"YOU FUCKING BEAUTY"[1]

"Fuck Fred Nile"[2] and other inoffensive comments

A discussion paper on the law of offensive language.

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10 November 2016

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[1] Magistrate Bradd *Tessadri v Holcombe, Wright and Rose* [2016] NSWLC at [29].
[2] Patrick Wright, 20 September 2015. Belmore Park, Sydney.
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Introduction

1. This discussion paper is written following the decision of his Honour Magistrate Bradd in the matters of ***Tessadri v Holcombe, Wright and Rose*** (*'Holcombe and others'*), decided 25 October 2016 in the Local Court of NSW at Sydney.[6]
2. The case raises disturbing questions about the interference by the NSW Police in the exercise of the right to protest. Our clients were peacefully protesting in a lawful manner, yet were subject to arrest and prosecution.
3. Each of the accused were charged with one count of using offensive language in a public place, contrary to s4A *Summary Offences Act 1988* (NSW) ("*SOA*").
4. Notice was given to each of the Commonwealth, State and Territory Attorneys-General that the proceedings involved a matter arising under the Constitution or involving its interpretation within the meaning of section 78B of the *Judiciary Act 1903*. In particular, the nature of the constitutional matter was whether s 4A(1) *Summary Offences Act 1988* (NSW) constitutes a burden on the implied freedom of communication about government or political matters and is invalid. The Attorney-General of New South Wales intervened in the proceedings in the Local Court. The remaining Attorneys-General declined to intervene.
5. Following a defended hearing, each of the accused were found not guilty and the proceedings were dismissed.
6. The Magistrate did not determine the constitutional issue.

An Outline of the Facts

7. The facts in the case were agreed.
8. At about 1.30pm on 20 September 2015, the accused persons April Holcombe, Catherine Rose and Patrick Wright attended Belmore Park at Haymarket to engage in a political protest activity with a group of about thirty to forty other persons, called Community Action Against Homophobia. The purpose of the meeting of the Community Action Against Homophobia group was to hold a counter protest against a public assembly and march organised by Reverend Fred Nile and a group called Unity Australia and due to commence at the same location at 2pm. The

[6] A copy of the judgment is included at the end of this paper.

purpose of the public assembly and march organised by Reverend Fred Nile and Unity Australia was to publicly celebrate and thank God that legislation to redefine marriage to include same sex couples had failed and to demonstrate their support for the institution of marriage between a man and a woman.

9. During the course of the protest activity by Community Action Against Homophobia, Rose and a number of other persons made speeches and led chants. The word "fuck" was used several times. This word was amplified on loudspeakers and chanted by the group.

10. One of the chants led by Rose was as follows:

> *"When I say same sex, you say marriage. Same sex. Marriage. Same sex. Marriage. When I say bigots, you say fuck off. Bigots. Fuck off. Bigots. Fuck off."*

11. Following one of these chants, police spoke to Rose in relation to the use of swear words. Sergeant Paul Paxton told her that police had received complaints from members of the public and told her to stop swearing. Rose remarked that "fuck" was part of the common vernacular. Sgt Paxton responded that it was not part of children's vernacular and told her to let all of the speakers know that if they swore, they would get an infringement notice.

12. Rose returned to the Community Action Against Homophobia protest group and spoke to a number of people including Holcombe.

13. Rose continued to lead chants. When leading chants, Rose did not use the words "Fuck off."

14. During the course of the Community Action Against Homophobia protest, a number of persons took the microphone to make speeches.

15. Holcombe made a speech into the microphone as follows:

> *"... the fact that people over there are contributing to an epidemic LGBTI youth suicide, self harm and mental illness...What's the real damage? Me saying fuck them or they encouraging young people to kill themselves or harm themselves or feel like they have no place in this society. They are the people, they are the danger, they are the ones with the capacity to hurt, they are the ones who should be thrown into the dustbin of history and we will do whatever it takes, which means staring down these bigots here who are on their side whether they say it or not, they are on their side. They are on the side of the establishment who want to entrench homophobia in every element of life. We have to push back against them because we can: if we couldn't, we wouldn't be able to get to the point that we are at now, so we have to keep pushing because we know we can win, we've won in*

the past. But every single time these people here have been the obstacle, we need to stand against them and make sure us saying bad language about these fuckers is nothing compared to the epidemic of suicides that these people contribute to. Hang your head in shame cops, hang your head in shame parliament, hang your head in shame Fred Nile, hang your head in shame all homophobes. We'll fight you to the very end."

16. Wright made a speech into the microphone as follows:

    "There's a long, long political tradition here in Sydney about protesting Fred Nile every time he tries to get his bigots together and he fails. So let's look at the track record of Fred Nile. He failed to get the cops to keep arresting us for having sex. He failed in that. He failed in his quest to keep an unequal age of consent. He failed there. He failed to stop the passage of de facto recognition. He failed to stop the vast majority of Australians supporting marriage equality and he'll fail to stop it passing, because Fred Nile is a political failure, because you are marginal and you are irrelevant and we will win. So fuck Fred Nile."

17. Rose made a number of political speeches into the microphone and during the course of one of those speeches she referred to politicians as "*those fuckers*".

18. During the course of the protest and the public assembly, members of the public, including children, passing by both groups assembled in the park and who were not affiliated with either group. The speeches and chants could be heard in the park.

19. At the end of the protest, Rose left amongst a crowd of participants. Police approached Rose and arrested Rose for the offence of offensive language. Police obtained particulars from Rose and she was released. Rose left Belmore Park with a number of other protest participants. Wright and Holcombe also left Belmore Park with other protest participants.

20. Belmore Park is a large open area in the City of Sydney frequented by all kinds of people including families and children.

21. Police issued each of the accused persons with a Penalty Notice for offensive language. Section 339 *Criminal Procedure Act 1986* (NSW) renders the Penalty Notices invalid. The defendants sought the withdrawal of the notices and this was granted.

22. Police then charged each of the accused persons with offensive language by way of a Court Attendance Notice.

Using Offensive Language contrary to s4A *Summary Offences Act 1988*

Actus reus

23. The actus reus requires the voluntary vocalisation of the subject words. In most cases, this element will be easily established by the prosecution.

Mens rea

24. The case law as to the *mens rea* element of 'offensive language' does not seem to be settled either in NSW or in other States with comparable offence provisions. There are a number of cases that suggest that 'intent' is required. In the decisions of ***Worcester v Smith* [1951] VLR 316** at 318 and ***Ball v McIntyre* (1966) 9 FLR 237** it was held that 'offensive' meant language that was 'calculated to wound the feelings, arouse anger or resentment or disgust in the mind of a reasonable person.' Used in this way the term 'calculated' suggests a high degree of deliberateness / intent is required.

25. In ***Daire v Stone* (1992) 56 SASR 90** the Supreme Court of South Australia considering a charge of disorderly behavior, which falls under the same provision as offensive language, held as follows:

> *'...the prosecution must prove beyond reasonable doubt that there is a conscious and deliberate course of conduct by the accused person which constitutes this interference with the comfort of other people such as to leave the tribunal of fact with no reasonable doubt that the conduct of the accused person was intentionally done to bring about such an interference.'*

26. Several years later the Supreme Court of South Australia in ***SA Police v Pfeifer* [1997] SASC 6172** reversed its position and held that that the offence provision attracted strict liability:

> *...I conclude any presumption that intent or knowledge is an essential element of the offence is rebutted. If it is established that the relevant conduct is offensive in the required sense, a person charged will be convicted if the prosecutor proves that the person did not honestly and reasonably believe that the conduct was not offensive.*

27. In the absence of a clear appellate statement as to the *mens rea* element, it was the defence position that the Court should be guided by the

principles enunciated by the High Court in *He Kaw Teh* (1985) 157 CLR 523 and unambiguously expressed by McHugh J at 566:

> *'... It is now firmly established that mens rea is an essential element in every statutory offence unless, having regard to the language of the statute and its subject matter, it is excluded expressly or by necessary implication ... Earlier doubts as to the existence of the presumption or as to its strength ... have now been removed.'*

28. There is nothing apparent in the wording of s4A *SOA* to say that *mens rea* is not required. Nor are there any surrounding circumstances or factors from which a 'necessary implication' to this effect can be drawn. In our view, s4A *SOA* has an mental element.

Intention or recklessness

29. The authorities offer little assistance as to whether the mental element requires 'intention' or the lower standard of 'recklessness.' However, if a person chooses to communicate in an offensive way, knowing that doing so is likely to cause offense, it is difficult to see why they should not be answerable for this simply because causing offense was not their primary purpose.

30. It seems that recklessness is likely to be sufficient to engage criminal liability.

31. The Prosecutor submitted that the test for offensiveness came from *Worcester v Smith*, that the behaviour or language must be "calculated to wound the feelings, arouse anger or resentment or disgust and outrage in the mind of a reasonable person."

32. His Honour Magistrate Bradd similarly adopted this approach throughout the judgment when assessing the language used by each of the accused.

33. His Honour referred to the language being "used as expression to dismiss the argument against marriage equality." His Honour concluded that in the context in which the language was used "it cannot be said that the language is used to wound the feelings, arouse anger or disgust in a reasonable person."

What does 'offensive' mean legally?

34. Kerr J in *Ball v McIntyre* following *Worcester v Smith* and applying the

reasonable person test stated:

> *'...some conduct which is hurtful or blameworthy or improper is not offensive within the meaning of the section. What has to be considered in the particular case is whether the conduct in question, even if in some sense hurtful or blameworthy, or improper, is also offensive within the meaning of the section. It is important, I think, for this point to be made because it is sometimes thought that it is sufficient to constitute offensive behavior if it can be said that conduct is hurtful, blameworthy or improper, and thus may offend." 'Conduct which offends against the standards of good taste or good manners, which is a breach of the rules of courtesy or runs contrary to commonly accepted social rules, may well be ill advised, hurtful, not proper conduct.' 'People may be offended by such conduct, but it may well not be offensive within the meaning of the section.'*

35. There are numerous cases in which the word 'fuck' and its derivatives has been found not to be offensive.

36. In ***Commissioner of Police v Anderson NSW Supreme Court*** (NSW Court of Appeal, 21 October 1996 unreported) a Sergeant of police was charged under Police Departmental Regulations with using offensive language. The Sergeant was alleged to have shouted at a colleague, saying "Constable, fucking get over here." And "Why aren't these fucking messages on the fucking pad?". This was followed by "I don't fucking care. I want them on the fucking pad and you put them on at this time." And "How many fucking messages are you putting on?" followed by "Well put on three and fucking get someone else to put the others on." Comment was made by Meagher JA (obiter) to the following effect:

> *'There was no evidence that persons in the public area were ever offended, nor that the public area was frequented by gentle old ladies or convent school girls. Bearing in mind that we are living in a post-Chatterly, post-Wolfenden age, taking into account all circumstances, and judging the matter from the point of view of reasonably contemporary standards, I cannot believe that Sergeant Anderson's language was legally offensive.'*

37. Determining the threshold at which a communication crosses from discourteous, in breach of convention or hurtful etc. to one which attracts criminal penalty will depend on the particular facts and circumstances of the case.

38. The High Court in *Monis v The Queen; Droudis v The Queen* (2013) 249

CLR 92 considered the requisite degree of offensiveness required for the offence of using the postal service in a way that is offensive (contrary to s471.12 *Criminal Code* (Cth)) following its consideration by the NSW Court of Criminal Appeal. The comments in *Monis* are apposite when considering an offence of using offensive language contrary to s4A(1) although there are reasons to distinguish the offences given the postal service provision includes alternative means of using the service to menace or harass and the term 'offensive' in s4A(1) does not draw its meaning from being co-located with those such terms.

39. If one were to draw an analogy to *Monis*, the s4A(1) offence would involve a degree of offensiveness at "the higher end of the spectrum, although not necessarily the most extreme". The offence would also be engaged only by language that is "very", "seriously" or "significantly offensive": *Monis* at [336] per Crennan, Kiefel and Bell JJ. In that way, the offence would not be engaged by mere insults or slights that are likely to engender hurt feelings: see *Monis* at [338] per Crennan, Kiefel and Bell JJ. To be legally offensive, the words must fall within "the higher ranges of seriousness": per French CJ at [43] and see also at [59]. Hayne J referred with approval to the "intensifying epithets" used by Bathurst CJ in the Court of Criminal Appeal decision to describe the reaction that the conduct in question was calculated or likely to arouse: "*significant* anger, *significant* resentment, outrage, disgust, or hatred": at [160].

The reasonable person

40. It seems well settled that in determining whether something is offensive, the Court is to consider the reaction of the reasonable person. In *Ball v McIntyre* (1966) 9 FLR 237 Kerr J stated at 245:

> *'I recognise that different minds may well come to different conclusions as to the reaction of the reasonable man in situations involving attitudes and beliefs and values in the community, but for my part I believe that the so called reasonable man is reasonably tolerant and understanding and reasonably contemporary in his reactions.'*

41. In attributing qualities to the reasonable person they must also be given an appreciation or awareness of issues which place the relevant conduct in context. In *Monis v R* [2011] NSWCCA 231 at 118 McClellan CJ remarked:

> *'The section will only be breached if reasonable persons, being persons who are mindful of the robust nature of political debate in Australia and who have considered the accepted boundaries of that debate, would conclude that the particular*

use of the postal service is offensive.'

42. The reasonable person is therefore someone who is aware and mindful of the arguments and passions held by groups of people on opposing sides of a political or ideological debate. In this case we submitted that the reasonable person is aware of the ongoing marriage equality debate, and that Reverend Fred Nile is an outspoken opponent of gay marriage. We also submitted that the reasonable person would appreciate that this is a controversial and impassioned issue and that many members of the LGBTIQ community are diametrically opposed to the views of Reverend Fred Nile and his followers.

Context

43. Use of the word "fuck" has become so pervasive that it can be heard accompanying and emphasising expressions of humor, celebration, pleasure, approval, excitement and wonderment to name a few. It is also regularly heard in music and television shows broadcast at all times of the day and night. It is no longer a word which is reserved to express negative sentiments. While pervasiveness does not make the term agreeable to all, it is a signal of increasing exposure and community tolerance for the word and its derivatives.

44. The question is not whether "fuck" and its derivatives can be offensive, but rather whether its use in this case was offensive within the meaning of the section.

45. His Honour examined the word "fuck" in the following way (emphasis added) at [29]:

> *'The word "fuck" is defined in the Macquarie Dictionary, which lists various phrases in which the word appears.* ***The word has no meaning, what is meant depends on the context in which it appears.*** *Whether it is part of a child's vernacular depends on the words that a child listens to from others. If the child's caregivers, or persons in close association with the child use the word, one can expect that the child will use the word, merely copying what the child has heard.* ***A person does not use offensive language merely by using the word "fuck".*** *It depends on whether the word is used in a way calculated to wound the feelings, arouse anger or resentment or disgust and outrage in the mind of a reasonable person, which will depend on the context in which the word is used, phrases such as "you fucking beauty", for "fucks sake", "fucking hell", are just a few of the ways where*

the word is used, and is unlikely to be offensive.'

The meaning of the language

46. In ***Dalton v Bartlett*** **(1972) 3 SASR 549** Hogarth J in stated:

> *'The primary purpose of language is to convey a message to others. It seems to me that the decency or otherwise of language used on a particular occasion must depend upon the meaning it conveys, rather than the form of language when divorced from its meaning.'*

47. As discussed above, the use of expletives in this case was a means to convey opposition to the views held and advocated by Reverend Fred Nile and his supporters. Where used, the word 'fuck' was used to emphasise or punctuate a political point.

48. Indeed the meaning of the comment "Bigots. Fuck off", which conveys a message that bigots or prejudiced people are not welcome and should go away, is not inherently offensive at all.

Motive

49. Understanding the reason for someone else's use of coarse language has the capacity to increase or decrease the extent to which that communication is perceived to be offensive. Where the apparent motive is to convey or emphasise a political message, we submitted that it is less likely to 'wound the feelings, arouse anger or resentment or disgust.' Robust and impassioned debate is to be expected around political issues, particularly those that involve civil rights.

50. In ***Watson and Williams v Trenerry*** **[1998] NTSC 22** the Northern Territory Supreme Court was dealing with a charge of offensive behavior that involved the burning of an Australian flag. In that decision it was remarked:

> *'...I am of the view that the manifest motive of the appellants in doing what they did is a relevant circumstance. The fact that the flags were objectively seen to be burned in the course of a political protest is, I think, a relevant circumstance. In my view the motive manifested to others by words and deeds is relevant.'*

51. To the bystander, the language was manifestly used by the accused

persons in this case in the course of conveying a political message during a peaceful protest.

Manner of delivery

52. In this case the subject language was being used by a small group of non-threatening and relatively disorganised protestors. It was a static protest. For the most part the swearing accompanied one of several chants in which the purpose of the words was to emphasise the groups opposition to the views expressed by the group led by Reverend Fred Nile. The manner of delivery ranged from light-hearted to impassioned. At no point was a message of violence or aggression communicated, nor could such a motive be detected in the way the message was delivered. Among the crowd people were laughing and smiling.

Directed / non-directed usage

53. Those swear words used as a part of a chant were not directed at any particular person and were clearly meant only to emphasise the message of opposition being communicated.

54. His Honour addressed this issue in his judgment, in the following way at [22] and [26]:

> *'The phrase "these fuckers" ... and [t]he phrase "So fuck Fred Nile" [are phrases] addressed to the supporters of the counter protest group, rather than the other protest group.'*

Degree of repetition

55. There was some repetition of chants that involved the word "fuck" or one of its derivatives. However, it was clear from the video footage these make up the minority of the chants. For the most part the group appears to be deliberately restrained in its use of coarse language.

56. In the case of Rose, after she was spoken to by Sergeant Paxton she abstained from using any swear words in the chants she led. After this she also made a number of political speeches, despite being one of the most vocal members of the group, the only swear word she used was when referring to Federal politicians was "those fuckers."

Time of day / night

57. The protest took place at 1:30pm on a Sunday in a public park. From the video footage of the event taken by the Police, it can be seen that members of the public were in the vicinity, but that it was relatively quiet.

58. The Prosecutor made much of the fact that the conduct took place on a Sunday at about 1.30pm where all types of people including families with children were present and likely to be present.

59. His Honour ultimately did not consider this to be a persuasive factor.

Constitutional Invalidity

Not determining the constitutional question as a preliminary matter

60. The Attorney-General intervening in the proceedings urged the Magistrate to not decide the question of constitutional validity if the Court was of the view the defendants were not guilty.

61. The defendants argued to the contrary, submitting that if an offence provision is invalid by virtue of being in violation of the Constitution, then the Court has no jurisdiction to hear and determine the proceedings. The Court Attendance Notice (or indictment) would disclose an offence not known to law. In those circumstances, it would be appropriate to mark the papers accordingly "No jurisdiction - struck out" as opposed to (determining and) dismissing the proceedings: see for example: ***DPP v Goben* [1999] NSWSC 696**.

62. It was further submitted that to proceed in circumstances where the Court may not have jurisdiction and without determining that question is a course of action contrary to the rule of law in a basic way. It is to regard a dismissal of a criminal charge by a Local Court as if it were an order of no consequence, such a trifle that a court need not even be concerned whether it in fact has jurisdiction to make it.

63. In the circumstances envisaged by the Attorney-General of NSW in the case of *Holcombe and others*, persons will continue to be arrested and deprived of their liberty, unless and until a trial is resolved adversely to an accused who seeks appellate review.

64. His Honour however was of the view that the Local Court "has the discretion to deal with proceedings in a manner it considers to be efficient, and in accordance with law." His Honour concluded that the most efficient

way for the Court to deal with the proceedings was "to consider the charges first": at [10].

65. None of the authorities relied upon by the Attorney-General of NSW in *Holcombe and others* (including those cited by his Honour in the judgment) are authority for the proposition that a Court exercising criminal jurisdiction could allow a trial or hearing to proceed without first resolving an assertion of constitutional invalidity of the offence-creating provision made by an accused.

66. The decisions in ***Pan Laboratories Pty Ltd v Commonwealth* (1999) 73 ALJR 464** ("*Pan*") and ***Alqudsi v Commonwealth* [2015] HCA 49** ("*Alqudsi*") in particular both involved the fragmentation of trial proceedings in lower courts by the initiation of proceedings in the High Court where constitutional matters were raised and sought to be determined by the High Court pre-trial.

67. As was made clear in both decisions, in remitting the matters to the trial courts, it was open to the accused persons in those cases to make an application to quash the indictment in the trial courts and have the constitutional issues determined there: see *Alqudsi* at [22] and *Pan* at [11] and [17].

Constitutional invalidity of s4A(1) SOA

68. The decision in *Holcombe and others* leaves open the question of whether the law prohibiting the use of offensive language in public in s4A *SOA* violates the freedom of political communication recognised by the Australian Constitution. It remains to be seen how the constitutional validity of this offence may be decided by other courts in other cases. It is our firm view that the offensive language laws in NSW should not continue to be routinely assumed to be constitutionally valid.

69. The Police have a range of powers to deal with disorderly and threatening behaviour. Laws that criminalise offensive speech and conduct are unnecessary and unconstitutional.

70. This latter view is hardly a novel one. Indeed, it was the view of a band of well-known judicial radicals; French CJ, Hayne J and Heydon J in *Monis* v The Queen; Droudis v The Queen (2013) 249 CLR 92.

71. In our view, s4A(1) *SOA* ("the impugned law") is invalid. The invalidity arises because the impugned law:

a. Effectively burdens the constitutionally-implied freedom of communication about government or political matters ("the freedom of political communication"); and

b. Does not have an object that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government; or

c. Alternatively, if the impugned law has a legitimate object or end, it is not reasonably appropriate and adapted to achieving it.[7]

72. Moreover, whilst the facts in *Holcombe and others* did so, it is our view that it is not necessary for the facts of a case to directly engage the issue of political communication in order for the constitutional challenge to be available. In other words, even if the charged language could not be described as being "political", the offence provision is still vulnerable to constitutional challenge and in our view invalid.

The scope of s4A(1) SOA

73. The impugned law proscribes conduct that is very wide-ranging. The legislation gives no definition of "offensive language". Judicial consideration of the term "offensive" has focussed on conduct that objectively engenders certain emotional reactions: conduct that is *"calculated [or likely] to wound the feelings, arouse anger or resentment or disgust or outrage in the mind of a reasonable person."*[8]

74. The impugned law covers language that could produce in a reasonable person, an emotional reaction such as anger, resentment, disgust or outrage as a consequence of an expressed difference of opinion on a political issue or by virtue of the way that a political view is expressed, even where the reasonable person in the audience is sympathetic to the underlying message conveyed. As Hayne J referred to the range of possibilities for giving offence in ***Monis v The Queen; Droudis v The Queen*** (2013) 249 CLR 92 ("*Monis*"):

> *'Almost any human interaction carries with it the opportunity for and the risk of giving offence, sometimes serious offence,*

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[7] Applying the test for invalidity set out in *Lange v ABC* (1997) 189 CLR 520 and *Coleman v Power* (2004) 220 CLR 1.

[8] *Worcester v Smith* [1951] VLR 316 per O'Bryan J at 318, considering the meaning of "offensive behaviour" in s25 *Police Offences Act 1928* (Vic) which prohibited behaving in an offensive manner in a public place; see also *Coleman v Power* (2004) 220 CLR 1; *Monis v R; Droudis v R* [2011] NSWCCA 231 particularly at [25]-[45] per Bathurst CJ and *Monis v The Queen; Droudis v The Queen* (2013) 249 CLR 92.

to another. Sometimes giving offence is deliberate. Often it is thoughtless. Sometimes it is wholly unintended.'[9]

75. The offence provision catches a very wide range of words, expressions and communication used by persons. It is not necessary for the language to be about another person, nor directed to any other person, nor even heard by, nor in the presence of any other person.

76. Significantly, the offence provision is not a composite provision which includes other language such as threatening or abusive language, or menacing or harassing conduct and so it does not draw its meaning in part from being co-located with such terms.

77. There is no element requiring the language to be used with intent to provoke a breach of the peace or whereby a breach of the peace is likely (and this omission must be seen to be deliberate given earlier iterations of a similar offence included such an element).[10] The likelihood of violence is neither a necessary nor sufficient element of the offence. There is no justification for reading into the impugned law a requirement of intended or likely breach of the peace. In this regard, the impugned law proscribes conduct that is much broader than that proscribed by the offence of using insulting words to any person in or near a public place under examination in *Coleman v Power* (2004) 220 CLR 1 (*"Coleman v Power"*). In that case, Gummow, Hayne and Kirby JJ interpreted the provision as proscribing words which were directed to hurting an identified person and that were provocative, in the sense that either they were intended to provoke unlawful physical retaliation or they were reasonably likely to provoke unlawful physical retaliation from either the person to whom they were directed or some other person who heard the words uttered.[11]

78. The provision extends to conduct in places not normally open to the public but used by the public, even a limited class of persons of the public, and on payment of money. It extends to conduct committed in any private place that is within hearing of a public place or school.

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[9] (2013) 249 CLR 92 at [222].

[10] See, for example, the earlier similar offence created by section 6 of the *Vagrancy Act 1851* (NSW): "*Than any person who shall use any threatening abusive or insulting words or behaviour in any public street thoroughfare or place with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned shall forfeit and pay on conviction in a summary way by any Justice of the Peace any sum not exceeding five pounds and in default of immediate payment shall be committed to the common gaol or house of correction for any period not exceeding three calendar months.*"

[11] At [183] per Gummow and Hayne JJ, (Kirby agreeing at at [226]).

A. Does the impugned law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?

79. The answer to this question is "yes". It is not necessary for the direct purpose of the law to be to restrict or control political communication so as to effectively burden the freedom. It is sufficient that the law incidentally restricts or controls political communication. By its operation and practical effect, the impugned law restricts, controls or limits the content of communications on political or governmental matters or the time, place, manner or conditions of their occurrence.

80. The issue of marriage equality is significant in the public affairs of the Commonwealth, States and Territories in Australia. The accused persons were engaged in peaceful political protest, chanting and making speeches about the rights of homosexual citizens and criticising opponents of marriage equality legislation. The facts of this matter demonstrate that the potential scope of the impugned law extends to restricting or controlling communication about government or political matters.

81. The impugned law imposes a potential penalty of a criminal record, a financial penalty or a fetter on personal liberty by the imposition of community service hours or a good behaviour bond for up to two years without a criminal conviction and with or without conditions. The impugned law also exposes citizens to the loss of personal liberty by virtue of arrest being used as a mechanism for commencing criminal proceedings.

82. The Attorney-General of NSW conceded in this case that s4A(1) *SOA* "effectively burdens" the implied freedom of political communication in its terms, operation or effect.

B. Does the law have an object that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

83. The answer we suggest to this question is "no". The purpose of the impugned law is properly described as the prevention of the conduct which it prohibits.[12] Thus, its purpose is to prevent persons in or near public places or schools from using language that may be heard by others and that reasonable persons would regard as being, in all the circumstances,

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[12] *Monis* at [73] per French CJ.

offensive. It attempts to prevent persons being offended or potentially offended.

84. Given the breadth of the impugned law, its purpose could not be said to be directed to avoiding breaches of the peace nor to keeping public places free from violence nor to preventing citizens (who might otherwise participate in political communication) from being intimidated into silence. To read in such purposes would be to fundamentally alter the scope of the provision and the mischief to which it is targeted. The impugned law pursues no other object or end but regulating the giving of offence. There is no over-riding important public interest.

85. The identified purpose is inconsistent with the constitutionally prescribed system of government in Australia. It is not a legitimate end to silence or restrict or regulate communication about political or governmental matters in the public domain through the prism of "offensiveness". The impugned law criminalises peaceful political protest, communication and expression.

86. As McHugh J held in *Coleman v Power*:

> *'... the system of representative and responsible government cannot operate without the people and their representatives communicating with each other about government and political matters.'*[13]

87. An inherent characteristic of our system of government is one which promotes a broad range of views and ideas being abled to be voiced and to clash. It is integral to our system of government that citizens can freely participate in and contribute to the clash of ideas without the risk of criminal sanction by virtue of expressing ideas that are considered offensive according to some broadly accepted community standard or because their ideas are at the edges of a political controversy.

88. Beyond protecting the voices on the margins or fringes of political discussion, it is an inherent aspect of our system of government that ordinary citizens can assemble in public places or local meeting places such as schools and express their opinions and ideas, debate each other, seek to persuade others to their point of view by the use of persuasive or provocative language, or dissuade others with criticism, even acerbic criticism and offensive insults. Political speech can be and often is impolite, indecorous, emotional and acrimonious and accordingly give rise to the wounding of feelings, an arousal of anger, disgust or outrage, even to a significant degree. Ordinary citizens must be able to have recourse to common and coarse language to express their political views.

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[13] *Coleman v Power* (2004) 220 CLR 1 at [89] per McHugh J.

89. This is a longstanding position. Gummow and Hayne JJ commented in *Coleman v Power*:

> *'Insult and invective have been employed in political communication at least since the time of Demosthenes.'*[14]

90. Kirby J in the same case said the following:

> *'One might wish for more rationality, less superficiality, diminished invective and increased logic and persuasion in political discourse. But those of that view must find another homeland. From its earliest history, Australian politics has regularly included insult and emotion, calumny and invective, in its armoury of persuasion. They are part and parcel of the struggle of ideas. Anyone in doubt should listen for an hour or two to the broadcasts that bring debates of the Federal Parliament to the living rooms of the nation. This is the way present and potential elected representatives have long campaigned in Australia for the votes of constituents and the support of their policies. It is unlikely to change. By protecting from legislative burdens governmental and political communications in Australia, the Constitution addresses the nation's representative government as it is practised. It does not protect only the whispered civilities of intellectual discourse.'*[15]

91. McHugh J made similar comments in *Coleman v Power*:

> *'Insults are as much a part of communications concerning political and governmental matters as is irony, humour or acerbic criticism. Many of the most biting and offensive political insults are as witty as they are insulting.'*[16]

92. And further, as French CJ stated in *Monis*:

> *'Based on a broad imputed awareness of the nature of Australian political debate and communications, reasonable persons would accept that unreasonable, strident, hurtful and highly offensive communications fall within the range of what occurs in what is sometimes euphemistically termed 'robust' debate. That does not logically preclude the conclusion that a*

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[14] At [197].
[15] At [239].
[16] *Coleman v Power* at [81] per McHugh J.

communication within that range is also one which is likely or calculated to induce significant anger, outrage, resentment, hatred or disgust. There may be deeply and widely held community attitudes on important questions which have a government or political dimension and which may lead reasonable members of the community to react intensely to a strident challenge to such attitudes.'[17]

93. Hayne J in *Monis* stated the following:

> *'The elimination of communication giving offence, even serious offence, without more is not a legitimate object or end. Political debate and discourse is not, and cannot be, free from passion. It is not, and cannot be, free from appeals to the emotions as well as to reason. It is not, and cannot be, free from insult and invective. Giving and taking offence are inevitable consequences of political debate and discourse. Neither the giving nor the consequent taking of offence can be eliminated without radically altering the way in which political debate and discourse is and must be continued if "the people" referred to in ss 7 and 24 of the Constitution are to play their proper part in the constitutionally prescribed system of government.*
>
> *On its own, regulating the giving of offence is not a legitimate object or end.'*

94. Hayne J in *Monis* (in finding that the criminalisation of offensiveness was not permissible) made the point that the determination of what legislative ends or purpose are legitimate cannot be separated from the democratic context of the Constitution, at [143]:

> *"Even more fundamentally, the determination of what ends are "legitimate" must be made recognising that a constitutional principle is at stake. To subordinate the freedom to a law which pursues an end wholly unrelated to the freedom, even one said to be in the "public interest", would fail to recognise that the freedom is an indispensable incident of the constitutionally prescribed system of government".*

95. On the question of what the purpose of the offence provision in *Monis* was and whether it was permissible, Hayne J in *Monis* at [214] said:

> *"The better view is that the object or end pursued by s 471.12 is not a legitimate object or end. Preventing use of a postal or similar service in a way that is offensive does no more than*

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[17] At [67].

regulate the civility of discourse carried on by using such a service. Coleman v Power established that promoting civility of discourse is not a legitimate object or end".

96. Gummow and Hayne JJ at [199] in *Coleman v Power* stated:

> *"If s 7(1)(d) is not construed in the way we have indicated, but is construed as prohibiting the use of any words to a person that are calculated to hurt the personal feelings of that person, it is evident that discourse in a public place on any subject (private or political) is more narrowly constrained by the requirements of the Vagrants Act. And the end served by the Vagrants Act (on that wider construction of its application) would necessarily be described in terms of ensuring the civility of discourse. The very basis of the decision in* Lange *would require the conclusion that an end identified in that way could not satisfy the second of the tests articulated in* Lange*."* (Emphasis added)

97. Kirby J in *Coleman v Power* stated at [254]-[256]:

> *"It follows that s 7(1)(d) can, and should be, construed so that it conforms to the* Lange *test as reformulated in this appeal. As so construed, "insulting" words in the context of the Act are those that go beyond words merely causing affront or hurt to personal feelings. They refer to words of an aggravated quality apt to a statute of the present type, to a requirement that the insulting words be expressed "to" the person insulted, and to a legislative setting concerned with public order. They are words intended, or reasonably likely, to provoke unlawful physical retaliation [264]. They are words prone to arouse a physical response, or a risk thereof [265]. They are not words uttered in the course of communication about governmental or political matters, however emotional, upsetting or affronting those words might be when used in such a context.*
>
> *In such communication, unless the words rise to the level of provoking or arousing physical retaliation or the risk of such (and then invite the application of the second limb of the Lange test) a measure of robust, ardent language and "insult" must be tolerated by the recipient. In Australia, it must be borne for the greater good of free political communication in the representative democracy established by the Constitution.*

If s 7(1)(d) is confined to the use in or near a public place of threatening, abusive or insulting words that go beyond hurting personal feelings and involve words that are reasonably likely to provoke unlawful physical retaliation [266], the proportionality of the contested provision and the legitimate ends of State government in the context of the fulfilment of those ends and of the system of representative and responsible government provided in the federal Constitution becomes clear. The Act, so interpreted, is confined to preventing and sanctioning public violence and provocation to such conduct. As such, it deals with extreme conduct or "fighting" words [267]. It has always been a legitimate function of government to prevent and punish behaviour of such kind. Doing so in State law does not diminish, disproportionately, the federal system of representative and responsible government. On the contrary, it protects the social environment in which debate and civil discourse, however vigorous, emotional and insulting, can take place without threats of actual physical violence."

98. McHugh J in *Coleman v Power* at [105] stated:

"The use of insulting words is a common enough technique in political discussion and debates. No doubt speakers and writers sometimes use them as weapons of intimidation. And whether insulting words are or are not used for the purpose of intimidation, fear of insult may have a chilling effect on political debate. However, as I have indicated, insults are a legitimate part of the political discussion protected by the Constitution. An unqualified prohibition on their use cannot be justified as compatible with the constitutional freedom. Such a prohibition goes beyond anything that could be regarded as reasonably appropriate and adapted to maintaining the system of representative government."

99. French CJ in *Monis* took a sceptical view of the various submissions by the State parties as to the "purposes" of the law in question, in stating at [73]:

"Its purpose is properly described as the prevention of the conduct which it prohibits. That is the prevention of uses of postal or similar services which reasonable persons would regard as being, in all the circumstances, offensive. That should not be regarded as a legitimate end not least because, as explained below, its very breadth is incompatible with its implementation in a way that is consistent with the

maintenance of that freedom of communication which is a necessary incident of the system of representative government prescribed by the Constitution".

100. Heydon J in *Monis* agreed with French CJ.[18]

101. The Attorney-General of NSW in *Holcombe and others* instead submitted that the "protective" purpose of the impugned law is not incompatible with the maintenance of the constitutionally prescribed system of government, or the implied freedom that supports it, nor is the means employed to achieve that purpose.

102. The findings by French CJ referred to above were made in the context of similar submissions having been made to those advanced by the Attorney General of NSW in the matter of *Holcombe and others*. These included the submission, summarised by Hayne J, that the purpose of criminalising the offensive use of the postal service was permissible because at [195]:

"... if really offensive communications can be made by post, recipients would be "fearful" (presumably fearful of receiving a communication that would offend them). Some submissions went no further than that. If the assertion is right (and there is no basis for deciding that it is) it is an observation that leads to no relevant legal conclusion. Perhaps it is for that reason that the Commonwealth took a further step in its argument and asserted that there could and would be consequences for the postal service flowing from this postulated fear. The Commonwealth identified these consequences as persons being "discouraged from willing receipt of mail" with a consequent "adverse effect upon the willingness of senders ... to use postal services as a means of communication". No basis for this assertion was provided. It is not an assertion that is self-evidently likely to be true. On the contrary, the notion that a person who has received an offensive communication in the mail (even one that is really offensive) will thereafter not take any mail at all is inherently improbable. If that were ever to happen its occurrence would be very rare indeed and it would have not the slightest effect on the general operation of the postal service. The fears expressed by the Commonwealth should be dismissed as spectral".

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[18] At [236], despite describing the ultimate conclusion as, "*an outcome so extraordinary as to cast doubt, and perhaps more than doubt, on the fundamental assumption and the chain of reasoning which led to it*" - the fundamental assumption being the very existence of the implied freedom of political communication.

103. The only authority cited for the Attorney-General's proposition in *Holcombe and others* that s4A(1) *SOA* had a "protective" purpose are the obiter comments made by Loveday J, a single justice of the Supreme Court of New South Wales, in *R v Stutsel and Reid* (1990) 20 NSWLR 661 at 663-664 and a decision of the District Court in *Jolly v R* [2009] NSWDC 212 (3 July 2009) at [20].

104. We submitted that imputing to the legislature the purpose of preventing persons being deterred from using public places, because of the possibility of being offended, is to drift from a true analysis of purpose to mere speculation and opinion as to what ends a law may achieve. If this were indeed the legislative purpose, it would be likely the legislature would have actually enacted an offence tailored to achieve that. The offence in question is clearly not so tailored.

105. There is also no real basis to conclude that in the absence of the offence provision persons might be deterred from using public space. The true purpose is to be construed by considering the direct effect of the legislation, not by reference to mere speculation as to why that direct effect might be.

106. The Attorney-General of NSW opined that the purpose of the offence provision is to prevent citizens from remaining at home and in other private places, lest they be offended in public places. We *could* have opined in response that the offence provision has consistently been used as a tool of oppression against disempowered and marginalised citizens by police, to the extent that its purpose must have been to facilitate the oppressive regulation of the lives of citizens deemed threatening to the established social order. Neither opinion is particularly useful.

107. The true purpose of the offence provision is to stop offensive language being used in public places, to regulate the 'civility' of discourse. Just as in *Monis* the purpose of the law was, *"properly described as the prevention of the conduct which it prohibits".*[19] Just as in the reasons of three justices in *Monis*, and of four justices in *Coleman v Power*, that purpose is impermissible.

108. If that is the purpose of the offence provision in s4A(1), the inquiry into constitutional validity is resolved in favour of the defendant.

109. The Attorney-General submitted that *Monis* was binding and the Local Court bound to find the offence creating provision valid. We submitted however that *Monis* is not binding on lower courts in relation to s4A(1) *SOA* because it is concerned with different legislation and that the court could and should adopt the essential reasoning of French CJ and Hayne and Heydon JJ and find that the offence provision is a law made for an

[19] French CJ at [73].

impermissible purpose - it being no role of Parliament in a free society to regulate offensiveness alone, even serious offensiveness.

110. The impugned law imposes a standard which is arbitrary in application and which unduly fetters political communication. To restrict this type of language in the public domain is to restrict the effectiveness of the freedom of political speech and the extent to which new or controversial ideas may be brought to the attention of potential listeners and voters. The implied freedom must include the capacity to criticise, and criticise harshly, the views of other political actors.

111. Even when read as narrowly as is possible (requiring a high degree of offensiveness or seriously offensive language), consistent with its purpose and text, the object of the provision is incompatible with the maintenance of the system of government we enjoy.

112. It follows that the law is invalid and it is unnecessary to consider the second limb of the second question in the *Lange v ABC; Coleman v Power* test.

C. Is the law reasonably appropriate and adapted to achieving that legitimate object or end in a manner compatible with the constitutionally prescribed system of government and the freedom of political communication?

113. As held by French CJ in *Monis*, the questions of whether the section serves a legitimate end and whether if so, it serves that end in a manner which is compatible with the maintenance of the constitutionally prescribed system of government collapse into one. The impugned law cannot be applied in such a way as to meet the compatibility requirement given the answer to the question above at B.

114. However, and in the alternative, the answer to this question we suggest is "no".

115. If the impugned law were considered to have as its legitimate end the prevention of breaches of the peace, the mere use of offensive language in a public place does not justify the potential consequences of an arrest without warrant, criminal conviction and criminal penalties.

116. Secondly, if the impugned law were considered to have as its legitimate end the prevention of a chilling effect on political discussion and debate, it is not appropriate and adapted to that purpose, because the potential penal consequences of the law are likely to have a greater silencing effect on political discussion and debate than allowing citizens to voice their

views (and subject their views) however offensive to the marketplace of ideas.

117. The existence of the defence of "reasonable excuse" in s4A(2) does not operate to render the offence provision constitutionally valid. Assuming a legitimate purpose underpins the offence-creating provision, we suggest that it would be to impermissibly redraft the offence to interpret the defence to apply to any political communication, no matter how offensive. Such an exercise in construction would be impermissible for the same reasons a 'political communication exception' carve-out of liability is impermissible.

The impugned law should not be read down

118. Any attempt to bring the impugned law within the bounds of a valid imposition on the freedom of political communication would be to fundamentally alter the offence provision enacted by Parliament.

119. In addition, there are a range of possibilities - such as reading in a breach of the peace element or reading in an exception for political speech either generally or as a component of the "reasonable excuse" defence in s4A(2). There is no reason based upon the law itself to select one limitation rather than another. Accordingly, the law should not be reduced to validity by adopting one or more of the possible limitations and the law should be held to be invalid in its totality.[20]

Prohibition on issuing Penalty Notices to Protesters and others

120. A disturbing aspect of this case is that all of our clients were initially issued with Penalty Notices for using offensive language despite the law clearly prohibiting the Police using them against protesters in these circumstances.

121. Section 339 *Criminal Procedure Act 1986* (NSW) relevantly provides:

> **339 Limitation on exercise of penalty notice powers**
>
> This Part does not authorise a police officer to serve a penalty notice in relation to:
>
> (a) an industrial dispute, or
>
> (b) an apparently genuine demonstration or protest, or
>
> (c) a procession, or

[20] *Monis v The Queen* (2013) 249 CLR 92 at [76] per French CJ, citing *Pidoto v Victoria* (1943) 68 CR 87 per Latham CJ at 111.

(d) an organised assembly.

122. Any protestors or others who have previously been issued with invalid Penalty Notices may be able to apply to the State Debt Recovery Office for a refund of their paid fines. However, as was the case here, that potentially leaves such persons open to criminal prosecution in the Local Court for the offence (subject to the limitation period of 6 months).

123. The authors welcome any comments or feedback about the issues raised in this paper.

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Local Court
New South Wales

Case Name:	Tessadri v Holcombe, Wright and Rose
Medium Neutral Citation:	
Hearing Date(s):	09/05/2016, 01/07/2016
Date of Orders:	
Date of Decision:	25/10/2016
Jurisdiction:	Criminal
Before:	Magistrate Bradd
Decision:	Holcombe Wright and Rose are not guilty of using offensive language
Catchwords:	The validity of section 4A of the Summary offences Act – whether a finding in relation to the criminal hearing can determined before the question of the constitutional validity of the legislation is considered
Legislation Cited:	Summary Offences Act 1923
Cases Cited:	Pan Laboratories Pty Ltd v Commonwealth (1999) 73 ALJR 464; Alqudsi v Commonwealth [2015] HCA 49; Worchester v Smith [1951] VLR 316; Spence v Loguch NSWSC unreported; Ball v McIntyre [1966] 9 FLR 237; Connolly v Willis 1984] 1 NSWLR 373
Texts Cited:	Macquarie Dictionary
Category:	Primary
Parties:	Sergeant Tessadri (Police Prosecutor) April (Samuel) Holcombe Patrick Wright Catherine Rose
Representation:	Counsel: L Valentine for the prosecutor C Lenehan for the Attorney General of New South Wales (intervening) S Lawrence for Rose and Wright F Graham for Holcombe

	Solicitors: Hearn Legal for Rose Stanford Lawyers for Holcombe and Wright
File Number(s):	2015/347661 (Wright) 2015/348760 (Holcombe) 2016/82320 (Holcombe)
Publication Restriction:	Nil

JUDGMENT

1 Holcombe, Wright and Rose ("the accused persons") have each been served with a court attendance notice ("CAN"). Each CAN alleges that on 20/09/2015 at Belmore Park, Haymarket each of the accused persons used offensive language in a public place.

2 Each of the accused persons has pleaded not guilty.

3 The representatives of the police prosecutor and each of the accused persons have agreed on the facts. The accused persons have made a combined submission that the legislation upon which the alleged offence is based, namely section 4A (1) of the *Summary Offences Act* 1988 ("the Act") is invalid.

4 A threshold question is whether the court must determine whether the Act is invalid first, and if found not to be invalid go onto to determine whether each of the accused persons is guilty of the offence, or whether the court can determine whether each of the accused persons are guilty of the offence, and if the court finds that each of the accused persons is not guilty, not determine the validity of the Act.

5 Mr Lenehan submits that the court can do the latter, whereas counsel for each of the accused persons submits that the court must determine the validity of the Act first.

Must the court determine the issue of validity first?

6 Counsel for each of the accused persons submit that the issue of validity must be determined first because the court cannot proceed without jurisdiction.

7 Mr Lenehan submits that the cases of *Pan Laboratories Pty Ltd v Commonwealth*[1] ("Pan") and *Alqudsi v Commonwealth*[2] ("Alqudsi) are law for the proposition that the court should exercise its criminal jurisdiction first.

8 In Pan, the Commonwealth Director of Public Prosecutions ("DPP") had filed an indictment in the District Court of New South Wales alleging Pan had committed various offences. The jury found Pan not guilty of four counts and guilty on ten of the remaining twelve counts. Pan applied to the trial Judge to reserve certain question of law pursuant to the *Judiciary Act* 1903 (Cth) s 72. The trial Judge rejected the application and proceeded to convict Pan and to sentence it. The convictions were set aside by the Court of Criminal Appeal. A new trial was ordered. The DPP filed a fresh bill of indictment. The District Court trial Judge vacated the hearing date to permit an application to be made to the High Court. Kirby J, sitting alone decided that:

> ...the constitutional arguments should proceed to hearing on their merits. However, they should do so in a manner respectful; of the court of criminal trial and of its control over the trial process. In that way, the arguments which Pan wishes to advance will be reserved. The function of the criminal process will be reinforced. The questions may go away if the jury acquits Pan in the lower court...

9 In Alqudis, in the course of a mention in the Local Court of New South Wales, counsel for Alqudis indicated to the Crown the prospect of a High Court challenge to the Act that enacted the offences for which Alqudis had been charged. Alqudis was committed to trial, and the Commonwealth Director of Public Prosecutions ("DPP") applied to the Chief Justice of the Supreme Court for the trial to proceed in the Supreme Court. The application was granted. In the Supreme Court, counsel for Alqudis raised the possibility of a High Court challenge. An adjournment was granted. On the next date, Alqudis was arraigned, and pleaded not guilty. Counsel for the Alqudis once again raised the possibility of a High Court challenge. A trial date was fixed. Subsequently before the trial date, Alqudis commenced proceedings in the High Court. The DPP sought a direction in the High Court that the proceedings before the

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[1] (1999) 73 ALJR 464
[2] [2015] HCA 49

court be remitted to the Supreme Court. French CJ, sitting alone followed Pan and stated:

> There is ample authority for the proposition that this Court should be reluctant to disturb the progress of pending criminal proceedings.
>
> There are many contingencies that might shape the progress of the debate about constitutional validity in the Supreme Court...There other contingencies under which the constitutional point may never be reached or might become irrelevant, for example, because of an acquittal after trial.

10 While the submission of counsel for the accused persons has the appeal of logic, Pan and Alqudis indicate that the criminal trial may take place first. It is in the public interest for the court to deal with proceedings that come before it in the most efficient way. In my view, the court has the discretion to deal with proceedings in a manner it considers to be efficient, and in accordance with law. In the proceedings before me, the most efficient way is for the court to consider the charges first.

The charges

11 The parties agree that the accused persons attended Belmore Park to engage, with others, in a political protest. The protest was a protest held to counter a protest assembly and march organised by Reverend Nile and a group called Unity Australia to support the institution of marriage between a man and a woman.

12 Catherine Rose led a chant that was amplified on loudspeakers as follows:

> When I say same sex, you say marriage. Same sex. Marriage. Same sex. Marriage. When I say bigots, you say fuck off. Bigots. Fuck Off. Bigots. Fuck off. Bigots. Fuck off.

13 She also made speeches where referred to politicians as "those fuckers".

14 Samuel Holcombe made a speech into the microphone as follows:

> ...the fact that people over there are contributing to an epidemic LGBTI youth suicide, self-harm and mental illness...What's the real damage? Me saying fuck them or...we need to stand against them and make sure us using bad language about these fuckers is nothing compared to the epidemic of suicides these people contribute to.

15 Patrick Wright made a speech into the microphone as follows:

> There's a long, long political tradition here in Sydney about protesting Fred Nile...So fuck Fred Nile.

16 A police Sergeant told Catherine Rose that police had received complaints from members of the public, and told her to stop swearing. She replied that "fuck" was part of the common vernacular. The police officer responded by saying that it was not part of children's vernacular.

17 Ms Valentine for the prosecutor states that to be offensive within the meaning of the Act, the behaviour must be calculated to wound the feelings, arouse anger or resentment or disgust and outrage in the mind of a reasonable person; *Worchester v Smith*[3]. Whether the language is offensive depends to some extent upon where the behaviour took place, and the circumstances in which it took place; *Spence v Loguch*[4]. The reasonable person contemplated by the test is envisioned as being reasonably tolerant and understanding and reasonably contemporary in his reactions; *Ball v McIntyre*[5] If there is evidence that a person present was offended then this evidence although not necessary is relevant and admissible; *Connolly v Willis*[6].

18 Ms Valentine submits that:

(1) The offences took place on a Sunday at about 1:30 pm where all types of people including families with children were present and likely to be present given the day and time.

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[3] [1951] VLR 316 at 318
[4] NSWSC (unreported)
[5] [1966] 9 FLR 237
[6] [1984] 1 NSWLR 373

(2) The chants were directed at the Unity Australia group and Reverend Nile, and were calculated to arouse anger, resentment and disgust in the minds of the group representing Unity Australia.

(3) A police officer received complaints from members of the public. Children were present.

Was the language used by Catherine Rose offensive?

19 In leading the chant, Rose did not use the phrase "fuck off". She said "bigot" and persons in the crowd used the aforementioned phrase.

20 The offence for which Rose is charged is one of "Use offensive language". There is no evidence that Rose used the language "fuck off"

Was the language used by Samuel Holcombe offensive?

21 The first part of the language complained of is:

> What's the real damage? Me saying fuck them or they encouraging young people to kill themselves or harm themselves or feel that they have no place in this society.

22 The phrase "fuck them" is a phrase addressed to the supporters of the counter protest group, rather than the other protest group. The phrase is used as expression to dismiss the argument against marriage equality. In the context in which the phrase is used it cannot be said that the language is used to wound the feelings, arouse anger or disgust in a reasonable person

23 The second part of the language complained of is;

> we need to stand against them and make sure us using bad language about these fuckers is nothing compared to the epidemic of suicides these people contribute to.

24 The phrase "these fuckers" is a phrase addressed to the supporters of the counter protest group, rather than the other protest group. The phrase is

used as expression to dismiss the argument against marriage equality. In the context in which the phrase is used it cannot be said that the language is used to wound the feelings, arouse anger or disgust in a reasonable person

Was the language used by Patrick Wright offensive?

25 The language complained of is:

> There's a long, long political tradition here in Sydney about protesting Fred Nile... So fuck Fred Nile.

26 The phrase "So fuck Fred Nile" is a phrase addressed to the supporters of the counter protest group, rather than the other protest group. The phrase is used as expression to dismiss the argument against marriage equality. In the context in which the phrase is used it cannot be said that the language is used to wound the feelings, arouse anger or disgust in a reasonable person

Conclusion

27 I am not satisfied beyond a reasonable doubt that the language used by each of the accused persons was offensive.

28 The charge against each of the accused persons is dismissed.

The word "fuck"

29 When the word was used in various ways by each the three persons, police officers were standing around them. They took on an observer role. Nevertheless, a police officer says that he told Catherine Rose that complaints had been received; and "fuck' was not part of children's vernacular. The word "fuck" is defined in the Macquarie Dictionary, which lists various phrases in which the word appears. The word has no meaning, what is meant depends on the context in which it appears. Whether it is part of a child's vernacular depends on the words that a child listens to from others. If the child's caregivers, or persons in close association with the child use the word, one can expect that the child will use the word, merely copying what the

child has heard. A person does not use offensive language merely by using the word "fuck". It depends on whether the word is used in a way calculated to wound the feelings, arouse anger or resentment or disgust and outrage in the mind of a reasonable person, which will depend on the context in which the word is used, phrases such as "you fucking beauty", for "fucks sake", "fucking hell", are just a few of the ways where the word is used, and is unlikely to be offensive.

Validity of the Act

30 Having dismissed the charges of offensive language, the question of the validity of the Act is no longer an issue to be considered.