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Before the High Court: Politics, Police and Proportionality - An Opportunity to Explore the Large Test: *Coleman v Power*

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Abstract

On 26 March 2000, Patrick Coleman stood in the Townsville Mall and handed out leaflets with the following printed on them: 'Get to know your local corrupt type coppers', identifying Constable Brendan Power as one of the 'slimy lying bastards' the subject of Coleman's attention. A number of police officers, including Constable Power, attended the scene and, following a struggle, Coleman was placed in a police vehicle. He was charged with distributing material with insulting words contrary to s7(1)(d)1 of the Vagrants Gaming and Other Offences Act 1931 (Qld) (hereinafter Vagrants Act), using insulting words contrary to s7A(1)(c)2 of the same Act, obstructing police, serious assault against police and wilful damage. At trial, Coleman was found guilty of all the charges except that of wilful damage. On 15 November 2002, Coleman was granted special leave to appeal to the High Court. Coleman argues that the legislation forming the basis of the 'insulting words' charges is invalid and that therefore all the charges against him fall away. Coleman asserts invalidity by claiming that the two relevant sections of the Vagrants Act infringe the implied constitutional freedom of political communication by going 'far beyond any legitimate aim [of the Act] ... far beyond protecting the public integrity of the police force'. Further, that his purported arrest was unlawful, based on charges which were invalid, that they therefore constituted unlawful assault upon him, giving rise to a right of self-defence against the police officers which he exercised and which formed the factual basis of the charges of obstructing and assaulting police. The Coleman v Power appeal presents the High Court with an opportunity to further consider the scope of the implied constitutional freedom of political communication, the test to determine legislative invalidity of regulation that inhibits that freedom and possibly examine issues such as police powers of arrest. This is Coleman's second attempt at raising the issue of the constitutional freedom in the High Court. His individual position aside, the rest of the Australian community should watch with interest to see how the Court interprets and applies the freedom. Will the Court give the freedom a strong role in restricting the legislative power of the state, placing great weight on citizens' need and desire to protest? Or will it confine the freedom's operation to a limited sphere?

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Before the High Court

Politics, Police and Proportionality — An Opportunity to Explore the *Lange* Test: *Coleman v Power*

ELISA ARCIONI*

1. Patrick Coleman: From Student Activist to High Court Appellant

On 26 March 2000, Patrick Coleman stood in the Townsville Mall and handed out leaflets with the following printed on them: ‘Get to know your local corrupt type coppers’, identifying Constable Brendan Power as one of the ‘slimy lying bastards’ the subject of Coleman’s attention. A number of police officers, including Constable Power, attended the scene and, following a struggle, Coleman was placed in a police vehicle. He was charged with distributing material with insulting words contrary to s7(1)(d)¹ of the *Vagrants Gaming and Other Offences Act* 1931 (Qld) (hereinafter *Vagrants Act*), using insulting words contrary to s7A(1)(c)² of the same Act, obstructing police, serious assault against police and wilful damage. At trial, Coleman was found guilty of all the charges except that of wilful damage.

Coleman was unsuccessful in the District Court but the Queensland Court of Appeal allowed his appeal in part. That Court was unanimous in concluding that the relevant part of s7A(1)(c) was beyond the Queensland Parliament’s legislative power, as it infringed the implied constitutional freedom of political communication. However, the Court was split in relation to whether s7(1)(d) was invalidated and the consequences of any invalidity of the *Vagrants Act* on the remainder of Coleman’s charges and sentence.

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- 1 ‘Any person who, in any public place or so near to any public place that any person who might be therein, and whether any person is therein or not, could view or hear: ... (d) uses any threatening, abusive or insulting words to any person ... shall be liable to a penalty of \$100 or to imprisonment for six months and may, in addition thereto, or in substitution therefore, be required by the court to enter into a recognisance, with or without sureties to be of good behaviour for any period not exceeding 12 months, and, in default of entering into such recognisance forthwith, may be imprisoned for any period not exceeding six months unless such recognisance is sooner entered into.’
- 2 ‘Any person: (a) who by words capable of being read either by sight or touch prints any threatening, abusive, or insulting words of or concerning any person by which the reputation of that person is likely to be injured, or by which the person is likely to be injured in the person’s profession or trade, or by which other persons are likely to be induced to shun, or avoid, or ridicule, or despise the person; or ... (c) who delivers or distributes in any manner whatsoever printed matter containing any such words ... shall be liable to a penalty of \$100 or to imprisonment for six months.’

On 15 November 2002, Coleman was granted special leave to appeal to the High Court. Coleman argues that the legislation forming the basis of the ‘insulting words’ charges is invalid and that therefore all the charges against him fall away. Coleman asserts invalidity by claiming that the two relevant sections of the *Vagrants Act* infringe the implied constitutional freedom of political communication by going ‘far beyond any legitimate aim [of the Act] ... far beyond protecting the public integrity of the police force’.³ Further, that his purported arrest was unlawful, based on charges which were invalid, that they therefore constituted unlawful assault upon him, giving rise to a right of self-defence against the police officers which he exercised and which formed the factual basis of the charges of obstructing and assaulting police.

The *Coleman v Power* appeal presents the High Court with an opportunity to further consider the scope of the implied constitutional freedom of political communication, the test to determine legislative invalidity of regulation that inhibits that freedom and possibly examine issues such as police powers of arrest. This is Coleman’s second attempt at raising the issue of the constitutional freedom in the High Court.⁴ His individual position aside, the rest of the Australian community should watch with interest to see how the Court interprets and applies the freedom. Will the Court give the freedom a strong role in restricting the legislative power of the state, placing great weight on citizens’ need and desire to protest? Or will it confine the freedom’s operation to a limited sphere?

2. *The Freedom*

From the late 1970s, decisions of the High Court and English courts have reflected the importance of freedom of communication generally and, more specifically, on political matters.⁵ However, it was not until 1992 that a majority of the High Court accepted that a freedom of political communication is implied in the Australian Constitution.⁶ Even then, each judgment of the majority described the freedom differently and to this day differences remain. Nevertheless, some elements are agreed upon. First, the freedom finds its source in the system of governance established by the Constitution, although the precise description of that system and the requirements for its operation are not settled; neither is the scope of the freedom (this is considered below). Secondly, the freedom of political communication is freedom *from* legislative and executive restraint, not a positive

3 *Coleman v Power* (Queensland District Court, Pack J, 26 February 2001) at [18].

4 Coleman’s last (failed) attempt was an application concerning the Queensland Court of Appeal’s decision in *Sellars v Coleman* [2001] 2 Qd R 565. Special leave was refused on 26 June 2002.

5 *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth* (1977) 139 CLR 54 at 88 (Murphy J); *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 52 (Mason J); *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 581–82 (Murphy J); *Davis v The Commonwealth* (1988) 166 CLR 79 at 100 (Mason CJ, Deane & Gaudron JJ) and 116–17 (Brennan J); *Attorney-General v Observer Ltd* [1990] AC 109 at 203.

6 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 (hereinafter *Nationwide News*); *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 (hereinafter *Australian Capital Television*).

right capable of enforcement; nor is it an absolute freedom. The freedom affects Australian legislation by rendering it invalid when it infringes the freedom in an unacceptable way. It is this outcome that Coleman will urge upon the Court in relation to portions of the *Vagrants Act*.

In the uncharacteristically unanimous reasons for judgment in *Lange v Australian Broadcasting Corporation*⁷ (hereinafter *Lange*), the High Court explained how legislative validity is to be determined in relation to legislation which impacts upon the freedom:⁸

First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?⁹ Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative government and the procedure prescribed by s128 [of the Constitution] for submitting a proposed amendment of the *Constitution* to the informed decision of the people ...¹⁰ If the first question is answered “yes” and the second is answered “no” the law is invalid.

The *Lange* test seems to have been accepted by courts around the country as the authoritative approach in determining the validity of legislation and in interpreting the common law.¹¹ I do not propose to challenge that acceptance in this article and consider it unlikely that the High Court will do so in this appeal. However, there is scope for disagreement as to its application, perhaps reflective of a diversity of opinion regarding which method of reasoning in earlier judgments concerning the implied freedom is the one encapsulated by the *Lange* test. It is also unlikely that a majority of the Court will question the underlying existence of the freedom, given the unanimous judgment of the High Court in *Lange*, its application in subsequent cases and the parties’ implicit acceptance of both the freedom and the *Lange* test at the special leave application for this appeal. However, only three members of the *Lange* bench remain on the Court (McHugh, Gummow and Kirby JJ) and two other members of the current bench have made public their criticism of the line of authority regarding the freedom.¹²

7 (1997) 189 CLR 520.

8 *Id* at 567–68.

9 Compare *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 337 (hereinafter *Cunliffe*).

10 *Id* at 300, 324, 339, 387–88. In this context, there is little difference between the test of ‘reasonably appropriate and adapted’ and the test of proportionality: see at 377, 396.

11 *Roberts v Bass* (2002) 77 ALJR 292 at 304 [66] (Gaudron, McHugh & Gummow JJ) and 323 [162] (Kirby J); *Jones v Scully* [2002] FCA 1080 at [236]; *Coleman v P* (2001) 189 ALR 341 at 342 [3] (McMurdo P) and 354 [45] (Thomas JA with whom Davies JA agreed at 351 [34]); *Coleman v Power*, above n3 at [22]–[23].

12 Justice Dyson Heydon, ‘Judicial Activism and the Death of the Rule of Law’ (2003) 47(1) *Quadrant* 9 at 17; *Roberts v Bass*, *id* at 345 [285] (Callinan J) referring to his Honour’s earlier reasons in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 330–332 [338].

3. *The First Limb of the Lange Test — Threshold Requirements and a Question of Scope*

The first requirement of the *Lange* test is that the legislation ‘effectively burden’ the freedom in its terms, operation or effect. This requirement necessarily gives rise to a question about what constitutes a ‘burden’. There does not appear to be any reason to depart from the ordinary definition of the word.¹³ In the context of the *Lange* test, ‘burden’ should therefore have a broad meaning, encompassing any inconvenience, restriction or adverse consequence imposed upon political communication, although it is questionable whether any ‘mere’ burden is sufficient. Nevertheless, prohibition, such as that provided for in the *Vagrants Act*, could clearly fit within the concept of burden in the *Lange* test. The two relevant sections of the *Vagrants Act* each create a legal restriction on communication, backed by the possibility of a criminal record, financial penalty and/or incarceration. There is also the direct practical restriction on the exercise of the freedom, through the possibility of arrest. Such consequences would presumably deter individuals from exercising the freedom and in the event of its exercise, expose the individual to damage to personal reputation through a criminal record, loss of money and perhaps liberty through the imposition of a custodial sentence. If providing for damages constitutes a burden on the freedom, by having a ‘chilling effect’,¹⁴ all the more reason for prohibition to undoubtedly fall within the scope of ‘effective burden’.¹⁵

Although prohibition per se will almost certainly constitute a ‘burden’ for the purposes of the first limb of the *Lange* test, because of the wording of the relevant sections of the *Vagrants Act* this is relevant to Coleman’s appeal only if ‘insulting’ language can also be political communication. In the absence of legislative definition, ‘insulting’ must be given its ordinary meaning, with assistance to be drawn from judicial consideration of the word. In addressing this matter, the Queensland Court of Appeal drew together relevant authorities, which all support a broad interpretation of the word ‘insulting’.¹⁶ The word clearly includes ‘to treat insolently’ or with scorn, or to ‘affront’,¹⁷ possibly extending to the broader idea of ‘an act ... of attacking’,¹⁸ but does it include political communication? I would support the Court of Appeal’s recognition of the reality of politics and answer that question in the affirmative.¹⁹ Political debate, in the most limited sense of

13 ‘Burden’ is defined in the *Macquarie Dictionary* (3rd ed, 1998 reprint) at 293: ‘1. that which is carried; a load. 2. that which is borne with difficulty ...’; the *Oxford English Dictionary* (1970) vol I also emphasises the notion of a ‘load’ at 1182.

14 *Roberts v Bass*, above n11 at 312 [102] (Gaudron, McHugh & Gummow JJ).

15 The reasons in *Lange* would support that conclusion by implying that prohibition would be sufficient. See above n7 at 568: ‘The law of defamation does not contain any rule that *prohibits* an elector from communicating ... *Nevertheless*, in so far as the law of defamation requires electors and others to pay damages for the publication of communications ... it effectively burdens the freedom of communication’. [Emphasis added.]

16 *Coleman v P*, above n11 at 344–45 [11]–[13] (McMurdo P) and 356–57 [52]–[55] (Thomas JA with whom Davies JA agreed at 351–52 [35]).

17 *Macquarie Dictionary*, above n13 at 1106; see also the *Oxford English Dictionary* (1970) vol V at 361.

18 *Oxford English Dictionary*, *ibid*.

argument regarding the policies of elected representatives or electoral candidates, can clearly fall within the scope of ‘insulting’ language. Debate in this area of political communication would encompass vigorous argument, including passionate attempts to destroy another’s electoral reputation. In the High Court’s recent decision in *Roberts v Bass*²⁰ it was held by a majority of the Court that ‘targeting’ an electoral opponent, in the sense of acting with a motive to injure his or her reputation as a politician, was not improper but part of a ‘political struggle’.²¹ The High Court’s acceptance of the combative nature of politics, together with observations such as it being ‘unrealistic’ that political campaigns in Australia be ‘genteel’,²² and that ‘political debate’ does not fit any ‘platonic ideal’,²³ tends towards the conclusion that political communication and ‘insulting’ language are not mutually exclusive.

Once it is concluded that the *Vagrants Act* has the potential to burden the freedom, there is an argument that a further threshold must be passed before attention is given to the second limb of the *Lange* test. That possible further requirement is that the actual communication in question must fall within the scope of the freedom.²⁴ That is, not only must the legislation have the theoretical breadth to burden political communication, the factual circumstances of any case questioning the validity of the legislation must fit within the scope of ‘political communication’ protected by the Constitution. This argument is based on the need for the Court to have before it a factual basis upon which to determine the legal issues, the circumstances must constitute a ‘suitable vehicle’ to traverse the legal ground. In the special leave application of the Rabelais case, Gleeson CJ and Gummow J did not seek to dissuade the parties of the submission that such a threshold requirement exists.²⁵ At the special leave application for the present appeal, when asked whether the Attorney-General of Queensland accepted that ‘it was a political statement that was here involved’, his counsel responded ‘we accept that the section is apt to be engaged when a political statement is made, and we accept that the nature of the statement was such as to be *possibly* characterised as that’.²⁶ The latter statement suggests that the respondents do not go so far as to concede the issue.

I hope that at least one of the parties raises the argument left open by the ‘possibly’ in the Attorney’s response, in order for the Court to provide some timely guidance concerning the scope of the freedom. It is clear from *Lange* that the freedom applies to ‘communication about government or political matters’,²⁷

19 *Coleman v P*, above n11 at 345 [13] (McMurdo P) and 355 [48], 359 [66] (Thomas JA).

20 *Id* at 292.

21 *Id* at 300–01 [39]–[42] (Gleeson CJ), 313 [107] (Gaudron, McHugh & Gummow JJ) and 327 [184] (Kirby J).

22 *Id* at 325 [171] (Kirby J).

23 *Id* at 313 [227] (Hayne J). See also *Levy v Victoria* (1997) 189 CLR 579 at 623 (McHugh J).

24 Compare with *Coleman v P*, above n11 at 354 [46] (Thomas JA).

25 *Brown v The Members of the Classification Review Board* (transcript of special leave application, 11 December 1998). Special leave was refused.

26 *Coleman v Power* (transcript of special leave application, 15 November 2002) at 3. [Emphasis added.]

27 Above n7 at 567.

although it is questionable how ‘government’ and ‘political’ sit together — whether one is a subset of the other or if not, what the overlap is between the two. Regardless of the outcome of that debate, the freedom covers more than communication concerning electoral candidates during an election period.²⁸ It includes communication concerning State, Territory and national issues, possibly extending to international issues that may have implications in this country.²⁹ But how far does it extend? Members of the Court have questioned whether there is an end to what is ‘political’³⁰ while another has cautioned that the freedom not be ‘debased’³¹ by giving it too broad a coverage. It is unlikely and perhaps undesirable for the Court to give a definition of ‘political’ that could apply to all situations. However, a consideration of the position of police in society could provide one avenue of argument for this appeal.

The scope of the freedom must be referable to what is deemed to be necessary for the operation of the system of governance prescribed by the Constitution. The essence of that system is representative and responsible government. It is settled that the details of the system must be based firmly on the text and structure of the Constitution and a number of sections have been cited as the font of such a system. These include ss7, 24, 25 and 128.³² However, it is inevitable that notions external to the text will assist in determining what is required for the maintenance of that constitutionally-prescribed system. A basic description of representative government is a system where parliamentarians are elected by the people through free and informed elections. Responsible government begins with the consequent relationship between electors and the elected, in that the elected members are *responsible*, ie accountable, to the citizens whom they represent. However, responsible government does not end there; it extends accountability to the apparatus of government and official conduct more generally.

In *Lange*, the unanimous Court stated ‘the attitudes of the electors to the conduct of the Executive may be a significant determinant of the contemporary practice of responsible government’.³³ The ‘executive’ is the branch of government whose apex is the Ministers, elected representatives of the people and therefore accountable to them. However, it is not only the Ministers and their personal actions that is covered by the freedom. It is the entire executive arm of government that falls within its scope, which includes the public service,³⁴ the ‘institutions and agencies of government’³⁵ and those who staff them.³⁶ Those institutions and individuals are the repositories of significant power. To restrict the

28 *Id* at 561.

29 *Id* at 576.

30 *Theophanous v The Herald & Weekly Times Ltd* (1993) 182 CLR 104 at 123 (Mason CJ, Toohey & Gaudron JJ) (hereinafter *Theophanous*).

31 *Levy v Victoria*, above n23 at 638 (Kirby J).

32 See, for example *Nationwide News*, above n6 at 46 (Brennan J) and 71–2 (Deane & Toohey JJ); *Australian Capital Television*, above n6 at 137–8 (Mason CJ) and 227–232 (McHugh J).

33 Above n7 at 559.

34 *Id* at 561. See also *Nationwide News*, above n6 at 74 (Deane & Toohey JJ).

35 *Nationwide News*, *id* at 48 (Brennan J); Compare at 34 ‘public institutions’ (Mason CJ); *Theophanous*, above n30 at 124 (Mason CJ & Gaudron J) and 150 (Brennan J); *Australian Capital Television*, above n6 at 217 (Gaudron J); *Cunliff*, above n9 at 329 (Brennan J).

36 *Nationwide News*, *id* at 79 (Deane & Toohey JJ).

coverage to the Ministers alone would give the freedom little substance. Just as in *Roberts v Bass*,³⁷ where the Court looked to the reality of politics to determine the requirements of the freedom, the Court in this case should take the same approach.

Police officers are arguably part of the executive by reason of being the holders of a public office,³⁸ with responsibilities including the protection of the rule of law and maintenance of the peace. As members of the executive, discussion of their functions must fit within the scope of the freedom. There is continuing debate concerning the precise position of police, as they have a measure of independence perhaps inconsistent with much of the public service. It is also clear that they are not ‘servants’ of the state.³⁹ Nevertheless, a consideration of their functions and powers shows the need for accountability. Police are the enforcement arm of the government. In exercising their responsibilities, police are given wide powers over citizens; to restrain, detain, question and charge. The impartiality of the police force is essential for the operation of that role. That enforcement must therefore be open to public scrutiny, just as are tribunals and courts.⁴⁰ In *Theophanous v The Herald & Weekly Times Ltd*⁴¹ the ‘propriety, appropriateness or significance of official conduct’ was one of the descriptions of the type of communication that was determined to fall within the scope of the freedom. The conduct of police clearly falls within this conception of the freedom.

4. *The Balancing Act — Finding the Legislation’s Purpose and Evaluating its Reasonableness*

The second part of the *Lange* test requires the Court to determine whether it was open to the legislature to consider the legislation as ‘reasonably appropriate and adapted’ to achieve a legitimate purpose or purposes consistent with the prescribed system of governance. Well-accepted methods of statutory interpretation should be used, considering the complete sections of the *Vagrants Act*, read in the context of the whole Act, although it should be noted that isolating the purpose or purposes of the legislation may be difficult, perhaps impossible.⁴² The legislative history and perhaps previous judicial discussion of its terms would also assist. The Court of Appeal’s description of the Act’s purposes, as well as Coleman’s own submission in that court, provide a number of options. They include the prevention of breaches of the peace, to ‘ensure basic standards of conduct in public’,⁴³ and prevent ‘public acrimony and violence’,⁴⁴ and the maintenance of the integrity of the police. All of these may be accepted to be legitimate aims consistent with the maintenance of the constitutionally-prescribed system of government.

37 Above n11 at 312 [102] (Gaudron, McHugh & Gummow JJ).

38 *Attorney-General of New South Wales v Perpetual Trustee Company* [1955] AC 457.

39 *Enever v The King* (1906) 3 CLR 969.

40 *Nationwide News*, above n6.

41 Above n30 at 180 (Deane J).

42 *Avel Pty Ltd v Attorney-General for New South Wales* (1987) 11 NSWLR 126 at 127 (Kirby P).

43 *Coleman v P*, above n11 at 348 (McMurdo P).

44 *Id* at 352 [36] (Davies JA). Each of those formulae possibly arising from the Queensland Attorney-General’s submission that the purposes were the ‘regulation of the conduct of persons, the promotion of good behaviour and the prevention of breaches of the peace’: *id* at 355–56 [51] (Thomas JA).

The focus then becomes whether the methods employed in the relevant sections of the *Vagrants Act* were ‘reasonably appropriate and adapted’ to achieve those ends. That is the phrase used in *Lange* which includes a footnote to *Cunliffe v The Commonwealth*⁴⁵ and the statement that ‘[i]n this context, there is little difference between the test of “reasonably appropriate and adapted” and the test of proportionality’. The use of those two concepts abounds in the jurisprudence concerning characterisation of a law for the purpose of determining legislative power. However, little assistance can be drawn from their prevalence, except to say that the essence of the test is the balance that is struck between the methods employed and the purpose of the legislation.

A distinction has been made concerning the test to be applied to legislation, depending on whether it has as its object the restriction of the freedom or whether that is the incidental effect of its operation. That distinction emerged before *Lange*⁴⁶ but has been applied since.⁴⁷ In the first category, it has been stated that such legislation requires ‘compelling justification’ to be held valid, while the second category is subject to a less stringent test. If the distinction is applied in this appeal, the *Vagrants Act* seems to fall within the second category, although from some of the parliamentary debates there arises a suggestion that political speech may have been its target.⁴⁸ However, it is questionable whether such a distinction can exist within the confines of the second limb of the *Lange* test. The better view is that the distinction merely serves to emphasise that the test applies differently to different legislation and that in every case it is a question of degree.

Regardless of the legislation’s characterisation, in order to evaluate this ‘question of degree’, a number of considerations should be addressed, as set out below, rather than merely stating that the law was or was not ‘reasonably appropriate and adapted’. Guidance is required from the Court to give content to statements such as the legislation being ‘extreme’⁴⁹ or constituting an ‘extraordinary intrusion’⁵⁰ into the freedom. In doing so, it is important to remember that it is for the Parliament to decide the way in which the balance should be achieved. The Court has the restricted role of overseeing that choice.

A. *Some Relevant Considerations*

(i) *Legislative Purpose and the Freedom — Their Relative Importance*

Although the focus is on the relationship between the legislative purpose and the methods chosen to achieve it, that should be done in the context of the impact the provisions have on the freedom of political communication. The conclusion will

45 Above n9 at 300, 324, 339, 387–88, with reference also given to 377, 396.

46 *Nationwide News*, above n6 at 76–77 (Deane & Toohey JJ); *Id* at 299.

47 *Kruger v The Commonwealth* (1997) 190 CLR 1 at 126–28 (Gaudron J); *Levy v Victoria*, above n23 at 619 (Gaudron J).

48 Mr Maher, Queensland, Legislative Assembly, *Parliamentary Debates (Hansard)*, 27 November 1936 at 1825; See also The Honourable Premier of Queensland W Forgan Smith at 1838–39 quoted in *Coleman v P*, above n11 at 348–49 [24] (McMurdo P).

49 *Cunliffe*, above n9 at 338 referring to *Nationwide News*, above n6.

50 *Nationwide News*, *id* at 101 (McHugh J).

always be a value judgment, reflecting the way in which the individual Justices prioritise the freedom and the purposes of the legislation. It is therefore important that in conducting the balancing exercise, explicit consideration should be given to their relative importance. The detrimental and beneficial effects of the legislation should be canvassed against each.

(ii) An Attempted Balance or an Absolute Ban?

The Court may derive assistance from considering whether the Parliament has attempted to achieve a balance. One approach is to consider the legislation *prima facie* beyond power if it exhibits no attempt at balancing the legislative aims and the freedom,⁵¹ with the onus placed on the party seeking to uphold the legislation's validity to prove that such absolute prohibition is necessary to achieve the legislative aims. There is no doubt that legislation can regulate the exercise of the freedom, but a balance is required. The Court should consider whether there are any defences, exceptions, exemptions, options for gaining permission to contravene the general section and whether such a process is subject to review. Where the regulation is of a severe nature, are there practicable alternatives or is the severity necessary to achieve the legislation's purposes?⁵²

(iii) Manner and Effect of Restriction — Time, Place, Form & Quality

Whether the inhibition placed on the freedom is direct or indirect, the Court should consider the nature of the temporal and spatial restrictions as well as the form or forms of communication that are regulated. Although again a matter of degree, a connection must be shown between the choice of restrictions and the legislative aim. The Court must assess not only what types of communication are affected by the regulation but also the effect of such inhibition on the purpose of the communication, ie dissemination. The freedom is not merely to allow individuals to express their views, rather, it is to allow those views to be received by others. The nature and specific subject-matter of the communication and the expected and desired audience are factors to be taken into account. The Court should assess whether there are ample alternative means of communication available in light of the restrictions in question and whether, by those restrictions, any *meaningful* exercise of the freedom is affected. For example, restrictions on prime time television are obviously more significant than those placed on the 'graveyard' shift.

(iv) Co-existing Alternative Regulation

The Court should consider whether there are alternative regulatory regimes already in place to achieve the purposes of the relevant legislation and if so, whether that legislation adds anything to the regime or merely creates greater restrictions on the exercise of the freedom. In this appeal, there are obvious parallels with criminal defamation, assault and perhaps other offences related to breaches of the peace. In conducting the balancing exercise, the Court may also

51 Id at 53 (Brennan J).

52 Id at 51 (Brennan J).

derive assistance from jurisprudence relating to those areas of regulation. In this case, assistance should be drawn from the law of defamation and the way in which the Court has previously required the defences to defamation to be redefined in order to comply with the constitutional freedom.

5. *A Possible Application to Coleman and the Consequences of Invalidity*

One interpretation of the facts of this appeal is that Coleman was publicly communicating his interpretation of the way in which certain Townsville police officers had been exercising their public powers. Considering the discussion above, that should fall within the scope of the freedom and therefore lead to a consideration of the second limb of the *Lange* test. However, the respondents may wish to raise two arguments in favour of the opposite conclusion, both of which should be rejected. The first is that Coleman was engaged in a personal not political campaign,⁵³ therefore nullifying any recourse to the constitutional protection. This distinction cannot be accepted. It is impossible to draw a clear line between the two. Political campaigns can be personal ones, directing public attention to an alleged instance of misuse of public power against a citizen. On the facts, regardless of Coleman's personal history with the particular policemen identified in his communications, those communications were clearly directed to the voting public, in a public place⁵⁴ and in relation to public officers and institutions.

The second argument is that the communication went beyond that which was appropriate or necessary.⁵⁵ The freedom should not be concerned with what is 'appropriate'. Once a communication fits within the scope of subject matter covered by the freedom, there should not be limitations inherent in the exercise of that freedom. The legislature and the general common law exist to protect other interests of individuals or the community as a whole, and that should be the location of such restrictions. Unlike the law of defamation, alleged malice should not be powerful enough to destroy the protection of the freedom at such a threshold stage. There should be no requirement of balancing competing interests, rights or protection in determining whether the communication falls within the scope of the freedom. The only relevant balancing exercise is contained in the second limb of the *Lange* test.

In applying that second limb, the Court may reach the conclusion that both sections of the *Vagrants Act* are invalid for going further than is necessary for the achievement of any of the purposes described above. There is no doubt that public order, general peace and the integrity of the police force are important aims to be achieved. However, that should not be done in such a way as to seriously inhibit the freedom where there are distinct benefits from the exercise of that freedom in relation to at least one of those aims — the integrity of the police. In order to

53 *Coleman v Power*, above n3 at 11 [28] quoting Magistrate Previtara.

54 Analogous to 'Hyde Park': see *Levy v Victoria*, above n23 at 641–42 (Kirby J).

55 See Mr Bennett's suggestion of such a limitation in the special leave application for *Brown v The Members of the Classification Review Board*, above n25 at 6.

achieve that aim, there must be the opportunity for criticism and debate of the exercise of police powers. '[T]he public interest is never, on balance, served by the suppression of well-founded and relevant criticism of the ... organs of government or of the official conduct or fitness for office of those who constitute or staff them'.⁵⁶ Considering the broad definition to be given to both 'insulting' and 'public place',⁵⁷ there is a severe curtailment of the exercise of the freedom. There does not seem to be any reason for such severity. The restriction is not limited in time and the restriction as to place is relatively meaningless, given the broad definition of 'public place'. There seem to be no defences available to the charges under the *Vagrants Act*.

If Coleman seeks support from the quotation above, the respondents may argue that Coleman's communications were not 'well-founded' or 'relevant', although this was neither conceded in the courts below nor even addressed. Such characterisation of Coleman's acts is irrelevant. His acts are the vehicle to bring the validity of the *Vagrants Act* into question, but its validity is to be judged against its general operation, not only Coleman's actions. Once Coleman's acts fall within the freedom's scope, the factual circumstances become irrelevant in balancing the legislative purposes against the means employed to satisfy them. His acts would only have been relevant at this stage if there existed a defence of 'well-founded and relevant criticism' to the charges of insulting language.

If the Court upholds the conclusion of the Court of Appeal in relation to s7A(1)(c) and also concludes that the prohibition in s7(1)(d) of using 'insulting' language is invalid, the Court will have to consider the question of severance. The Court could sever the word 'insulting' from the two sections, leaving them to operate on 'abusive' or 'threatening' language, although it may have to consider the operation of the subsections as a whole to determine whether they, in their entirety, 'exceed power'.⁵⁸ Alternatively, the Court may consider 'reading down' the sections so that they do not apply to political communication. That would create difficulties in enforcement, if the police were not given some guidance on how to recognise such communication. The better approach is for the Court to sever the offending word 'insulting' and leave it to the Queensland Parliament to determine the manner in which the balance should be struck if they wish to reinstate an offence regarding insulting language. Thus, the legislation would read: s7(1)(d) "Any person who ... (d) uses ~~any~~ threatening or abusive ~~or insulting~~ words ... shall be liable to ..." and s7A(1)(c) "Any person ... who ... prints any threatening or abusive, ~~or insulting~~ words or ... (c) who delivers or distributes in

⁵⁶ *Nationwide News*, above n6 at 79 (Deane & Toohey JJ).

⁵⁷ 'Public place' being defined in s2 of the *Vagrants Act* to include, relevantly: '... every road and also every place of public resort open to or used by the public as of right, and also includes: (a) any vessel, vehicle, building, room, licensed premises, field, ground, park, reserve, garden, wharf, jetty, platform, market, passage or other place for the time being used for a public purpose or open to access by the public, whether on payment or otherwise, or open to access by the public by the express or tacit consent or sufferance of the owner, and whether the same is or is not at all times so open; and (b) a place declared, by regulation, to be a public place ...'

⁵⁸ *Acts Interpretation Act* 1954 (Qld) s9.

any manner whatsoever printed matter containing any such words ... shall be liable to ...”.

In either case, Coleman’s charges under those sections would be set aside. However, do the other charges of obstructing police and assaulting police then fall away in a domino effect? If the head charges were based on invalid legislation, does that infect the arrest made? Police powers of arrest must come under scrutiny. The focus will likely be upon the construction of s35 of the *Police Powers and Responsibilities Act 1997* (Qld) (being the relevant legislation in force at the time of the purported arrest) and its relationship with any common law relating to powers of arrest. If the arrest is found to have been unlawful, the law of self-defence would need to be considered to determine whether Coleman’s actions constituting the basis for the charges of assault and obstruction fall within it. If the answer to those questions is yes, all the charges would fall away.

6. *The Beginning or the End?*

Coleman’s fate in the High Court will clearly have ramifications for the general community’s freedom to engage in such protests and other actions. There is no doubt the Court will have to balance the benefits of public peace and protest. I hope that it does so in a way that acknowledges that balancing act, taking a realistic approach to what is required for our system of governance to operate. I also hope that some broader guidance is provided to legislatures — federal, State and local, concerning how they should be striking that balance when placing limits on what we can do where, when and how.