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BURNS V CORBETT: WHAT IF THE HIGH COURT HAD DECIDED THE IMPLIED FREEDOM OF POLITICAL COMMUNICATION ISSUE?

KEITH THOMPSON *

I INTRODUCTION

In the 2013 federal election, Tess Corbett stood for the seat of Wannon in rural Victoria representing Katter’s Australian party. During the course of the election, she was interviewed by a journalist who questioned her. Presumably so that the electors of Wannon would know whether to vote for her or not, the journalist pressed. Ms Corbett was asked if she ‘considered homosexuals to be in the same category as paedophiles’ and she answered ‘Yes’.¹ In an article written by Rex Martinich, the *Hamilton Spectator* reported that she added: ‘[p]aedophiles will be next in line to be recognised in the same way as gays and lesbians and get rights.’² Similar material was printed the following day in the *Sydney Morning Herald* courtesy of the State Political Correspondent for *The Age*, and in *The Australian* courtesy of its Victoria Political Editor.³ While the article did not report the

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¹*Burns v Corbett* [2013] NSWADT 227 (1 January 2013) (Chesterman DP, Member Kellegan and Member Lowe) [19].

²Ibid.

³Ibid [20].

comparison of homosexuals to paedophiles, it added that Ms Corbett had told *The Australian's* reporter that she was pleased to have 'got on the front page' of the *Hamilton Spectator*.⁴

Mr Gary Burns complained to the Administrative Decisions Tribunal in New South Wales, that Ms Corbett had committed a public act that vilified gay people in New South Wales in breach of the *Anti-Discrimination Act 1977* (NSW). Ms Corbett did not attend the hearing. On appeal she indicated that she did not attend the first hearing because she believed that a New South Wales Tribunal did not have jurisdiction to hear any case against her because she was a resident of Victoria. In the final analysis she was correct since a New South Wales' tribunal's jurisdiction to hear a case against a citizen of another state was at the heart of the decision in her favour in both the New South Wales Court of Appeal⁵ and in the High Court of Australia.⁶ But neither of those decisions touched the implied freedom of political communication argument that Ms Corbett raised in her first appeal to the New South Wales Civil and Administrative Appeals Tribunal.⁷ That argument was dismissed by the Appeals Tribunal because s 49ZT of the *Anti-Discrimination Act 1977* (NSW) had been found valid in the New South Wales Court of Appeal's earlier decision in *Sunol v Collier*.⁸ Section 49ZT's good faith exception meant that section was properly adapted to preserving the implied freedom of political communication and Ms Corbett was found not to have acted in good faith.⁹ But that dismissal of Ms Corbett's implied freedom of political communication argument is not entirely satisfactory because the Court of Appeal did not have to consider whether s 49ZT unduly burdened the implied freedom of political communication

⁴Ibid.

⁵*Burns v Corbett* [2017] NSWCA 3 (2017).

⁶*Burns v Corbett* [2018] HCA 15 (2018).

⁷*Corbett v Burns* [2014] NSWCATAP 42 (2014).

⁸*Sunol v Collier (No 2)* (2012) 260 FLR 414.

⁹*Corbett v Burns* [2014] NSWCATAP 42 (2014) [31-40](Hennessy DP, Senior Member Wakefield and Member Field).

in Ms Corbett's case since *Sunol v Collier* was not an electoral case.¹⁰

I will discuss the implied freedom of political communication issues which arose in the *Burns v Corbett* saga of cases explained below in four parts. In Section II, of this article for the sake of context, I will briefly set out what happened in each of the five hearings where the dispute between Mr Burns and Ms Corbett was aired. In Section III, I will explain the doctrinal development of the implied freedom of political communication with particular reference to the electoral context, and in Section IV, I will discuss both the application of that doctrine in *Sunol v Collier*¹¹ and how I think it should have been applied in *Burns v Corbett*. In Section V, I raise the question of how state tribunals which are not invested with federal jurisdiction can properly take federal constitutional matters into account in their quasi-judicial consideration of discrimination and rights cases that have a national and international dimension. I suggest that the jurisdictional basis upon which the *Burns v Corbett* case had to be decided infers the need for the Commonwealth to pass domestic legislation which covers discrimination fields in the interests of both consistent and predictable decision making, and so that all competing rights and freedoms are properly balanced each time a case is considered, and not just those which are mentioned in an individual state's anti-discrimination legislation.

I conclude that the need for a Commonwealth rights regime that covers the field is as compelling in 2018 as were the needs for comprehensive marriage legislation in 1961 and comprehensive trade practices legislation in 1965 when Sir Garfield Barwick was the Attorney-General. While I am not an advocate of centralised political power in Australia, I see no other way to unify our understanding of human dignity and respect and to create the single law in Australia to which the High Court has aspired since long before *Lange v Australian Broadcasting*

¹⁰Ibid.

¹¹*Sunol v Collier (No 2)* (2012) 260 FLR 414.

Commission (1997) CLR 520 (*'Lange'*).¹²

II *Burns v Corbett*: THE PROCEDURAL HISTORY

As explained above, in 2013, Gary Burns complained to The Administrative Decisions Tribunal ('ADT') in New South Wales that Ms Corbett had committed a public act that vilified gay people in New South Wales in breach of the *Anti-Discrimination Act 1977* (NSW).¹³ She appealed to the Administrative Decisions Tribunal and was heard by the New South Wales Civil and Administrative Tribunal Appeals Panel ('NCATAP') on 30 April 2014. NCATAP issued its decision on 14 August 2014.¹⁴ Ms Corbett's request that NCATAP rehear the merits of the case was refused and her appeal was dismissed though the NCATAP decision made it clear that those panellists did consider her submissions about the construction of the *Anti-Discrimination Act 1977* (NSW) and the implied freedom of political communication.¹⁵ Ms Corbett again approached NCATAP, this time seeking an extension of time within which she could challenge the orders made by the original ADT and that those orders be stayed.¹⁶ She failed again but was told that she could apply for an extension of time within which to appeal the NCATAP decision to the Supreme Court of New South Wales.¹⁷

At that point, it appears that Ms Corbett gave up, but Mr Burns saved her. He brought contempt proceedings against her in the New South Wales Supreme Court

¹²The High Court has said that 'there is but one common law in Australia which is declared by this court as the final court of appeal' (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520, 563.

¹³*Burns v Corbett* [2013] NSWADT 227 (1 January 2013).

¹⁴*Corbett v Burns* [2014] NSWCATAP 42 (2014) (Chesterman DP, Member Kellegan and Member Lowe) [54].

¹⁵*Ibid.*

¹⁶*Corbett v Burns* [2015] NSWCATAP 172 (2015).

¹⁷*Ibid.*

because she had not made the apology ordered by the original ADT, which had been confirmed in the first NCATAP appeal decision.¹⁸ Ms Corbett's defence in the Supreme Court included the argument that neither the ADT nor the NCATAP had jurisdiction over her because she was a resident of Victoria. The matter was removed to the Court of Appeal because that issue was 'important and might be dispositive'.¹⁹ The Court of Appeal found in Ms Corbett's favour because neither Tribunal was a Court that could be invested with federal jurisdiction to determine a matter between the residents of two separate states.²⁰ Ms Corbett's submissions about the implied freedom of political communication were not considered by the New South Wales Court of Appeal.²¹ Mr Burns appealed to the High Court. There were five separate judgments, but all the justices were agreed that since a state tribunal was not a state court that could be invested with power to determine matters between citizens of different states under s 75(iv) of the *Constitution*, a state law which purported to confer such jurisdiction was inoperative by virtue of the combined effect of s 109 of the *Constitution* and s 39 of the *Judiciary Act 1903* (Cth).²² Once again, the arguments about the implied freedom of political communication and its affect upon the validity of subss 49ZS and 49ZT of the *Anti-Discrimination Act 1977* (NSW), were not considered. But the result was that Ms Corbett did not have to apologise as both the ADT and NCATAP had ordered.

The original ADT did not consider the implied freedom of political communication in its decision. That may not surprise some readers since Ms Corbett did not appear at the tribunal to argue her case at first instance. Ms Corbett's decision appears as part of the justification for not deciding the appeal in her favour in the

¹⁸ *Burns v Corbett* [2017] NSWCA 3 (2017).

¹⁹ *Ibid*.

²⁰ *Ibid* [95] (Lemming J).

²¹ *Ibid* headnote.

²² *Burns v Corbett* [2018] HCA 15 (2018).

reasoning of both the Appeals Panel and Boland ADCJ DP at NCATAP when they heard her in person. They found that her personal testimony was prerequisite to the ADT identifying her subjective state of mind at the time she made her statements for the purposes of the exception in s 49ZT of the *Anti-Discrimination Act 1977* (NSW). They could not make that decision on the basis of ‘documented and uncontested facts’ as her counsel had submitted. When she was heard in NCATAP the second time, Boland ADCJ DP noted that Ms Corbett ‘had sought leave to tender a statement setting out her reasons for non-attendance at the 2013 hearing. But the appeal panel found there was no reason why the matters relied on could not have been presented at the hearing.’²³ He then found, as had the first Appeals panel, that this evidence was available at the first hearing had she sought to adduce it and in those circumstances there had been no breach of procedural fairness. She was ‘bound by her conduct of the case’ and had made ‘a deliberate choice’ not to attend the primary hearing. Since hers were not ‘exceptional circumstance[s]’ within the meaning of the High Court in *University of Wollongong v Metwally*,²⁴ her only remedy was ‘to seek leave to appeal the appeal panel’s decision to the Supreme Court of NSW on a question of law’.²⁵ The writer finds it surprising that the tribunal either did not realise the relevance of the implied freedom of political communication, or purposely decided not to take that freedom into account whether they heard submissions on the matter or not.

The original Tribunal did consider ss 49ZS, 49ZT and 88 of the *Anti-Discrimination Act 1977* (NSW) and found Mr Burns’ complaint of homosexual vilification substantiated. The Tribunal members therefore ordered Ms Corbett to refrain from such conduct in the future and to publish an apology in prescribed form at her own expense in the *Sydney Morning Herald* within 28 days of the judgment of

²³ *Corbett v Burns* [2015] NSWCATAP 172 (2015) [21].

²⁴ (1984) 158 CLR 447

²⁵ *Corbett v Burns* [2014] NSWCATAP 42 (2014).

15 October 2013.²⁶ The Tribunal found that Ms Corbett had committed a public act in breach of the *Anti-Discrimination Act* because she ‘gave express or implied permission for these statements to be published’.²⁷ By that permission she had also caused republication, including in New South Wales because ‘she would have appreciated [republication was] very likely to occur’.²⁸

The Tribunal said it would not have had jurisdiction to hear Ms Burns’ complaint if the only publication had been that occurring in the *Hamilton Spectator* on 22 January 2013.²⁹ Again, the Tribunal did not consider whether the implied freedom of political communication had any part to play in its consideration of the matter. When the New South Wales Civil and Administrative Appeals Tribunal heard and dismissed Ms Corbett’s appeal, it considered Ms Corbett’s submission that the original ‘Tribunal had erred when it failed to turn its mind to the High Court authorities on the implied freedom of political communication.’³⁰ The Appeals Tribunal dismissed that submission because ‘there [could] be no doubt that s 49ZT was valid’ since the New South Wales Court of Appeal’s decision in *Sunol v Collier* and because Ms Corbett’s communication did not fall within the good faith exception to s 49ZT.³¹

The stoush between Mr Burns and Mr Corbett was the subject of three further appellate hearings. A further Deputy President of the New South Wales Civil and Administrative Appeals Tribunal found that s 32(3)(a) of the *Civil and Administrative Tribunal Act 2014* (NSW) ‘preclude[d] the bringing of any internal appeal

²⁶*Burns v Corbett* [2013] NSWADT 227 (1 January 2013) [54](Chesterman DP, Member Kellegan and Member Lowe).

²⁷*Ibid* [26-27].

²⁸*Ibid* [28].

²⁹*Ibid* [31].

³⁰*Ibid* [17](Hennessy DP, Senior Member Wakefield and Member Field).

³¹*Corbett v Burns* [2014] NSWCATAP 42 (2014), cited in *Sunol v Collier (No 2)* (2012) 260 FLR 414.

against any decision of the appeals panel’;³² the New South Wales Court of Appeal found that no Tribunal in New South Wales had the jurisdiction to determine this dispute between residents of two states under s 75(iv) of the *Constitution*,³³ and the High Court of Australia affirmed the Court of Appeal’s decision.³⁴ But none of those further hearings touched the implied freedom of political communication that had originally been dismissed on 30 April 2014.

III THE IMPLIED FREEDOM OF POLITICAL COMMUNICATION AND ITS ELECTORAL CONTEXT

Despite the best efforts of Murphy J in obiter,³⁵ the majority of the High Court did not accept that there was a single implied human right in the Australian Constitution until 6 years after he died. But in two separate judgments in 1992 first a bare majority of the High Court, and then all of the judges except Dawson J, expanded upon the idea in *Davis v Commonwealth* in 1988 that legislation which silenced free speech could be disproportionate to its other objectives.³⁶ They found that there was an implication in the *Constitution* which prevented the federal government from passing laws that unduly interfered with the freedom of Australians

³² *Corbett v Burns* [2015] NSWCATAP 172 (2015).

³³ *Burns v Corbett* [2017] NSWCA 3 (2017).

³⁴ *Burns v Corbett* [2018] HCA 15 (2018).

³⁵ Justice Murphy’s suggestions that the Constitution contained implied rights included the idea the Minister of Immigration was the guardian of minor asylum seekers (*R v Director-General of Social Welfare (Vic); Ex parte Henry* (1975) 133 CLR 369); that there was an implied freedom from slavery or any form of servitude (*General Practitioners Society v Commonwealth* (1980) 145 CLR 532), from sex discrimination (*Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237) and from cruel and unusual punishment (*Sillery v The Queen* (1981) 180 CLR 353). He reiterated all of these in his judgment in *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 which was handed down one hour before he died (Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 7th ed, 2018), 1330).

³⁶ *Davis v Commonwealth* (1988) 166 CLR 79.

to communication about political matters.³⁷ And while it took time for this new insight to settle,³⁸ it was clear from the original judgments outline of the new implied freedom in 1992, that meaningful elections relied on ‘participation, association and communication’.³⁹ Quoting Isaacs J in *Commonwealth v Kreglinger & Fernau Ltd and Bardsley*, Chief Justice Mason said that the principle of responsible government ‘is part of the fabric on which the written words of the Constitution are superimposed’.⁴⁰ He continued:

Only by exercising th[e] freedom [of political communication] can citizen communicate his or her views on the wide range of matters that may call for, or are relevant to, political actions or decision. Only by exercising that freedom can the citizen criticize government decisions and actions...Communication in the exercise of the freedom is by no means a one-way traffic, for the elected representatives have a responsibility not only to ascertain the views of the electorate but also to explain and account...Absent such a freedom of communication, representative government would fail to achieve its purpose...The efficacy of representative government depends also upon free communication on such matters between all persons, groups and other bodies in the community.⁴¹

McHugh J was careful to narrowly tailor the new right to the electoral context.

He said:

the business of government must be examinable and the subject of scrutiny, debate and ultimate accountability at the ballot box...Before they can cast an effective vote at election time, [electors] must have access to the information...necessary to make an informed judgment...It follows that the

³⁷In *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, a unanimous High Court found s 299(1)(d)(ii) in the *Industrial Relations Act 1988* (Cth) invalid because it was disproportionate to the legislation’s overall objective, but only four of the judges found this was because the Constitution contained an implied freedom of political communication. But later in the same year two more judges found that the reason why such disproportionality could be found was because the Constitution as a whole anticipated and relied on that implied freedom (*Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106).

³⁸There were for example, questions about whether the new implied freedom expanded the qualified privilege defence in defamation cases along American lines (*Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104) and whether it applied in the states as well as at a federal level (*Stephens v West Australian Newspapers Pty Ltd* (1994) 182 CLR 211). And while the idea that new implied freedom might change the common law of defamation has stalled, it is now clear that the implication operates throughout the country

³⁹*Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

⁴⁰*Ibid* 231.

⁴¹*Ibid* quoting Isaacs J from *Commonwealth v Kreglinger & Fernau Ltd and Bardsley* (1926) 37 CLR 393, 413.

electors must be able to communicate with the candidates...concerning election issues...Only by the spread of information, opinions and arguments can electors make an effective and responsible choice.⁴²

Though Justice McHugh would originally have confined the new implied freedom to the electoral context,⁴³ it was quickly clear that most political communication in Australia takes place between elections. Thus in *Coleman v Power*, he agreed that the specific section of legislation, which would have criminalised insulting words spoken into a megaphone by a university student during a protest rally, was invalid because it burdened the student's freedom of communication 'in a manner' that was more than was necessary to keep vagrants under control.⁴⁴

Subsequently, and in answer to the criticism that this proportionality rationale made it difficult to discern what political communication was protected,⁴⁵ the High Court has refined its *Lange* test⁴⁶ and explained that legislation which burdens the implied freedom of political communication must not only be suitable and necessary to achieve the purpose concerned. It must also take the implied freedom of political communication into account in the balance that it strikes to achieve that legislative objective.⁴⁷ Adrienne Stone has also suggested that the decision in *Coleman v Power* represents High Court authority for the proposition that irreverence in the face of authority is part of our political tradition.⁴⁸ So how does the implied freedom of political communication in the *Constitution* interact with other freedoms expressed in statute and particularly those created under state anti-discrimination laws? Does the implied freedom of political communication

⁴²Ibid 231.

⁴³Ibid.

⁴⁴*Coleman v Power* (2004) 220 CLR 1, 50 [92].

⁴⁵Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communications' [1999] *University of Melbourne Law Review* 1.

⁴⁶*Lange v Australian Broadcasting Commission* (1997) 189 CLR 520.

⁴⁷*McCloy v New South Wales* (2015) 257 CLR 178.

⁴⁸Adrienne Stone, 'Insult and Emotion, Calumny and Invective: Twenty Years of Freedom of Political Communication' [2011] *University of Queensland Law Journal* 79.

trump other inconsistent freedoms to extent of any inconsistency under s 109 of the Constitution? The High Court's decision in *Coleman v Power* confirmed that result and its further decisions in *Viskausas v Nilaud*⁴⁹ and *University of Wollongong v Metwally*⁵⁰ reiterated the point where inconsistency exists even when the federal legislation was intended to coexist with a state law. But what about the New South Wales gay vilification law that Ms Corbett was found to have breached?

IV THE DECISION IN *Sunol v Collier (No. 2)*

Sunol v Collier is the authority which the New South Wales Civil and Administrative Tribunal's Appeal Panel relied upon when it upheld the first instance decision that Ms Corbett had breached s 49ZT of New South Wales' *Anti-Discrimination Act 1977*. The Appeals Panel found, citing Allsop P in *Sunol v Collier* that:

there could be public acts that are communications of a political or government character that will not be reasonably expressed or in good faith. If these fall within s 49ZT(1) and not within s 49ZT(2) 'a distinct type of communication capable of falling within the Constitutional protection...will be made unlawful.'⁵¹

While the original Tribunal had not expressly taken the implied freedom of political communication into account, it had nonetheless:

approached its task correctly by considering firstly whether the conduct came within the terms of s 49ZT(1) and then considering whether s 49ZT(2) applied. In circumstances where there was no basis for finding that the exemptions might be available to the Respondent, the Tribunal made no error of law.⁵²

In effect, the Appeals Panel considered that the Court of Appeal in *Sunol v Collier*

⁴⁹ *Viskausas v Nilaud* (1983) 153 CLR 280.

⁵⁰ *University of Wollongong v Metwally* (1984) 158 CLR 447.

⁵¹ *Corbett v Burns* [2014] NSWCATAP 42 (2014) [43].

⁵² *Ibid.*

had found that while s 49ZT(1) may have burdened the implied freedom of political communication, the exceptions protecting communications made “reasonably” and in “good faith” in s 49ZT(2) saved the section as a whole from breaching the implied freedom.

The late Mr Collier had complained to the New South Wales Anti-Discrimination Board that Mr Sunol had vilified homosexuals by posting materials on the internet.⁵³ There had been conciliation under s 91A(5) of the *Anti-Discrimination Act 1977* (NSW) and in the following agreement, Mr Sunol had agreed not to post further material that vilified homosexual people. But within six months (in February and May 2008) Mr Sunol had posted further materials which clearly breached his undertaking and the Tribunal registered part of the conciliation agreement so that it became enforceable. Mr Sunol appealed that registration and questions arising were referred by Basten JA to the Court of Appeal.⁵⁴

Mr Sunol argued that his further internet postings were political communications within the tests set out by the High Court in *Lange* as amended in *Coleman v Power* and that the provisions of the *Anti-Discrimination Act 1977* (NSW) had chilled his freedom of political speech because they went further than they needed to in seeking to prevent the vilification of homosexual persons.⁵⁵ The New South Wales Attorney-General submitted that the prevention of vilification of homosexual persons and violence that could result was a legitimate purpose of the New South Wales Government, but accepted that the legislation made such vilifying speech illegal even if it was not intended to incite violence. But he added that speech that did not illuminate electoral choices was not protected by the implied freedom of political communication under the *Constitution*.⁵⁶

⁵³*Sunol v Collier (No 2)* (2012) 260 FLR 414.

⁵⁴*Ibid.*

⁵⁵*Ibid.*

⁵⁶*Ibid.*

The Chief Justice said that when one applied the *Lange-Coleman* tests, one started not with the communications but with the legislation. He then asked whether s 49ZT of the *Anti-Discrimination Act 1977* (NSW) burdened the freedom of political communication that was implied in the *Constitution* and whether the burden was imposed in a manner compatible with the maintenance of the system of government prescribed by the Constitution?⁵⁷ He concluded that the burden imposed was compatible because it only proscribed ‘public acts which...would incite [hatred, serious contempt or severe ridicule] in an ordinary member’ of the class to which the public act was directed, and because s 49ZT(2)(c) exempts public acts done reasonably and in good faith.⁵⁸ He added that: ‘It did not seem...that debate, however robust, needs to descend to public acts which incite hatred, serious contempt or severe ridicule of a particular group of persons.’⁵⁹ This final aside adverted to discussion of what constituted an incitement to hatred, serious contempt or severe ridicule in *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* (2006) 15 VR 207 (*‘Catch the Fire Ministries Case’*). In that discussion, Bathurst CJ had preferred the view that public acts need only incite hatred, serious contempt or severe ridicule in an ordinary member of the intended audience, rather than in a reasonable member of that audience since reasonable people never respond to incitements to hatred.⁶⁰ While Allsop P and Basten JA agreed with the Chief Justice in the result and in the orders that should be made, they both wrote separate judgements. Justice Basten did not consider that s 49ZT burdened political discourse at all. Indeed, he thought it ‘appropriate and well adapted’ to the maintenance of representative government and that it was drafted in a manner that promoted political discourse.⁶¹ But neither the Chief Justice nor the Presid-

⁵⁷Ibid 421, 424-426, [24], [42-53].

⁵⁸Ibid 425-426, [46-52].

⁵⁹Ibid.

⁶⁰Ibid.

⁶¹Ibid 433-435, [89-94].

ent agreed with Basten JA that s 49ZT did not burden political discourse at all. The President's consideration of what constituted an appropriate burden under the second *Lange-Coleman* test was even more nuanced than the Chief Justice's analysis and it was his analysis that the Appeals Panel relied on in *Corbett v Burns*.⁶²

He first took notice of 'the high value that the common law (and the legislature) places on freedom of expression' and the 'conservative approach that should be adopted to the construction of statutes that restrict it'.⁶³ He observed that s 49ZT was an attempt by the New South Wales Parliament 'to weigh the policies of preventing vilification and permitting appropriate avenues of free speech'.⁶⁴ But then he analysed the effect of s 49ZT(2)(c) in the context of the implied freedom of political communication in the *Constitution*. The Chief Justice had opined that the existence of the exemption in s 49ZT(2)(c) was one of the reasons why the section as a whole did not offend the implied freedom.⁶⁵ But Allsop P recognised the possibility that political communications 'laden with emotion, calumny or invective' that were made reasonably or in good faith might be excluded by s 49ZT(2)(c) and thus be unlawful under the New South Wales legislation.⁶⁶ But he continued that despite this, s 49ZT(2)(c) still did not offend the implied freedom because of the importance the New South Wales Government attached to eliminating 'forces of anger, violence, alienation and discord' concerning human sexuality from public discussion.⁶⁷ And he suggested that the decision of the Federal Court (of which he was part) in relation to racial discrimination in *Toben v Jones*⁶⁸ was another example of legislation where a government had been justified in limiting the scope

⁶² *Corbett v Burns* [2014] NSWCATAP 42 (2014).

⁶³ *Sunol v Collier (No 2)* (2012) 260 FLR 414, 427, [59].

⁶⁴ *Ibid* 427, [60].

⁶⁵ *Ibid* 427, [52].

⁶⁶ *Ibid* 429-30, [72].

⁶⁷ *Ibid* 430, [73].

⁶⁸ *Toben v Jones* (2003) 129 FCR 515.

of the implied freedom ‘to maintain respectful and harmonious relations between racial...groups’.⁶⁹ His honour also demonstrated that he understood and was alert to the scope of the limitation he was approving when he concluded that s 49ZT might not have been appropriate and adapted to ‘the maintenance of the system of representative government’ within the meaning of the *Lange-Coleman* test if it was directed to prevent the ‘vilification of politicians, or judges, or public servants, or political parties, or people in general’ because the need to protect homosexuals was greater.⁷⁰

That conclusion is more remarkable since his honour recognised and had quoted⁷¹ McHugh J’s expectation that ‘insults are a legitimate part of the political discussion protected by the Constitution’;⁷² Gummow and Hayne JJ’s affirmation that ‘insults and invective were well known forms of political communication’;⁷³ and Kirby J’s confirmation that ‘insult, emotion, calumny and invective are part of the ‘armoury’ of political discourse and the struggle for ideas.’⁷⁴ For it means that notwithstanding the scope of the implied freedom that those majority High Court judges saw in *Coleman v Power*, Allsop P considered that the New South Wales legislature was justified in ending such speech if it concerned homosexuals and Jews.

The difficulty with that conclusion is that it seems to respect parliamentary sovereignty a little too much. For while it is certainly true that any Australian parliament can eliminate a common law right if it is sufficiently clear and unambiguous in accordance with the principle of legality,⁷⁵ the significance of the

⁶⁹ *Sunol v Collier (No 2)* (2012) 260 FLR 414, 430, [73].

⁷⁰ *Ibid* [74].

⁷¹ *Ibid* 428, [66].

⁷² *Coleman v Power* (2004) 220 CLR 1, 54, [105].

⁷³ *Sunol v Collier (No 2)* (2012) 260 FLR 414, 428 [66] per Allsop P quoting Gummow and Hayne JJ in *Coleman v Power* (2004) 220 CLR 1, 77 [195].

⁷⁴ *Ibid* per Allsop P quoting Kirby J in *Coleman v Power* (2004) 220 CLR 1, 91 [239].

⁷⁵ Though this idea was not called ‘the principle of legality’ until Lord Steyn coined that

implied freedom of political communication under the *Constitution* is surely that it is supposed to be beyond the power of the legislature as something greater than a common law right.

The question of how a freedom that exists under the *Constitution* is best interpreted by the High Court, is a point that has concerned Adrienne Stone since 1999.⁷⁶ Proportionality analysis obscures judicial value judgements including how much the judges may be deferring to the legislature.⁷⁷ Professor Stone suggested that the High Court's decision in *Coleman v Power* could be reduced to a finding that 'the law has no legitimate role in "civilising" public debate.'⁷⁸ On that interpretation, Allsop P's deference to the legislature in *Toben v Jones* and in *Sunol v Collier*, corresponds with the dissenting views of the Chief Justice, Heydon and Callinan JJ in *Coleman v Power*.⁷⁹ For the High Court majority in *Coleman v Power*, the only law that could shut down a raucous political communication was

phrase in the English House of Lords in *R v Home Secretary; Ex parte Pierson* [1998] AC 539, the principle may be identified in Commonwealth jurisprudence during the first decade after federation – see for example O'Connor J in *Potter v Minahan* (1908) 7 CLR 277 and then again fifteen years later in *Waterside Workers' Federation of Australia v Gilchrist, Watt & Sanderson Ltd* (1924) 34 CLR 482. The principle was very clear in the joint judgment of Mason, Brennan Gaudron and McHugh JJ in *Coco v The Queen* (1994) 179 CLR 1 and was reiterated by Chief Justice French in *Momcilovic v The Queen* (2011) 245 CLR 1, 46 [42]-[43] after Lord Steyn coined 'the principle of legality' phrase. Chief Justice French wrote: 'The common law...helps to define the boundaries between the judicial and legislative functions. That is a reflection of its character as 'the ultimate constitutional foundation in Australia' [citing *Wik* (1996) 187 CLR 1]. It also underpins the attribution of legislative intention on the basis that legislative power...is exercised in the setting of a 'liberal democracy founded on the principles and traditions of the common law...in that context...this Court recognized the application to statutory interpretation of the common law principle of legality... It is a presumption that Parliament does not intend to interfere with common law rights and freedoms except by clear and unequivocal language.'

⁷⁶See, eg, Stone, above n 45; Stone, above n 48.

⁷⁷This question raises another which deserves deeper analysis elsewhere and that question concerns the nature of the difference between the interpretation of a statute in a Westminster democracy that accepts the doctrine of parliamentary sovereignty, and the judicial review of a statute that offends constitutional power in some way. Do both processes fall back on the same kind of proportionality analysis or is that a mistake when an apex court has its judicial review hat on? Does not the apex court start with the text in both cases and how are parliamentary intent and sovereignty factored into their analysis when undertaking two arguably different functions?

⁷⁸Stone, above n 48, 80.

⁷⁹*Ibid* 85-86, quoting *Coleman v Power* (2004) 220 CLR 1, 126 (Heydon J); 111-112 (Callinan J) and 24 (Gleeson CJ).

a law to stop speech ‘intended to or reasonably likely to produce an unlawful violent response.’⁸⁰

It is not my purpose here to revisit all of Professor Stone’s analysis in this article, but rather to suggest that the New South Wales Court of Appeal which led the Appeal Panel’s response to the implied freedom question in *Corbett v Burns*, may not have followed the High Court’s decision in *Coleman v Power* when it made its decision in *Sunol v Collier*.

But how should the implied freedom of political communication have been applied in Ms Corbett’s case? Ms Corbett was pleased that her interview with a local journalist made the front page of the *Hamilton Spectator*, but was that because she intended to induce violence against homosexuals including in New South Wales? And laying aside again the jurisdictional basis on which the decision against her was eventually set aside, given the electoral context, did she really offend s 49ZT(2)(c)? That is, could her statements to the *Hamilton Spectator* journalist be interpreted as having been made ‘reasonably and in good faith...or for other purposes in the public interest’ so that there was no need to hold s 49ZT invalid as a breach of the implied freedom?

Given the High Court’s emphasis on the origin of the implied freedom in the constitutional text and the robust communication that has always occurred in a representative democracy, I cannot but feel that the Court of Appeal in *Sunol v Collier* short-changed the electors of Australia. For unless the exception in s 49ZT(2)(c) confirms that Ms Corbett’s interview with the *Hamilton Spectator* journalist was protected, then s 49ZT does interfere with the exchange of ideas that is necessary between candidates and electors so that the electors know how to vote. While Ms Corbett’s views are certainly distasteful, it remains difficult

⁸⁰Ibid 86, quoting *Coleman v Power* (2004) 220 CLR 1, 53 (McHugh J).

to characterise her as some kind of demagogue stirring up hatred and violence against gays. And ultimately, the publication of her views led to her removal as a candidate from her party's ticket which is what is supposed to happen as the result of the exchange of ideas which are a necessary part of the argy-bargy of the election process.

If I am right that the New South Wales Court of Appeal got the implied freedom of political communication wrong in *Sunol v Collier*, it is difficult to criticise the followership of the New South Wales Civil and Administrative Tribunal's Appeals Panel in *Corbett v Burns*.⁸¹ But it is still odd that even in the absence of a contradictor, the original Administrative Decisions Tribunal did not even consider as fundamental a constitutional doctrine as the implied freedom of political communication when they decided against Ms Corbett in 2013. Certainly, the members of state tribunals around the country take their primary marching orders from the black letter state statutes they are called to apply, but are they not also supposed to take into account the constitutional implied freedom of political communication and the common law rights that have not been abrogated by the clear and unambiguous words of some legislature?

There are at least two ways in which this apparent lacuna can be addressed. The first is more continuing legal education. But a second idea – that common law and constitutional rights would be better understood and available if they were made part of a national regime – is more controversial, since it raises the spectre of a charter of human rights, and would inevitably contribute to the further consolidation of Commonwealth power. If the Commonwealth were to intervene, what form should their legislation take?

⁸¹ *Corbett v Burns* [2014] NSWCATAP 42 (2014).

V COMMONWEALTH ANTI-DISCRIMINATION LEGISLATION

It is now elementary that Commonwealth legislation trumps state legislation when they are inconsistent.⁸² Inconsistent state legislation is not rendered invalid by the conflicting Commonwealth law despite the clear words of s 109 since the Commonwealth cannot directly invalidate state legislation;⁸³ it is simply inoperative for the duration of the inconsistency.⁸⁴

But what legislation could the Commonwealth pass to ensure a more seamless understanding and application of anti-discrimination laws and human rights norms in Australia? The answer is that the Commonwealth has had the power to pass domestic human rights laws including anti-discrimination statutes, since it ratified the United Nation's 1966 *International Covenant on Civil and Political Rights* in 1980 ('*ICCPR*') even though that was arguably not confirmed by the High Court till 1982.⁸⁵ It exercised that power in 1975 when it passed the *Racial Discrimination Act 1975* (Cth) and again in 1984 when it passed the *Sexual Discrimination Act 1984* (Cth). But despite recommendations that it domesticate more of the human rights and anti-discrimination norms in the *ICCPR*,⁸⁶ it has lacked the political will to do so. The reasons are the same as the reasons why we have no Commonwealth Charter of Rights or even a simple Human Rights Act, as has been the NZ and Canadian solution.⁸⁷

⁸²*Australian Constitution* s109.

⁸³*Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

⁸⁴See eg, *Carter v Egg and Egg Pulp Marketing Board (Vic)* (1942) 66 CLR 557; *Wenn v Attorney-General (Vic)* (1948) 77 CLR 84; *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373.

⁸⁵*Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

⁸⁶The Human Rights and Equal Opportunity Commission recommended in 1998 that the Commonwealth Government should pass a Religious Freedom Act to implement some of its obligations under the *ICCPR*: Human Rights and Equal Opportunity Commission, 'Article 18: Freedom of religion and belief' (July 1998) <www.humanrights.gov.au/sites/default/files/content/pdf/human_rights/religion/article_18_religious_freedom.pdf>. The Commonwealth Government did not follow the recommendation.

⁸⁷See, for example, the sections entitled "Political doubts about implementing human rights

The appointment of the Ruddock Commission to advise the Commonwealth executive on what it should do to better protect religious freedom in the wake of the successful marriage plebiscite, raises a related issue. How do we best protect minorities in Australia? Should we rely on a patchwork of inconsistent state legislation, or should we pass uniform Commonwealth legislation as Garfield Barwick did as part of the Menzies government to sort out marriage and trade practices in 1961 and 1965? There is no doubt the Commonwealth legislative power exists. The failure is simply a matter of political will because successive governments have worried they will lose the next election if a human rights law proved unpopular. Ironically, that unpopularity has generally been attributed to Christian church dissent. Arguably, there is now Christian consensus that the religious freedom part of the package needs Commonwealth legislation, but ironically Commonwealth concern about popularity remains, perhaps because new human rights legislation would extend to minority groups that remain unpopular.

But these are political questions. The legal question raised by the third part of this paper is how to better educate the Australian public and the nation's lesser judicial officers about human rights and anti-discrimination norms. Despite the view that political debate in this country has never been and does not need to be civilised,⁸⁸ a significant minority of our most senior judges think there is a strong case for civility education by law.⁸⁹

Could not that process be started by the Commonwealth Parliament passing

in Australia” and “Religious doubts about implementing human right in Australia’ in the author’s article entitled ‘A Commonwealth Religious Discrimination Act for Australia?’ (2017) 7(1) *Solidarity The Journal of Catholic Social Thought and Secular Ethics*.

⁸⁸Stone, above n 48, and supporting text.

⁸⁹For example, Basten J did not think s 49ZT burdened freedom of political communication at all and Allsop P considered that the New South Wales Parliament was justified in limiting the implied freedom to prevent ‘anger, violence, alienation and discord’ *Sunol v Collier (No 2)* (2012) 260 FLR 414, Gleeson CJ, Heydon and Callinan JJ as the minority in *Coleman v Power* came to the same conclusion as Allsop P and Basten JA in *Sunol v Collier*.

a series of federal anti-discrimination laws or one new consolidated super-Act? Rolling out that understanding into primary and secondary school curricula would be a natural sequel.

VI CONCLUSION

The *Burns v Corbett* saga of cases has highlighted two gaps in state parliamentary, judicial and lay understanding in Australia. The New South Wales Court of Appeal and the High Court of Australia have subsequently confirmed that only courts exercising federal judicial power can decide cases that involve litigants in different states.⁹⁰ State tribunals do not have the power to make such decisions.⁹¹ But the question of what human rights and anti-discrimination laws exist in the various parts of Australia is much more vexed and is seldom litigated in the nation's highest courts. Often, as in the *Burns v Corbett* saga of cases, that is because those higher courts prefer to resolve the underlying disputes on other less contentious grounds.

This paper adds to the chorus of voices that have been calling for uniform human rights and anti-discrimination legislation across Australia. There are some areas where the Commonwealth does not have the power to impose a consistent legislative regime in the interests of uniformity and must rely on the states voluntarily joining a crusade. But when it comes to human rights and anti-discrimination norms, the Commonwealth Parliament has all the power it needs. By virtue of the international human rights treaties and conventions we have ratified, that power exists under s 51(xxix) of the *Constitution* and once passed, such legislation will trump any inconsistent laws that remain at a state level by virtue of s 109 of the same *Constitution*. These powers have existed since federation on January 1, 1901.

⁹⁰*Burns v Corbett* [2017] NSWCA 3 (2017); *Burns v Corbett* [2018] HCA 15 (2018).

⁹¹*Burns v Corbett* [2017] NSWCA 3 (2017); *Burns v Corbett* [2018] HCA 15 (2018).