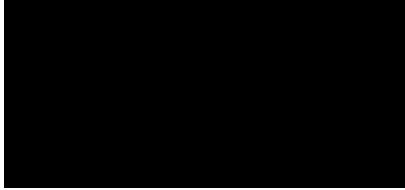


Fighting Antisemitism and Keeping Guns out of the Hands of Terrorists and Criminals Amendment Bill 2026

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Submission to Inquiry on into the *Fighting Antisemitism and Keeping Guns Out of the Hands of Terrorists and Criminals Amendment Bill 2026 (Qld)*

Please accept this submission to your inquiry into this Bill, which for brevity I will call the '*Fighting Antisemitism Bill*'. It focuses on the constitutional validity of proposed measures to prohibit political symbols and slogans. It does not address the other aspects of the Bill, as they fall outside my area of expertise.

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. This submission draws upon a submission previously provided to a NSW parliamentary committee on the same subject.

Summary of points for consideration

1. The proposed changes regarding the ban of symbols will add uncertainty, because no one can know for sure all the symbols which are banned. This is because they will not be identified in a regulation, unlike under the current law.
2. The proposed symbol-ban provisions are also unnecessary, because the same symbols are already banned in Queensland under Commonwealth law.
3. The proposed symbol-ban is open to abuse or inappropriate applications due to its automatic application without any independent assessment.
4. It would be better to maintain the current system where each banned symbol is specified and depicted in a regulation, so that citizens can know which symbols are banned and any inappropriately co-opted symbols can be excluded from the ban.
5. The meaning of a political expression should not depend upon the view of those who oppose its use. It should be determined in the context of its use or with objectivity. See, for example, *University of Toronto (Governing Council) v Doe 2024 ONSC 3755* (<https://canlii.ca/t/k5l9q>).
6. The provisions which permit the banning of expressions extend beyond antisemitism and race to expressions which are regarded as hostile or discriminatory on the basis of religion, sexuality and gender identity. This widens the possible fields of contention, with governments potentially being

pressured to ban the use of a range of words and phrases, having a greater impact upon freedom of speech than may currently be intended.

7. In general, a law that prohibits the use of symbols and expressions 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 representative government.
8. The provisions which tie the criminal offence of using the banned expression to material harms and which permit reasonable excuses will boost the prospects of the constitutional validity of the law, so it will be more likely to withstand a challenge than a law that simply banned the use of the expression.
9. On the other hand, a law that is directed at banning expressions due to their political content 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 disfavours 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. This is more difficult to see upon the face of this Bill, because the actual banning of expressions will occur by regulation, but such a regulation will not be valid unless it falls within the scope of the authorising power in the legislation, which has to be read consistently with the constitutionally implied freedom of political communication.
10. The proposed law must also be considered in the context of existing State and Commonwealth laws, as they may show that there are other means of achieving the same legitimate purpose which are less burdensome on the implied freedom of political communication.

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 three existing Queensland laws that could affect the use of political symbols and slogans that incite hatred.

Anti-Discrimination Act 1991 (Qld)

Section 124A provides that a person must not, by public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group on the ground of the race, religion, sexuality, sex characteristics or gender identity of the person or group. It does not, however, make unlawful the publication of a fair report of such an act, or the publication of material that would be covered by absolute privilege in defamation proceedings, or a ‘public act, done reasonably and in good faith, for academic, artistic,

scientific or research purposes or for other purposes in the public interest, including public discussion or debate about, and expositions of, any act or matter’.

This is not a criminal offence. It is instead dealt with as a civil matter under s 134 of the Act. A person may complain to the commissioner of the Queensland Human Rights Commission about an alleged contravention of s 124A, and it may be dealt with by way of conciliation. If it cannot be conciliated, it may be dealt with by a tribunal or a court.

Criminal Code Act 1899

The criminal offence concerning racial hatred is set out in s 52A of the *Criminal Code* (Qld). It provides that a person must not, by public act, knowingly or recklessly incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race, religion, sexuality, sex characteristics or gender identity of the person or group (which I will describe here as listed attributes). So far, this is the same as the civil provision.

However, s 52A includes the further qualification that to be a criminal offence this act must be done in a way that includes threatening physical harm towards, or damage to the property of, such a person or group, or inciting others to do so. Hence, the verbal expression of hatred, contempt or ridicule is tied to a particular harm, being the threat or incitement of physical harm or property damage. The maximum penalty is 3 years’ imprisonment. Another distinguishing feature is that it does not include the same exclusions for certain acts done reasonably and in good faith.

It is also an aggravating factor, under s 52B, for certain offences if the offender was wholly or partly motivated by hatred or serious contempt for a person or group, based on one or more of the listed attributes.

Section 52C addresses prohibited symbols. It defines a prohibited symbol as one prescribed by regulation, or something nearly resembling such a symbol. For reasons of certainty, it requires that there be a graphic representation of that symbol or image in the regulation. It states that the regulation cannot instead use a description of a class of symbols. The ban has to be directed at specific symbols, which are shown visually, so it is clear to anyone who wishes to find out which symbols are prohibited.

The Minister may recommend the making of the regulation if satisfied that the symbol or image ‘is widely known by the public as being solely or substantially representative of an ideology of extreme prejudice against a relevant group, identified by reference to one of the listed attributes. But there is also a more subjective alternative, that the Minister can recommend making the regulation if it is widely known by members of the ‘relevant group’ that the symbol or image is solely or substantially representative of an ideology of extreme prejudice against that group. This means that the Minister can make recommendations to ban symbols based upon the subjective view of the ideological opponents of a group, that the symbols used by that group represent an ideology of extreme prejudice against their opponents.

Once a symbol or image is prohibited, it is a criminal offence under s 52D for a person to publicly distribute, publish or display it ‘in a way that might reasonably be expected to cause a member of the public to feel menaced, harassed or offended’. This is so unless the person has a reasonable excuse. The penalty is a fine or 6 months’ imprisonment.

A reasonable excuse may include acts done for a genuine artistic, religious, educational, historical, legal or law enforcement purpose, or another purpose that is in the public interest, such as publishing a fair and accurate report of an event or matter of public interest, or engaging in a public dispute or issue that is carried on in the public interest, or opposing the ideology represented by the symbol – but only if the person’s conduct is reasonable for that purpose. A person who claims a reasonable excuse bears the evidential burden of showing it.

Summary Offences Act 2005 (Qld)

Section 6 of the *Summary Offences Act* provides that a person commits a public nuisance offence if they behave in a disorderly, offensive, threatening or violent way and their behaviour is likely to interfere with the peaceful enjoyment of a public place. This includes the use of ‘offensive, obscene, indecent or abusive language’. The aggravating factor in s 52B of the *Criminal Code* applies if the offender was wholly or partly motivated by hatred or serious contempt for a person or group, based on one or more of the listed attributes.

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.

Proposed Measures in Fighting Antisemitism Bill

Prohibited symbols

Proposed amendments to s 52C of the *Criminal Code* will expand the scope of the ban on prohibited symbols and images to those used by a ‘prescribed organisation, or a member of a prescribed organisation’, to identify the organisation or any part of it.

This will add uncertainty, because until now, a person could know precisely what symbols were prohibited by looking at the regulations. For example, clause 3 of the *Criminal Code (Prohibited Symbols) Regulation 2024* sets out a graphic image of the Nazi Hakenkreuz (being a particular form of the swastika). However, under the proposed revised section, prohibited symbols and images include any used by a prescribed organisation or a member of it, to identify the organisation or any part of it. There is no legal document that sets out what these symbols or images are, so no one can know how the law applies and what it prohibits. The best one could do is guess or search online sites or AI, which may be unreliable. People should not have to rely on ChatGPT or Google to determine the application of a law that binds them.

Nor, unlike with respect to other symbols or images prescribed by regulation, is there any requirement that the symbol or image be widely known as being solely or substantially representative of an ideology of extreme prejudice against a relevant group. Instead, it must just be a symbol or image used by a prescribed organisation or a member, to identify the organisation or part of it. These are vastly different requirements.

A prescribed organisation is defined in proposed s 52CA. It is a state sponsor of terrorism or a terrorist organisation that has already been identified as such under ss 110.3 and 102.1 of the Commonwealth's *Criminal Code*, but only if it has also been prescribed in Queensland by the making of a regulation. (Note that the regulation concerns prescribing the organisation. It does not identify the organisation's symbols. The ban of these unidentified symbols happens automatically and without any legal clarity as to what those symbols may be).

The upshot is that the symbols or images of these prescribed organisations are already prohibited under Commonwealth law (see Sub-Div CA of Div 80 in Part 5.1 of the *Criminal Code* (Cth)) and that the enactment of the Queensland ban will cause confusion due to the different criteria and defences that apply between the two jurisdictions. Whether a person is convicted of a criminal offence of displaying a prohibited symbol may depend upon which law the person is prosecuted under.

It also remains unclear at the Commonwealth level precisely what these symbols and images may be. How is the ordinary person on the street supposed to know that a symbol – which might be one that has historically been used with other meanings or by other groups – is now prohibited because it also happens to be used by a prescribed organisation or its members to identify itself?

To give a contemporary example, neo-Nazi groups currently use black Helly Hansen hiking clothes (which have a corporate HH symbol on them) as a means of identification (<https://www.abc.net.au/news/2026-01-24/verify-neo-nazi-symbols-explainer/106258068>) . Further, the media also identified a neo-Nazi marching in a protest by the fact that he was wearing a Celtic Cross symbol on his shirt (see: <https://www.theguardian.com/australia-news/2026/jan/26/man-charged-after-allegedly-making-comments-aligned-with-neo-nazi-ideology-at-sydney-anti-immigration-march-ntwnfb>). Would the display of such symbols be a criminal offence if the neo-Nazi group was a prescribed organisation?

Must the symbol be used solely or predominantly by that group, or could it be a symbol that is also used innocently by others? Could such a law be used maliciously by a prescribed group, to appropriate the symbol of their enemies (or perhaps a business that is owned by a member of an opposing group), in order to make it a banned symbol. The problem here is that something falls automatically within the definition of a prohibited symbol or image if it is 'used by a prescribed organisation, or a member of a prescribed organisation, to identify the organisation or any part of the organisation', without any need for official action, unlike under the existing law which requires the intervention by a Minister to advise the making of a regulation. The proposed law will result in both

uncertainty and potentially the inappropriate banning of symbols which may have different meanings and be precious to other communities.

Section 52D, as proposed to be amended, provides that it is an offence to publicly distribute, publish or display a prohibited symbol in a way that might reasonably be expected to cause a member of the public to feel menaced, harassed or offended. It does not appear that the person displaying the symbol needs to intend to cause such feelings or know that a member of the public might reasonably be expected to feel that way. However, for it to be an offence, the person displaying the symbol must know or ought reasonably to have known when they did so that the symbol was used by a prescribed organisation or a member of it, to identify the organisation or a part of it.

How should the person reasonably know this, if there is no legal source to identify what these symbols are? Not everyone is an expert on what symbols are being used by terrorist groups these days – particularly if they adopt symbols in common usage, as neo-Nazi groups have done.

If a prescribed organisation takes as its symbol an image of a watermelon, then is every fruiterer who displays a watermelon a person who ‘ought reasonably to have known’ that this was the case? While it is likely that such cases would not be prosecuted, one should not need to rely on selective enforcement of the law. There are also, of course, ‘reasonable excuses’ that may apply under s 52D, but one would be hard pressed to argue that displaying an image of a watermelon or wearing one’s Helly Hansen raincoat is done for an artistic or religious purpose or that it was for a purpose in the public interest. Moreover, no one should be put to the stress and the cost of a criminal trial and face the evidential burden of establishing a reasonable excuse, because the law does not precisely identify the symbols that are banned.

At the very least, all prohibited symbols should be identified and displayed in a regulation so people can know what they are and so that any inappropriately co-opted symbols can be excluded. Certainty in the scope of the criminal law is fundamental to the principle of the rule of law. It is no excuse to say that because the Commonwealth’s law is poorly drafted and breaches this principle, Queensland should do so too. Queensland currently has a better system, requiring the symbol to be prohibited explicitly by a regulation that contains a depiction of it – and it should maintain such a system under its proposed changes, as a matter of fairness to the Queensland people.

Prohibited expressions

This Bill also proposes to insert s 52DA into the *Criminal Code*. It provides that:

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

The penalty is a fine or 2 years' imprisonment. The same 'reasonable excuses' apply as outlined above in relation to prohibited symbols and images.

A 'prohibited expression' is to be prescribed by regulation – which at least gives some certainty, unlike in relation to symbols and images.

In deciding which phrases should be banned, the Minister must be satisfied either that it is 'widely known by the public as being solely or substantially representative of an ideology of extreme prejudice against a relevant group' or that this is 'widely known' by members of the relevant group. Again, this adds a level of subjectivity, despite the word 'known'. A group might 'know' that a phrase means a particular thing or represents an extremely prejudicial ideology, only because it has been constantly told by its own leaders that it does, even if those who use the phrase mean something completely different and do not regard it as representing a particular ideology. This subjective element means the banning of phrases is open to manipulation.

In addition, before recommending that the regulation be made banning an expression, the Minister must be satisfied that it is 'regularly used to incite discrimination, hostility or violence towards a relevant group.' This is important because it ties the use of the expression to actual harm, and will be relevant when applying the constitutional test for the implied freedom of political communication.

It should be noted that while these provisions are included in a Bill, the title of which refers to 'antisemitism', the 'relevant group' against whom the phrase incites discrimination, hostility or violence, may be distinguished by a much wider range of attributes. A 'relevant group' is defined as a group of persons who identify with each other on the basis of an attribute or characteristic that is, or is based on, the race, religion, sexuality, sex characteristics or gender identity of persons. This means that the banning of expressions is likely to extend in the future to expressions bound up in disputes between groups engaging in culture wars – moving well beyond the original impetus for the law and fuelling a 'cancel culture'.

The test for the constitutionally implied freedom of political communication

Whether the provisions concerning prohibited symbols and prohibited expressions are constitutionally valid will depend upon the application of 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. But this is now taken as only a ‘tool’ of analysis. Other judges instead use 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 representative government for which the *Constitution* provides”. (*Babet v Commonwealth* [2025] HCA 21 [38].)

Burden

A law which makes it a criminal offence to display or use, in public, symbols and expressions which convey political messages, would burden the implied freedom of political communication. 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

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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 Queensland 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]).

The criminal offence in 52D of the Queensland *Criminal Code*, as amended by the *Fighting Antisemitism Bill*, will apply if the person publicly displaying the symbol does so in a way that ‘might reasonably be expected to cause a member of the public to feel menaced, harassed or offended’. Whether feeling offended would be sufficient to justify such a criminal offence is questionable. If the symbol is declared by way of regulation, then the Minister must also be satisfied that it represents an ideology of

extreme prejudice against a relevant group (s 52C(3)), but this does not apply if it is the symbol of a prescribed organisation.

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]).

A law that provides for the banning of a particular political expression runs the risk that the purpose of the law could be characterised as preventing a particular political communication. However, s 52C, as proposed to be amended by the *Fighting Antisemitism Bill*, provides that the Minister may only recommend a regulation prohibiting an expression if satisfied that the expression is regularly used to incite discrimination, hostility or violence towards a relevant group, and proposed s 52DA only makes it an offence to recite, publish or display that expression if it is done in a way that might reasonably be expected to cause a member of the public to feel menaced, harassed or offended. Subject to the doubts about the sufficiency of the term ‘offended’, these provisions seek to tie the burden on political communication to a legitimate purpose that addresses a form of material harm. This enhances the prospects of its constitutional survival over a provision that just banned the use of an expression and could therefore be regarded as a law with that purpose.

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.

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 therefore apply to a law that provided for the banning of 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 permitting the prohibition of particular political communications based on their content 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.

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 whether the existing laws achieve the same legitimate purpose as the provisions in the Bill, as the existing laws might provide an obvious and compelling alternative, reasonably practical means of achieving the same purpose with a less burdensome effect on the implied freedom.

Conclusion

As can be seen from the above discussion, the *Fighting Antisemitism Bill* gives rise to a number of difficult legal issues in areas of jurisprudence which have not yet been fully developed. The Bill also affects fundamental human rights and has the potential, in the long-term, to restrict communications on a range of contentious topics. It therefore should not be passed quickly as a kneejerk reaction to recent events. It needs proper scrutiny and to be assessed for its potential long-term consequences.

Yours sincerely,



Anne Twomey
Professor Emerita of Constitutional Law

This submission is made in a private capacity, within my area of academic expertise, and does not represent the University of Sydney.