



HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M50 of 2026

BETWEEN:

WHITE AUSTRALIA PARTY INC.
First Plaintiff

and

THOMAS ANTHONY SEWELL
Second Plaintiff

and

THE COMMONWEALTH OF AUSTRALIA
First Defendant

and

THE ATTORNEY-GENERAL OF THE COMMONWEALTH
Second Defendant

**SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR
THE STATE OF QUEENSLAND (INTERVENING)**

Filed on behalf of the Attorney-General for the State of Queensland

21 August 2026

PART I: Internet publication

1. These submissions are in a form suitable for publication on the Internet.

PART II: Basis of intervention

2. The Attorney-General for the State of Queensland intervenes in this proceeding under s 78A of the *Judiciary Act 1903* (Cth) in support of neither party.

PART III: Reasons why leave to intervene should be granted

3. Not applicable.

PART IV: Submissions

SUMMARY OF ARGUMENT

4. The Attorney-General for Queensland submits:
 - (a) If the Court finds that Part 5.3B of the *Criminal Code* (Cth) is supported by the external affairs power, this Court should not go on to consider whether it might also be supported by any nationhood power. But if it is necessary to decide that issue, the Court should hold that Part 5.3B is not supported by any such power.
 - (b) The regulation-making power in s 5 of the *Criminal Code Act 1995* (Cth) is so constrained by ss 114A.4 to 114A.8 of the *Criminal Code* that any burden on the implied freedom imposed by the exercise of that power is justified across the range of potential exercises of that power. The regulation-making power therefore does not infringe the implied freedom. Any question about the validity of the regulations made pursuant to that power does not arise.
 - (c) In the alternative, any burden imposed by Part 5.3B of the *Criminal Code* on the free flow of political communication is appropriately characterised as slight (or narrow and shallow), incidental and non-discriminatory.
 - (d) The legitimate aim of Part 5.3B is to prevent hate crimes. There is no threshold of harm required to qualify as a legitimate aim.
 - (e) Part 5.3B is proportionate or reasonably appropriate and adapted to the legitimate aim. In fact, preventing hate crimes coheres with the values underling the

constitutionally prescribed system of representative and responsible government.

- (f) As to Ch III of the Constitution, Part 5.3B exhibits neither of the features of a bill of pains and penalties necessary to warrant characterising it as a legislative intrusion upon judicial power.

STATEMENT OF ARGUMENT

A. Head of power

5. If the Court finds that Part 5.3B of the *Criminal Code* (Cth) is supported by the external affairs power in s 51(xxix) of the Constitution, the Court need not, and should not, determine whether Part 5.3B might also be supported by any nationhood power (whether as a standalone implied power or a power implied from s 61 read with s 51(xxxix)).¹ A constitutional question should not be determined where ‘the controversy can be judicially determined on another basis’.²
6. But if it is necessary to decide the point, the Court should find that Part 5.3B is not supported by any nationhood power. It is well-recognised³ that the concept of a nationhood power sits in tension with the fact that the Constitution ‘assigns only specific legislative powers to the Commonwealth Parliament’ and is ‘not a unitary Constitution’.⁴ For that reason, even judges who have acknowledged the existence of the power have stressed that it is confined. Thus, in *Victoria v Commonwealth* (the *AAP Case*), Mason J discerned in the Constitution an implicit power ‘to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot

¹ DS [23]; *Government of the Russian Federation v Commonwealth* (2025) 99 ALJR 1562, 1571 [25] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), 1588 [111] (Edelman J).

² *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219, 249 [60] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ); *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537, 577 [116] (Gordon J); *Deripaska v Minister for Foreign Affairs* (2026) 100 ALJR 650, 673 [97] (Gordon and Steward JJ).

³ *Victoria v Commonwealth* (1975) 134 CLR 338, 364 (Barwick CJ), 378 (Gibbs J), 398 (Mason J) (‘*AAP Case*’); *Commonwealth v Tasmania* (1983) 158 CLR 1, 323 (Dawson J) (‘*Tasmanian Dam Case*’); *Davis v Commonwealth* (1988) 166 CLR 79, 102-4 (Wilson and Dawson JJ), 117-9 (Toohey J); *R v Hughes* (2000) 202 CLR 535, 555 [39] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Williams v Commonwealth* (2012) 248 CLR 156, 216-7 [83] (French CJ); James Stellios, *Zines and Stellios’s The High Court and the Constitution* (Federation Press, 7th ed, 2022) 495 (‘The concept of “nationhood” is an extremely vague notion from which to draw principles and rules relating to governmental power where the conflicting notion of a “federal state” is always present’); Peta Stephenson, *Nationhood, Executive Power and the Australian Constitution* (Hart, 2022) 59-64, 138-44.

⁴ *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 184 (Latham CJ).

otherwise be carried on for the benefit of the nation'.⁵ Yet his Honour added:⁶

It would be inconsistent with the broad division of responsibilities between the Commonwealth and the States achieved by the distribution of legislative powers to concede to this ... power a wide operation effecting a radical transformation in what has hitherto been thought to be the Commonwealth's area of responsibility under the Constitution, thereby enabling the Commonwealth to carry out within Australia programmes standing outside the acknowledged heads of legislative power merely because these programmes can be conveniently formulated and administered by the national government.

7. The conditions identified by Mason J in the *AAP Case* do not apply here. That the States can and do enact laws to address hate crimes dispels any notion that laws like Part 5.3B are 'peculiarly adapted' to enforcement by the Commonwealth and could not 'otherwise' be enforced by the States.⁷ A coercive law⁸ that applies generally for the foreseeable future is also far removed from the single stimulus package enacted in response to an acute financial crisis found to be 'peculiarly adapted' to the government of a nation in *Pape v Commissioner of Taxation*.⁹
8. Moreover, any nationhood power cannot extend to a general power to protect the nation as broad as that for which the Commonwealth contends.¹⁰ Any such implied power would not be 'securely based'¹¹ in the text and structure of the Constitution¹² given the

⁵ *AAP Case* (1975) 134 CLR 338, 397 (Mason J). See also *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 63 [133] (French CJ), 87-8 [228], 91-2 [241]-[242] (Gummow, Crennan and Bell JJ), 116 [329] (Hayne and Kiefel JJ); *Williams v Commonwealth* (2012) 248 CLR 156, 250-1 [196] (Hayne J), 342 [485] (Crennan J), 370 [583] (Kiefel J). .

⁶ *AAP Case* (1975) 134 CLR 338, 398 (Mason J).

⁷ Cf DS [27]. See *Williams v Commonwealth* (2012) 248 CLR 156, 235 [146] (Gummow and Bell JJ), 251 [196], 272-3 [257] (Hayne J) (Hayne J), 346 [497], 348 [503] (Crennan J), 373 [591] (Kiefel J).

⁸ See *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 24 [10] (French CJ), 92 [245] (Gummow, Crennan and Bell JJ); *Tasmanian Dam Case* (1983) 158 CLR 1, 203-4 (Wilson J), 252-3 (Deane J); *Davis v Commonwealth* (1988) 166 CLR 79, 112-13 (Brennan J).

⁹ *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 23 [8](1) (French CJ), 88-9 [230]-[231] (Gummow, Crennan and Bell JJ). Cf at 121 [345] (Hayne and Kiefel JJ), 191 [544]-[545] (Heydon J).

¹⁰ DS [23]-[28].

¹¹ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 134-5 (Mason CJ); *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 453 [389] (Hayne J); *McCloy v New South Wales* (2015) 257 CLR 178, 283 [318] (Gordon J); *Burns v Corbett* (2018) 265 CLR 304, 383 [175] (Gordon J).

¹² Compare the textual footing in Canada in s 91 of the *Constitution Act 1867* (Imp), 30 & 31 Vict, c 3 (Imp) and in India in sch IX, s 72 of the *Government of India Act 1935* (Imp) c 2. By comparison with those provisions, Latham CJ pointed out that 'the Commonwealth Constitution contains no special provision dealing with a national emergency' and does not confer 'residuary powers of general legislation': *Gratwick v Johnson* (1945) 70 CLR 1, 12.

Constitution is federal in nature¹³ and assigns only specific powers to the Commonwealth.¹⁴ Nor could such an implication be ‘logically or practically necessary’¹⁵ given the existence of the defence power in s 51(vi) of the Constitution.¹⁶ That power is not limited to external threats to the Australian nation or its people.¹⁷ Pointing to ss 51(xxxix) and 61 does not overcome these difficulties, for similar considerations would apply. Ultimately, to accept that the Commonwealth Parliament can enact a law like Part 5.3B otherwise than pursuant to an enumerated head of power would be ‘wholly subversive of the Constitution’.¹⁸

B. Implied freedom of political communication

Appropriate level of analysis

9. The plaintiffs challenge the validity of Part 5.3B of the *Criminal Code* (Cth). However, there is no impact on the free flow of political communication (or association as a corollary)¹⁹ until such time as a regulation is made specifying an organisation as a ‘prohibited hate group’.²⁰ The plaintiffs do not challenge the validity of the regulation-making power in s 5 of the *Criminal Code Act 1995* (Cth), nor do they challenge the *Criminal Code (Prohibited Hate Group – White Australia) Regulations 2026* (Cth).

¹³ *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 120 [339] (Hayne and Kiefel JJ), 134 [397], 182-3 [522], 199 [569] (Heydon J). One manifestation of the Constitution’s federal nature is s 119, which allows the Commonwealth to protect against ‘domestic violence’ but only ‘on the application of the Executive Government of the State’. As John Quick and Robert Randolph Garran explained, s 119 reflects the view that ‘[t]he maintenance of order in a State is primarily the concern of the State, for which the police powers of the State are ordinarily adequate’: *The Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, 1901) 964-5. If an unlimited defence power to protect persons and property would sit uncomfortably with s 119, a fortiori an unlimited implied power to do the same thing would be difficult to reconcile with s 119: see *R v Sharkey* (1949) 79 CLR 121, 150-2 (Dixon J).

¹⁴ *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 118 [335] (Hayne and Kiefel JJ).

¹⁵ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 135 (Mason CJ); *Burns v Corbett* (2018) 265 CLR 304, 355 [94] (Gageler J), 383 [175] (Gordon J); *Babet v Commonwealth* (2025) 99 ALJR 883, 910 [122] (Gordon J).

¹⁶ *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 171-2 [498], 176-7 [509] (Heydon J). See also at 122 [347], 125-6 [365]-[366] (Hayne and Kiefel JJ). See also Anne Twomey, ‘Pushing the Boundaries of Executive Power: *Pape*, the Prerogative and Nationhood Powers’ (2010) 34 *Melbourne University Law Review* 313, 334-8.

¹⁷ See *Thomas v Mowbray* (2007) 233 CLR 307, 324 [6] (Gleeson CJ), 362-3 [142]-[146] (Gummow and Crennan JJ), 503 [582]-[583] (Callinan J), 511 [611], 525-6 [649]-[650] (Heydon J). The Commonwealth does not rely on the defence power in this case.

¹⁸ *Tasmanian Dam Case* (1983) 158 CLR 1, 203-4 (Wilson J).

¹⁹ *Tajjour v New South Wales* (2014) 254 CLR 508, 553-4 [46] (French CJ), 566 [95] (Hayne J), 578 [143] (Gageler J), 605-6 [242]-[244] (Keane J); *Ravbar v Commonwealth* (2025) 99 ALJR 1000, 1099 [435] (Beech-Jones J).

²⁰ Under s 5 of the *Criminal Code Act 1995* (Cth) and s 114A.2 (definition of ‘prohibited hate group’) of the *Criminal Code*.

10. Even if the plaintiffs had challenged the validity of the regulation-making power, this Court has repeatedly emphasised the importance of distinguishing the constitutional law question of whether a regulation-making power is valid from the administrative law question of whether a regulation purportedly made under that power is valid.²¹ Where—as in this case—the regulation-making power is so tightly confined that it can only be exercised in a way that conforms to the implied freedom, the answer to the constitutional law question is that the regulation-making power is valid.²²
11. In this case, the several conditions on the exercise of power set out in ss 114A.4 to 114A.8 of the *Criminal Code* ensure that result. It is particularly important that s 114A.4(1)(b) requires the relevant Minister to be satisfied on reasonable grounds that specifying the organisation as a prohibited hate group would be ‘reasonably necessary’ to protect the Australian community or part of the Australian community against social, economic, psychological and physical harm that comes from organisations that engage in hate crimes or advocate engaging in hate crimes.
12. The text of 114A.4(1)(b) supplies a legitimate end for the purposes of the implied freedom. For the reasons advanced below, seeking to protect the community from the harms caused by hate crime is a legitimate end compatible with the constitutionally prescribed system of government. Further, s 114A.4(1)(b) provides that the power can only be exercised if the Minister is satisfied that doing so would be ‘reasonably necessary’ to achieve that legitimate end. ‘Reasonably necessary’ is ‘akin to the phrase “reasonably appropriate and adapted” for the second *Lange* question’.²³
13. Embedding a proportionality test in the statutory provision in that way ensures that it only authorises exercises of power that are proportionate to a legitimate aim. That

²¹ *Wotton v Queensland* (2012) 246 CLR 1, 14 [22] (French CJ, Gummow, Hayne, Crennan and Bell JJ), 29-30 [74] (Kiefel J); *Comcare v Banerji* (2019) 267 CLR 373, 405-6 [44] (Kiefel CJ, Bell, Keane and Nettle JJ), 421-2 [96] (Gageler J); *Palmer v Western Australia* (2021) 272 CLR 505, 530-1 [63]-[66] (Kiefel CJ and Keane J), 545-8 [117]-[128] (Gageler J), 573-4 [200]-[202] (Gordon J); *Commonwealth v AJL20* (2021) 273 CLR 43, 70 [43] (Kiefel CJ, Gageler, Keane and Steward JJ); *Ravbar v Commonwealth* (2025) 99 ALJR 1000, 1017 [30] (Gageler CJ), 1031 [104] (Gordon J), 1056-7 [226]-[229] (Edelman J), 1098 [429]-[433] (Beech-Jones J). In principle, this approach is applicable for any constitutional limits: see Joshua Thomson and Tristan Taylor, ‘Examining the Intersection of Constitutional and Administrative Review under the Wotton Approach’ (2023) 33 *Public Law Review* 315, 326.

²² *Palmer v Western Australia* (2021) 272 CLR 505, 531 [68] (Kiefel CJ and Keane J), 548 [127] (Gageler J), 574 [202] (Gordon J); *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 607 (Brennan J).

²³ *Wotton v Queensland* (2012) 246 CLR 1, 16 [32] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

ensures the statutory power is ‘calibrated to the constitutional test’.²⁴ That is so even though the statutory power turns on a state of satisfaction as to proportionality. In *Wotton v Queensland* and *Palmer v Western Australia*, this Court held that a statutory power that turned on a state of satisfaction was sufficiently constrained.²⁵ As Gageler J explained in *Palmer*, a requirement that the Minister be satisfied of particular matters implies that ‘the Minister must form the requisite state of mind reasonably and on a correct understanding of the Act’.²⁶

14. For these reasons, any burden imposed by the exercise of the regulation-making power would be justified ‘across the range of potential exercises of the power’.²⁷ The answer to the constitutional law question is that the regulation-making power in the *Criminal Code Act* is valid. An administrative law question might arise as to whether the exercise of that power was authorised by the regulation-making power, but the plaintiffs have not raised that question in this case.²⁸

Any burden is slight, incidental and non-discriminatory

15. In any event, Part 5.3B of the *Criminal Code*—in its application to the Regulations—does not infringe the implied freedom of political communication. A law will infringe the implied freedom if it burdens the free flow of political communication, and it is not reasonably appropriate and adapted to achieving a legitimate aim.²⁹ In answering the

²⁴ James Stellios, ‘*Marbury v Madison*: Constitutional limitations and statutory discretions’ (2016) 42 *Australian Bar Review* 324, 335. In *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 and *EGH19 v Commonwealth* (2026) 100 ALJR 400, the statutory powers were found not to be calibrated to the constitutional test despite the power being conditioned on a state of satisfaction as to proportionality. See, eg, *EGH19* at 436 [146] (Gordon J), cf at 460 [266] (Steward J), 485 [378] (Beech-Jones J). That can be explained on the basis that the relevant constitutional test in those cases—the *Lim* principle—does not merely require justification for the imposition of prima facie punitive detriments; it requires justification for conferring that function on the executive rather than the judiciary. The statutory test of justification for imposing the visa conditions in those cases did not necessarily answer that constitutional test of justification about the conferral of functions on one branch of government over another. See, eg, *EGH19* at 417 [56] (Gageler CJ and Gleeson J). These cases do not require any departure from the orthodox approach in *Wotton* in the context of the implied freedom.

²⁵ See *Wotton v Queensland* (2012) 246 CLR 1, 16 [32]–[33] (French CJ, Gummow, Hayne, Crennan and Bell JJ); *Palmer v Western Australia* (2021) 272 CLR 505, 531 [68] (Kiefel CJ and Keane J), 548 [128], 558 [158], 559–60 [165]–[167] (Gageler J), 575–6 [208] (Gordon J).

²⁶ *Palmer v Western Australia* (2021) 272 CLR 505, 558 [158] (Gageler J).

²⁷ *Palmer v Western Australia* (2021) 272 CLR 505, 560 [166] (Gageler J).

²⁸ Just as the plaintiffs elected not to do so in *Wotton v Queensland* (2012) 246 CLR 1, 16 [33] (French CJ, Gummow, Hayne, Crennan and Bell JJ); *Palmer v Western Australia* (2021) 272 CLR 505, 560 [169] (Gordon J).

²⁹ *Babet v Commonwealth* (2025) 99 ALJR 883, 896 [49] (Gageler CJ and Jagot J), 901 [72], 910 [118] (Gordon J), 932 [224], 933 [228] (Gleeson J), 936 [242] (Beech-Jones J); *Ravbar v Commonwealth* (2025) 99

latter question, it may assist to ask whether the law is suitable, necessary and adequate in its balance.³⁰

16. The nature and extent of the burden on the implied freedom should be identified at the outset in order to focus attention on what it is that needs to be justified at the next stage of the analysis.³¹ In this case, once a regulation is made prescribing a ‘prohibited hate group’, the offences in Division 114B of the *Criminal Code* will apply, among other things, to prevent a person from being a member of the organisation or providing it with support.³² The obvious objective is to prevent associations that are ‘criminogenic’ of hate crimes.³³ That will prevent people from communicating with each other in the course of associating as members, or from communicating on behalf of the organisation as a member.
17. However, much of that communication may not be about political or governmental matters at all.³⁴ Some affected communication might be political but properly characterised as ‘adventitious’. As Gageler J said in *Tajjour v New South Wales*, ‘[p]ersons who cannot associate to play cards cannot discuss politics between hands’, but that impact on the free flow of political communication is no more than ‘adventitious’ and does not count towards any burden on the implied freedom.³⁵ Likewise, some communication here might be political, but amount to a hate crime. Communication of that kind is independently criminalised by div 80, subdiv C of the *Criminal Code*, and also does not count towards any burden imposed on the implied

ALJR 1000, 1017 [27] (Gageler CJ), 1031 [101] (Gordon J), 1072-3 [309] (Gleeson J), 1080-1 [343] (Jagot J), 1097 [425], [427] (Beech-Jones J); *Farmer v Minister for Home Affairs* (2025) 99 ALJR 1408, 1421 [39] (Gageler CJ, Gordon and Beech-Jones JJ), 1460 [243] (Jagot J); *Hopper v Victoria* (2026) 100 ALJR 582, 592 [27] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ), 602-3 [84] (Edelman J), 618-9 [164] (Gleeson J).

³⁰ *Babet v Commonwealth* (2025) 99 ALJR 883, 896-7 [49] (Gageler CJ and Jagot J), 901 [72], 910 [118] (Gordon J), 925 [184] (Edelman J), 934 [231] (Gleeson J), 936 [242] (Beech-Jones J); *Ravbar v Commonwealth* (2025) 99 ALJR 1000, 1056 [225] (Edelman J) 1072-3 [309] (Gleeson J), 1080-1 [343] (Jagot J), 1097-8 [427] (Beech-Jones J); *Hopper v Victoria* (2026) 100 ALJR 582, 603 [87] (Edelman J), 619 [167] (Gleeson J).

³¹ *Hopper v Victoria* (2026) 100 ALJR 582, 592 [28] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ).

³² *Criminal Code*, ss 114B.2, 114B.6.

³³ See, similarly, *Tajjour v New South Wales* (2014) 254 CLR 508, 596 [207] (Keane J).

³⁴ Not all communication has the requisite connection to political or governmental matters: see *Clubb v Edwards* (2019) 267 CLR 171, 191 [29]-[31], [43] (Kiefel CJ, Bell and Keane JJ), 256-7 [249], 279-80 [305] (Nettle J).

³⁵ *Tajjour v New South Wales* (2014) 254 CLR 508, 578-9 [146], 582 [155] (Gageler J). See also *Farmer v Minister for Home Affairs* (2025) 99 ALJR 1408, 1450 [194] (Gleeson J).

freedom by Part 5.3B.³⁶

18. Further, because hate crimes are not inherently political,³⁷ Part 5.3B does not target communication on the basis that it is political in nature. Instead, it operates to prevent communications and associations because they are criminogenic of hate crimes, which themselves may or may not be political in nature. The burden on political communications is properly characterised as ‘incidental’.³⁸
19. The plaintiffs assert that the burden is discriminatory because Part 5.3B discriminates against organisations that meet the criteria for specification.³⁹ However, that amounts to no more than an assertion that Part 5.3B targets organisations that engage in hate crime, without identifying any particular political viewpoint that is thereby disproportionately affected.⁴⁰
20. The burden is therefore slight (or narrow and shallow),⁴¹ incidental and non-discriminatory.

Preventing hate crimes is a legitimate aim

21. To avoid infringing the implied freedom, that burden must be justified by reference to a legitimate aim.
22. To allow an effective means-ends analysis, the aim of a law needs to be identified at the

³⁶ *Brown v Tasmania* (2017) 261 CLR 328, 386 [188] (Gageler J), 456 [397] (Gordon J); *Ruddick v Commonwealth* (2022) 275 CLR 333, 391-2 [155]-[156] (Gordon, Edelman and Gleeson JJ); *Ravbar v Commonwealth* (2025) 99 ALJR 1000, 1018 [32] (Gageler CJ).

³⁷ *Farmer v Minister for Home Affairs* (2025) 99 ALJR 1408, 1447 [182] (Gleeson J). See also *Cunliffe v Commonwealth* (1994) 182 CLR 272, 339 (Deane J); *Catch The Fire Ministries Inc v Islamic Council of Victoria Inc* (2006) 15 VR 207, 264-5 [206]-[208] (Neave JA); *Owen v Menzies* [2013] 2 Qd R 327, 352-3 [73]-[76] (McMurdo P); *Monis v The Queen* (2013) 249 CLR 92, 212 [342] (Crennan, Kiefel and Bell JJ).

³⁸ *Coleman v Power* (2004) 220 CLR 1, 31 [30]-[31] (Gleeson CJ); *Hogan v Hinch* (2011) 243 CLR 506, 555-6 [95]-[99] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Wotton v Queensland* (2012) 246 CLR 1, 16 [30] (French CJ, Gummow, Hayne, Crennan and Bell JJ); *Ravbar v Commonwealth* (2025) 99 ALJR 1000, 1079-80 [340]-[341], 1091 [396] (Jagot J).

³⁹ PS [65].

⁴⁰ The differential operation of a law merely ‘serve[s] to identify the group targeted by [the] law’: *Hopper v Victoria* (2026) 100 ALJR 582, 594 [40] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ). See, similarly, *Babet v Commonwealth* (2025) 99 ALJR 883, 911 [128] (Gordon J), 928 [197] (Edelman J), 938 [251] (Beech-Jones J) (where the asserted discrimination turned on the application of the statutory criteria and nothing more).

⁴¹ *Clubb v Edwards* (2019) 267 CLR 171, 337-8 [480] (Edelman J); *Ravbar v Commonwealth* (2025) 99 ALJR 1000, 1057 [230] (Edelman J).

appropriate level of generality,⁴² somewhere between what the law does and the ‘animating social value’,⁴³ taking into account any express statement of the purpose in the statute.⁴⁴ Here what Part 5.3B does is disrupt associations that are criminogenic of hate crimes. It does so in order to prevent hate crimes.⁴⁵ Ultimately, as s 114A.1 states, that serves to protect the Australian community or part of it against the social, economic, psychological and physical harm that comes from organisations that engage in hate crimes or advocate engaging in hate crimes.

23. Any purpose will be legitimate provided it is not a purpose of impairing the implied freedom⁴⁶ (such as a purpose of ‘curbing political disagreement and debate’).⁴⁷ Protecting citizens from harm⁴⁸ and preventing crime⁴⁹ are obvious examples of legitimate aims.
24. There is no threshold of harm required to qualify as a legitimate aim.⁵⁰ In *Farmer v Minister for Home Affairs*, the impugned law had the aim of protecting the Australian community from a risk that a person would incite discord in the Australian community

⁴² *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137, 157 [40] (the Court); *Hopper v Victoria* (2026) 100 ALJR 582, 595 [45] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ).

⁴³ *R v Moriarity* [2015] 3 SCR 485, 498-9 [28] (Cromwell J for the Court), cited with approval in *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537, 615 [246] (Edelman J); *Alexander v Minister for Home Affairs* (2022) 276 CLR 336, 378-9 [105] (Gageler J).

⁴⁴ *Unions NSW v New South Wales* (2019) 264 CLR 595, 627 [79] (Gageler J), 657 [172] (Edelman J); *LibertyWorks Inc v Commonwealth* (2021) 274 CLR 1, 79 [204] (Edelman J); *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537, 592 [170] (Gordon J).

⁴⁵ See, similarly, *Tajjour v New South Wales* (2014) 254 CLR 508, 532-3 [1], 552 [41] (French CJ), 561 [77]-[78] (Hayne J), 571 [111]-[112] (Crennan, Kiefel and Bell JJ), 583 [160] (Gageler J), 596 [207] (Keane J).

⁴⁶ *Unions NSW v New South Wales* (2019) 264 CLR 595, 658 [175], 674 [222] (Edelman J).

⁴⁷ *Farmer v Minister for Home Affairs* (2025) 99 ALJR 1408, 1424 [55] (Gageler CJ, Gordon and Beech-Jones JJ).

⁴⁸ *Monis v The Queen* (2013) 249 CLR 92, 215 [349] (Crennan, Kiefel and Bell JJ). In another constitutional context, see *Garlett v Western Australia* (2022) 277 CLR 1, 24-25 [46] (Kiefel CJ, Keane and Steward JJ).

⁴⁹ *Tajjour v New South Wales* (2014) 254 CLR 508, 552 [41] (French CJ), 561 [77] (Hayne J), 571 [111]-[112] (Crennan, Kiefel and Bell JJ), 583 [160] (Gageler J).

⁵⁰ *Clubb v Edwards* (2019) 267 CLR 171, 235 [196] (Gageler J). Likewise, in *Monis v The Queen* (2013) 249 CLR 92, Crennan, Kiefel and Bell JJ appeared to suggest at 196 [290] that a law pursuing the end of ensuring a civil discourse or preventing mere hurt feelings would not satisfy the second *Lange* test because it would ‘unduly burden’ the implied freedom. That suggests the problem arose from the means not the ends. It is acknowledged that in *Coleman v Power* (2004) 220 CLR 1, there are some passages that appear to suggest the problem arose from the ends not the means: eg at 53-4 [102], [105] (McHugh J), 78-9 [199] (Gummow and Hayne JJ), 91 [239], 98 [255] (Kirby J). However, those passages are also consistent with the view that, in the particular circumstances, the burden on the implied freedom was so disproportionate to the aim of ensuring civility as to reveal that the true purpose was in fact the illegitimate aim of imposing that burden as an end in itself. Ultimately, as Gageler J said in *Clubb* at 235 [196], ‘*Coleman* and *Monis* should not be understood as authority for the proposition’ that an aim of preventing ‘uncivil or offensive speech’ is necessarily incompatible with the constitutionally prescribed system of government.

(or part of the community) of a kind or degree that is harmful to the community (or part). That aim was legitimate.⁵¹ *Farmer* does not imply that that level of harm is required in all cases. Any aim other than an aim of harming the implied freedom qualifies as legitimate. If the harm sought to be avoided is mere ‘hurt feelings’ or incivility, in some contexts that aim may be insignificant and outweighed by the harm to the implied freedom.⁵² However, in other circumstances the purpose of preventing such harm may be compelling.⁵³ Accordingly, at the level of principle, an aim of preventing *any* harm is legitimate, and capable of justifying a burden on the implied freedom, depending on the circumstances.

25. In the alternative, even if seeking to protect against minor harms were an illegitimate aim, it cannot be fatal that this law pursues that aim alongside the aim of protecting against more serious harms.⁵⁴ Preventing hate crimes is not merely about preventing hurt feelings.⁵⁵ Hate crimes threaten the safety, wellbeing and dignity of individuals, and corrode social cohesion.⁵⁶ Seeking to prevent such harm is clearly compatible with our constitutionally prescribed system of government.⁵⁷

⁵¹ *Farmer v Minister for Home Affairs* (2025) 99 ALJR 1408, 1424 [54]-[55] (Gageler CJ, Gordon and Beech-Jones JJ), 1461 [245]-[246] (Jagot J).

⁵² See *Monis v The Queen* (2013) 249 CLR 92, 196 [289], 199-200 [300]-[301], 214-5 [348]-[349] (Crennan, Kiefel and Bell JJ).

⁵³ *Clubb v Edwards* (2019) 267 CLR 171, 235 [196] (Gageler J).

⁵⁴ It would be sufficient that the law is proportionate to the legitimate aim of protecting against more serious harms even if the effect (not aim) of the law is also to protect against minor harms. In the face of a conclusion that the law is proportionate to at least one legitimate aim, one would not lightly attribute an additional aim that is illegitimate. To do so would likely be to identify the aim at the wrong level of generality, too close to merely what the law does. Jagot J has held that it is sufficient for validity that a law is proportionate to at least one legitimate aim, despite an apparent additional illegitimate aim: *Ravbar v Commonwealth* (2025) 99 ALJR 1000, 1088 [387], 1089-91 [392]-[394] (Jagot J). Cf at 1038 [140] where Gordon J left open the question. Cf at 1045 [177], 1053 [213] (Edelman J); *Farmer v Minister for Home Affairs* (2025) 99 ALJR 1408, 1434 [107] (Edelman J); *Hopper v Victoria* (2026) 100 ALJR 582, 605 [94], 609 [116] (Edelman J).

⁵⁵ Cf PS [67]-[72].

⁵⁶ See, similarly, *Hanson v Faruqi* [2026] FCAFC 96, [147]-[159] (Perry, Kennett and Bennett JJ).

⁵⁷ See, similarly, *Clubb v Edwards* (2019) 267 CLR 171, 196 [50]-[51], 198-9 [60], 213 [120]-[122] (Kiefel CJ, Bell and Keane JJ), 235-6 [197] (Gageler J), 260-1 [258], 280 [306] (Nettle J), 302-3 [380]-[381] (Gordon J), 329 [459] (Edelman J). See also *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 77 (Deane and Toohey JJ) (‘the protection or vindication of the legitimate claims of individuals to live peacefully and with dignity in such a society’); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 169 (Deane and Toohey JJ) (‘protection or vindication of the legitimate claims of individuals to live peacefully and with dignity within such a society’); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 179 (Deane J) (‘protection or vindication of the legitimate claims of individuals to live peacefully and with dignity in such a society’); *Levy v Victoria* (1997) 189 CLR 579, 596-7 (Brennan CJ), 608-9 (Dawson J), 611, 614-5 (Toohey and Gummow JJ), 619-620 (Gaudron J), 627 (McHugh J), 635-6 (Kirby J) (‘ensure a greater degree of safety of persons’).

26. The next question is whether Part 5.3B is reasonably appropriate and adapted to the objective of preventing hate crime. The polity bears the persuasive onus,⁵⁸ but scientific proof is not required to discharge that onus.

Scientific proof of harm is not required

27. The plaintiffs assert some deficiency in the evidence before the Court as to the causal links between hate crimes and particular events or harms.⁵⁹ However, Parliament has never been required to wait for scientific proof before acting.⁶⁰ Parliament is entitled to ‘respond to felt necessities’ and to ‘act prophylactically’.⁶¹
28. As the Supreme Court of Canada recently explained, at the rational connection stage, it is sufficient to show ‘that it is reasonable to suppose that the limit may further the goal, not that it will do so’.⁶² At the necessity stage, ‘governments have latitude to respond to complex policy issues, especially where the evidence is inconclusive’.⁶³ And at the final balancing stage, the salutary effects may be established by a reasoned apprehension, without requiring ‘legislatures to show that the law will produce the forecasted benefits’.⁶⁴ Otherwise, ‘[i]f legislation designed to further the public good were required to await proof positive that the benefits would in fact be realized, few laws would be passed and the public interest would suffer’.⁶⁵ More specifically, it is reasonable for

⁵⁸ *McCloy v New South Wales* (2015) 257 CLR 178, 201 [24] (French CJ, Kiefel, Bell and Keane JJ); *Brown v Tasmania* (2017) 261 CLR 328, 370 [131] (Kiefel CJ, Bell and Keane JJ); *Unions NSW v New South Wales* (2019) 264 CLR 595, 616 [45], 618 [53] (Kiefel CJ, Bell and Keane JJ), 631 [93] (Gageler J), 640 [117] (Nettle J), 650 [151] (Gordon J); *Unions NSW v New South Wales* (2023) 277 CLR 627, 644 [31] (Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ); *Hopper v Victoria* (2026) 100 ALJR 582, 595-6 [49] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ).

⁵⁹ PS [19].

⁶⁰ *Spence v Queensland* (2019) 268 CLR 355, 417 [96] (Kiefel CJ, Bell, Gageler and Keane JJ). See also *Batasuna v Spain* (European Court of Human Rights, Fifth Section, Application No 25803/04 and 25817/04, 30 June 2009) [81]-[82], where the European Court said that the state was not required to wait for proof of harm before intervening to disband an anti-democratic party.

⁶¹ *McCloy v New South Wales* (2015) 257 CLR 178, 251 [197] (Gageler J), 261-2 [233] (Nettle J); *Brown v Tasmania* (2017) 261 CLR 328, 421-2 [288] (Nettle J), 463 [422] (Gordon J).

⁶² *Taylor v Newfoundland and Labrador* (2026) 510 DLR (4th) 195, 271 [211] (Karakatsanis and Martin JJ, Côté, O’Bonsawin and Moreau JJ concurring), quoting *Alberta v Hutterian Brethren of Wilson Colony* [2009] 2 SCR 567, 594 [48] (McLachlin CJ, Binnie, Deschamps and Rothstein JJ agreeing).

⁶³ *Taylor v Newfoundland and Labrador* (2026) 510 DLR (4th) 195, 271 [212] (Karakatsanis and Martin JJ, Côté, O’Bonsawin and Moreau JJ concurring).

⁶⁴ *Taylor v Newfoundland and Labrador* (2026) 510 DLR (4th) 195, 272 [213] (Karakatsanis and Martin JJ, Côté, O’Bonsawin and Moreau JJ concurring).

⁶⁵ *Alberta v Hutterian Brethren of Wilson Colony* [2009] 2 SCR 567, 609 [85] (McLachlin CJ, Binnie, Deschamps and Rothstein JJ agreeing).

legislatures to apprehend that hate speech causes societal harm.⁶⁶ Indeed, it is a matter of ‘common sense and experience’ that hate speech inflicts such harm.⁶⁷

Part 5.3B is proportionate or reasonably appropriate and adapted

29. Part 5.3B of the *Criminal Code* is reasonably appropriate and adapted to its purpose of preventing hate crimes. To parse that conclusion in the language of proportionality:

- (a) Rational connection—It is reasonable to suppose that disrupting associations that are criminogenic of hate crimes will help to prevent hate crimes in the future. The premise is that preventing people from associating⁶⁸ as part of an organisation that has engaged in or advocated engaging in hate crimes⁶⁹ will prevent those people ‘from using the occasion of their association to consider or explore the possibility of one or more of them (or others) engaging in some criminal act and will thereby prevent crime’.⁷⁰ Proof that crime will in fact be prevented is not required.⁷¹
- (b) Necessary—The burden on the implied freedom is necessary to achieve that aim as there is no ‘obvious and compelling alternative which is equally practicable and available and would result in a significantly lesser burden on the implied freedom’.⁷² In particular, the plaintiffs’ suggestion that ‘conduct could be prosecuted directly’⁷³ overlooks that the status quo is not as effective in preventing hate crimes,⁷⁴ and fails to address the risk presented by the organisation itself.⁷⁵

⁶⁶ *Saskatchewan (Human Rights Commission) v Whatcott* [2013] 1 SCR 467, 526-9 [128]-[135] (Rothstein J for the Court). See also *R v Keegstra* [1990] 3 SCR 697, 768, 776 (Dickson CJ, Wilson, L’Heureux-Dubé and Gonthier JJ agreeing).

⁶⁷ *Saskatchewan (Human Rights Commission) v Whatcott* [2013] 1 SCR 467, 527-8 [132] (Rothstein J for the Court). The Court may have regard to ‘notorious facts’ of that kind in finding constitutional facts: *Thomas v Mowbray* (2007) 233 CLR 307, 482-3 [526] (Callinan J); 517 [629], 524-5 [646] (Heydon J); *Maloney v The Queen* (2013) 252 CLR 168, 185 [21] (French CJ), 299 [353] (Gageler J).

⁶⁸ *Criminal Code*, div 114B.

⁶⁹ *Criminal Code*, s 114A.4(1)(a).

⁷⁰ *Tajjour v New South Wales* (2014) 254 CLR 508, 562 [78] (Hayne J).

⁷¹ *Tajjour v New South Wales* (2014) 254 CLR 508, 563 [82] (Hayne J).

⁷² *Comcare v Banerji* (2019) 267 CLR 373, 401 [35] (Kiefel CJ, Bell, Keane and Nettle JJ).

⁷³ PS [74].

⁷⁴ See *R (Ammori) v Secretary of State for the Home Department* [2026] EWHC 292 (Admin), [131] (Swift and Stein JJ).

⁷⁵ *R (Ammori) v Secretary of State for the Home Department* [2026] EWCA Civ 721, [130]-[139] (Lady Carr CJ for the Court) (addressing why prosecuting individuals is not a less restrictive alternative to prescribing an organisation as a terrorist organisation).

- (c) Adequate in its balance—The value to society of preventing hate crimes far outweighs the slight and incidental impact on free political communication that comes from preventing people from communicating in the course of associating as members, or from communicating on behalf of the organisation as a member. Even if the hate speech that Part 5.3B prevents is political in nature, that speech carries little weight in our constitutional system.⁷⁶ The reason arises from a paradox that free political communication can be exercised to undermine free political communication.

Preventing hate crime coheres with the constitutionally prescribed system of government

30. Rather than entrench individual rights, our Constitution secures rights by ‘ensuring, as far as possible, each a share, and an equal share, in political power’.⁷⁷ The need for the implied freedom arises from a ‘paradox’ inherent in popular sovereignty.⁷⁸ At the extremes, popular sovereignty can undermine itself.
31. A mirror paradox arises in the exercise of free political communication. Though the implied freedom is not a personal right,⁷⁹ at the extremes, the exercise of free political communication can undermine the rationale for free political communication in the first place.⁸⁰ ‘Hate speech is not only used to justify restrictions or attacks on the rights of protected groups on prohibited grounds’; it also ‘impacts on that group’s ability to respond to the substantive ideas under debate, thereby placing a serious barrier to their

⁷⁶ So much so that it has been suggested that some forms of hate speech are not protected by the implied freedom at all: see *Catch The Fire Ministries Inc v Islamic Council of Victoria Inc* (2006) 15 VR 207, 246 [113] (Nettle JA), 265 [208] (Neave JA); *Sunol v Collier [No 2]* (2012) 289 ALR 128, 147 [88]–[89] (Basten JA), cf at 138 [42]–[43] (Bathurst CJ), 141–142 [65], 143 [68] (Allsop P); *Owen v Menzies* [2013] 2 Qd R 327, 333 [2]–[4] (de Jersey CJ), 352–3 [73]–[76] (McMurdo P), 368–9 [156] (Muir JA). Cf *Hanson v Faruqi* [2026] FCAFC 96, [138]–[140] (Perry, Kennett and Bennett JJ).

⁷⁷ Harrison Moore, *The Constitution of the Commonwealth of Australia* (John Murray, 1st ed, 1902) 329, cited with approval in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 136, 139–140 (Mason CJ); *McCloy v New South Wales* (2015) 257 CLR 178, 202 [27] (French CJ, Kiefel, Bell and Keane JJ), 226 [110]–[111] (Gageler J), 258 [219] (Nettle J); *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 68 [87] (Gageler J); *Unions NSW v New South Wales* (2019) 264 CLR 595, 660 [178] (Edelman J); *LibertyWorks Inc v Commonwealth* (2021) 274 CLR 1, 22 [44] (Kiefel CJ, Keane and Gleeson JJ); *Babet v Commonwealth* (2025) 99 ALJR 883, 895 [42] (Gageler CJ and Jagot J).

⁷⁸ *McCloy v New South Wales* (2015) 257 CLR 178, 227 [114] (Gageler J); *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537, 565 [76] (Gageler J).

⁷⁹ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560 (the Court); *Babet v Commonwealth* (2025) 99 ALJR 883, 907 [104] (Gordon J); *Ravbar v Commonwealth* (2025) 99 ALJR 1000, 1078 [337] (Jagot J), 1097 [424] (Beech-Jones J); *Farmer v Minister for Home Affairs* (2025) 99 ALJR 1408, 1414 [1], 1421 [37] (Gageler CJ, Gordon and Beech-Jones JJ), 1447 [185] (Gleeson J).

⁸⁰ As Edelman J put it, ‘[a]bsolute freedom for the pike is death for the minnow’: *Unions NSW v New South Wales* (2019) 264 CLR 595, 651 [155].

full participation in our democracy’.⁸¹ In a similar vein, in *Farmer v Minister for Home Affairs*, Jagot J observed that, left unchecked, the harms resulting from the incitement of discord in the Australian community ‘would be potentially incompatible with the continuation of Australia’s form of constitutionally protected representative and responsible government’.⁸² In short, untrammelled speech can imperil the equal share of political power promised by the Constitution.⁸³

32. The same paradox has been recognised in human rights systems, including the *International Covenant on Civil and Political Rights*,⁸⁴ which Part 5.3B is designed to implement in part.⁸⁵ Article 19(2) protects freedom of expression. However, art 19(3) recognises that the exercise of that freedom ‘carries with it special duties and responsibilities’. Often freedom of expression is limited to protect the rights of others. In a proportionality analysis, hate speech carries little weight and is readily outweighed by the need to protect the rights of others.⁸⁶ More fundamentally, art 5(1) recognises that some exercises of free speech and other rights may be so antithetical to the values of the Covenant that they lie outside its protection altogether.⁸⁷ Article 5(1) was specifically included ‘to impede the abusive exercise of certain rights of the Covenant by individuals and groups supportive of National Socialist, fascist or other totalitarian ideologies’.⁸⁸ That is why there is no tension between freedom of expression in art 19(2)

⁸¹ *Saskatchewan (Human Rights Commission) v Whatcott* [2013] 1 SCR 467, 507 [75] (Rothstein J for the Court).

⁸² *Farmer v Minister for Home Affairs* (2025) 99 ALJR 1408, 1461 [246] (Jagot J).

⁸³ See *Hanson v Faruqi* [2026] FCAFC 96, [154], [182]-[186] (Perry, Kennett and Bennett JJ).

⁸⁴ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁸⁵ *Criminal Code*, s 114A.1(1)(b)(i).

⁸⁶ Eg *Pastörs v Germany* [2019] ECHR 673, [46]-[49] (concerning Holocaust denial by a Member of Parliament); *Saskatchewan (Human Rights Commission) v Whatcott* [2013] 1 SCR 467, 520-1 [112]-[114] (Rothstein J for the Court).

⁸⁷ For example, in *MA v Italy*, the UN Human Rights Committee found art 5 removed the act of ‘reorganizing the dissolved fascist party’ from the scope of the human rights protected by the Covenant: *Views: Communication No 117/1981*, UN Doc Supp No 40 (A/39/40) 190 (10 April 1984) [13.3]. The equivalent clause in art 17 of the European Convention on Human Rights has also been applied to remove statements from the protection of freedom of expression in art 10 in the case of hate propaganda directed at Muslim and Jewish people: eg *Norwood v United Kingdom* (2005) 40 EHRR SE11, 112-3; *Pavel Ivanov v Russia* (European Court of Human Rights, First Section, Application No 35222/04, 20 February 2007).

⁸⁸ William Schabas, *UN International Covenant on Civil and Political Right: Nowak’s CCPR Commentary* (NP Engel, 3rd ed, 2019) 116 [8].

and art 20(2),⁸⁹ which requires the prohibition of '[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'.⁹⁰ Freedom of expression simply does not extend to the destruction of the human rights of others.

33. In the same way, hate speech is antithetical to the values underlying ss 7 and 24 of the Constitution. By preventing such speech and the harms it causes, Part 5.3B of the *Criminal Code* 'support[s] and enhance[s] equality of access to government, and the system of representative government which the freedom protects'.⁹¹

C. Chapter III of the Constitution

34. In support of their argument that Part 5.3B of the *Criminal Code* infringes Ch III of the Constitution, the plaintiffs assert the part 'bears the hallmarks' of a bill of attainder or a bill of pains and penalties.⁹² It does not.
35. In the Australian constitutional context,⁹³ the 'real question is not whether the Act amounts to a bill of attainder [or bill of pains and penalties], but whether it exhibits that characteristic of a bill of attainder which is said to represent a legislative intrusion upon judicial power'.⁹⁴
36. As this Court held in *Duncan v New South Wales*, the two key features of a bill of pains and penalties amounting to 'a legislative intrusion upon judicial power' are (1) a legislative determination of breach by some person of some antecedent standard of conduct; and (2) legislative imposition on that person of punishment consequent on that determination of breach.⁹⁵
37. Part 5.3B does not determine a breach of any standard of conduct by anyone. Division

⁸⁹ 'Art 5(1) is closely related to the special prohibitions of propaganda for war and of advocacy of national, racial and religious hatred in Art 20': William Schabas, *UN International Covenant on Civil and Political Right: Nowak's CCPR Commentary* (NP Engel, 3rd ed, 2019) 113 [1].

⁹⁰ Cf PS [41] (in relation to an apparent tension between the equivalent provisions of CERD).

⁹¹ *McCloy v New South Wales* (2015) 257 CLR 178, 221 [93] (French CJ, Kiefel, Bell and Keane JJ). See also *Sunol v Collier [No 2]* (2012) 289 ALR 128, 147 [89] (Basten JA); *Owen v Menzies* [2013] 2 Qd R 327, 352 [72] (McMurdo P); *Durston v Anti-Discrimination Tribunal [No 2]* [2018] TASSC 48, [53] (Brett J).

⁹² PS [103].

⁹³ Cf US Constitution, Art I, s 9, cl 3; Art I, s 10, cl 1.

⁹⁴ *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 649-50 (Dawson J), quoted with approval in *Haskins v Commonwealth* (2011) 244 CLR 22, 37 [25] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁹⁵ (2015) 255 CLR 388, 408 [43] (the Court); *Ravbar v Commonwealth* (2025) 99 ALJR 1000, 1040 [154] (Gordon J, Gleeson and Beech-Jones JJ agreeing).

114A allows for a ‘prohibited hate group’ to be prescribed if various conditions are met. Under s 114A.4, one of those conditions is that the AFP Minister is satisfied on reasonable grounds that the organisation has engaged in hate crimes or advocated engaging in hate crimes. But it is well-settled that members of executive can make findings about conduct that would, if proved on admissible evidence to the criminal standard, constitute a criminal offence.⁹⁶ To paraphrase what this Court said in *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd*, ‘[i]n determining that [an organisation has engaged in hate crimes], as a preliminary to [the making of a regulation], the [Minister] is not adjudging and punishing criminal guilt’.⁹⁷

38. Division 114B then makes it an offence for a person to do various things related to a prohibited hate group. Those offences set a standard of conduct for the future and cannot be characterised as somehow amounting to findings of a breach of any standard of conduct in the past.
39. Nor does Part 5.3B mete out any punishment or a prima facie punitive detriment of any kind.⁹⁸ Division 114B merely stipulates penalties for the offences it contains, but that does not amount to the infliction of punishment by legislative fiat. Those penalties can only apply if a person commits one of the offences in the future and is found guilty and punished by a court in the ordinary way. ‘If anything, therefore, the legislation recognises that it is for the judiciary alone to determine the existence of any contravention of law and the consequences of any such contravention including, if authorised, punishment of the contraveners’.⁹⁹
40. Part 5.3B simply bears no resemblance to a bill of pains and penalties or a bill of attainder.

⁹⁶ *Duncan v New South Wales* (2015) 255 CLR 388, 407-8 [41] (the Court).

⁹⁷ (2015) 255 CLR 352, 376 [49] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

⁹⁸ *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1, 12 [16] (Gageler CJ, Gordon, Gleeson and Jagot JJ), 56-7 [241]-[242] (Beech-Jones J); *EGH19 v Commonwealth* (2026) 100 ALJR 400, 410 [14] (Gageler CJ and Gleeson J), 424 [83] (Gordon J), 466-7 [296] (Jagot J), 478 [348] (Beech-Jones J); *Ravbar v Commonwealth* (2025) 99 ALJR 1000, 1093 [407] (Jagot J, Gageler CJ agreeing). Part 5.3B does not deregister the first plaintiff, but even if it did, a power to wind up or dissolve artificial legal entities has never been treated as exclusively judicial in nature: see *Ravbar* at 1071-2 [298]-[303] (Steward J).

⁹⁹ *Ravbar v Commonwealth* (2025) 99 ALJR 1000, 1094 [411] (Jagot J, Gageler CJ agreeing). See also *Bigelow v Forrest*, 76 US 339, 345 (1869) (‘[The] limitation upon bills of attainder does not apply to proceedings in courts, in individual cases, where there are regular trials and formal proceedings in which the individual has full opportunity to defend’).

PART V: Time estimate

41. It is estimated that Attorney-General for Queensland will require 25 minutes for oral argument.

Dated 21 August 2026.



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

Pursuant to *Practice Direction No. 1 of 2024*, this annexure sets out the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provisions	Reason for providing version	Applicable date or dates
Australian legislation					
1.	<i>Commonwealth Constitution</i>	Current	ss 7, 24, 51(vi), 51(xxix), 51(xxxix), 61; Ch III; s 119	In force at all relevant times	All relevant times
2.	<i>Criminal Code Act 1995 (Cth)</i>	Current	s 5; sch, Part 5.3B	In force at all relevant times	All relevant times
3.	<i>Criminal Code (Prohibited Hate Group – White Australia) Regulations 2026 (Cth)</i>	Current	ss 1-4	In force at all relevant times	All relevant times
4.	<i>Judiciary Act 1903 (Cth)</i>	Current	s 78A	In force at all relevant times	All relevant times
International legislation					
5.	<i>Constitution Act 1867 (Imp)</i> , 30 & 31 Vict, c 3	Current	s 91	Illustrative purposes	As at 1945 and current
6.	<i>Government of India Act 1935 (Imp)</i> c 2	As enacted	sch IX, s 72	Illustrative purposes	As at 1945
7.	<i>United States Constitution</i>	Current	art I, s 9, cl 3; art I, s 10, cl 1	Illustrative purposes	Current
International conventions					
8.	<i>Convention for the Protection of Human Rights and Fundamental</i>	Current	arts 10, 17	Illustrative purposes	Current

	<i>Freedoms</i> , opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953)				
9.	<i>International Covenant on Civil and Political Rights</i> , opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)	Current	arts 5, 19, 20	Illustrative purposes	Current