 'content neutral', 'viewpoint neutral' or 'indifferent to the content of any political communication' other than by reference to the harm it may cause (*Farmer*, [57], [198], [249], [250], [258]). See also *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1, [46]; *Clubb*, [55], [123], [170], [180], [182] and [375]; *Comcare v Banerji* (2019) 267 CLR 373, [90]; and *LibertyWorks Inc v Commonwealth* (2021) 274 CLR 1, [177] and [236].

A much higher level of scrutiny would apply to laws that ban specific phrases that express a particular political point of view. As was stated in *Clubb* at [54], a law that burdens one side of a political debate, and thereby necessarily prefers the other, tends to

distort the flow of political communication. The free flow of political communication is required by the implied freedom of political communication, and distorting that flow by favouring some sources of political communication over others may lead to invalidity (*Unions NSW v New South Wales* (2013) 252 CLR 530, [27], [135], [137] and [167]-[168].)

In short, a law that is directed at prohibiting particular political communications based on their content, such as a law banning the use of a particular political slogan or chant, is at much greater risk of constitutional invalidity than a law that is content neutral and instead directed at the harmful impact of the law – eg chanting slogans that a reasonable person would consider are likely to cause serious community discord, intimidation, or violence.

Reasonably appropriate and adapted

If such a law is found to have a legitimate purpose, the court will then assess whether it is reasonably appropriate and adapted to serve that legitimate purpose. In the course of this assessment, particularly by those judges using the structured proportionality test, consideration may be given to whether there is another obvious and compelling alternative, reasonably practical means of achieving the same purpose which has a less burdensome effect on the implied freedom (*McCloy v NSW* (2015) 257 CLR 178, [2]). This may involve the consideration of other relevant existing laws, such as those noted above, which may serve the same legitimate purpose, but have a less burdensome effect on the implied freedom.

In *Lees v New South Wales* [2025] NSWSC 1209, 152-157, the existence of a more appropriately adapted and less burdensome existing law led the Court to find that the impugned law was not reasonably ‘necessary’. Hence, careful consideration should be given to the relationship between the proposed law for banning political slogans, and currently existing laws which might provide an obvious and compelling alternative, reasonably practical means of achieving the same purpose with a less burdensome effect on the implied freedom.

Whether the law burdens a freedom that exists independently of the law

In general, there is a common law freedom of speech which allows protesters to express their views on issues. However, if there is no independent freedom to do so because the act is prohibited by a law in a separate scheme (eg because protesting on private land is prohibited by the law of trespass) or the freedom depends on a statutory right (eg a statutory right to have a political party’s name on the ballot paper), then the law will not burden the implied freedom (*Mulholland v AEC* (2004) 220 CLR 181, [107]-[108], [188], and [356]; *Brown v Tasmania* (2017) 261 CLR 328, [357], [557]; *Ruddick v Commonwealth* (2022) 275 CLR 333, [172]; *Babet* [73], [97], [169], [172], [209] and [255]; *Farmer*, [131]).

In this case, the use of particular political slogans during protests would fall within the common law freedom of speech. But as noted above, there are arguably already laws –

in particular, provisions of the *Crimes Act 1900* (NSW), which prohibit the use of such slogans.

Edelman J has argued that if the two laws impose cumulative burdens as part of a single scheme, whether formally contained within the same statute or not, then the appropriate course is to assess the scheme as a whole. If the two laws independently burden the implied freedom, with the first in time having removed the freedom altogether, then it should be challenged, with the later law being used as an example of the foreseeable effect of the earlier law (*Babet*, [172]).

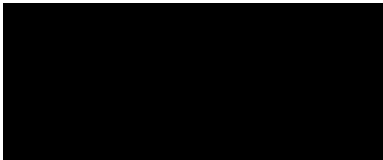
Again, this is a difficult and contested field, which is best avoided if possible.

Conclusion

As can be seen from the above discussion, the Government's proposal to ban particular political slogans and chants gives rise to a number of difficult legal issues in areas of the jurisprudence which have not yet been fully developed.

It is unrealistic to expect a parliamentary committee, in such a very short time over the Christmas holiday break, with no oral hearings and presumably few submissions by experts in the field, to come up with the desired constitutionally challenge-proof law. In the circumstances, a constitutionally safer course would be to stick with content-neutral laws that are closely tied to preventing particular, serious harm to the community, as they are the types of laws that are most likely to survive scrutiny.

Yours sincerely,



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