

## **WARNING**

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Family Name					
Given Name/s					
Student Number					
Teaching Period	Semester 2, 2018				

<b>LWZ204 – Australian Constitutional Law</b>	<b>DURATION</b>	
	Reading Time:	<b>20 minutes</b>
	Writing Time:	<b>120 minutes</b>
<b>INSTRUCTIONS TO CANDIDATES</b>		
<p>The examination has 2 Parts.</p> <p>Part A:                      Answer both questions worth a total of 40 marks - Marks for each question are of equal value.</p> <p>Suggested Time:            80 minutes (1 hour and 20 minutes)</p> <p>Part B:                      Answer TWO questions only, worth 20 marks</p> <p>Suggested Time:            40 minutes</p> <p><b>Total marks for this examination: 60</b></p>		
<b>EXAM CONDITIONS</b>		
<p><u>You may begin writing from the commencement of the examination session.</u> The reading time indicated above is provided as a guide only.</p>		
This is an OPEN BOOK examination		
Any calculator is permitted		
Any handwritten material is also permitted		
Any hard copy, English dictionary is permitted (annotated allowed)		
<b>ADDITIONAL AUTHORISED MATERIALS</b>	<b>EXAMINATION MATERIALS TO BE SUPPLIED</b>	
Any printed material with the exception of CDU Library books	1 x 20 Page Book 1 Scrap Paper	

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## **PART A**

**You must answer all questions in Part A.**

**Suggested time allocation for Part A: 1 hour and 20 minutes**

### **QUESTION ONE**

**This question is compulsory**

90 member states of the United Nations signed a joint statement on the Rights of Lesbian, Gay, Bisexual and Transgender (“LGBT”) Persons drafted by the United Nations Human Rights Council. The joint statement provides in pertinent part:

*We call on states to take steps to end acts of violence, discrimination, denigration and related human rights violations committed against individuals because of their sexual orientation or gender identity, encourage Special Procedures, treaty bodies and other stakeholders to continue to integrate these issues within their relevant mandates.*

After signing this statement, twenty five states (including Australia, Canada, New Zealand, the UK and the United States) entered into a multi-lateral treaty, the *Convention on the Elimination of All Forms of Discrimination Against Sexual Minorities* (‘the Treaty’). The Treaty addresses the issues of discrimination and related human rights violations, such as harassment, intimidation and vilification in all places. The Treaty aims to minimise the emotional and physical consequences resulting from homophobic and transphobic hate speech as well as victimization and potential violence that can result from such speech. The Treaty states:

*Convention on the Elimination of All Forms of Discrimination Against Sexual Minorities*

**Preamble**

Homophobic and transphobic hate speech has devastating psychological and physical effects on its targets as well as the wider group of which they are or perceived to be a member. These injuries may include pecuniary loss as well as a variety of negative feelings, such as loss of dignity, depression and other physical ailments. Each state signatory to this Treaty undertakes to address the issue of homophobic and transphobic hate speech. This Treaty is intended to promote equality of opportunity for all members of the community and improve the quality of democratic life through a citizenry respectful of the dignity and worth of all its members.

**Art 1(1):**

Any advocacy of hatred based on homosexual orientation or transgender identity that constitutes incitement to discrimination, hostility or violence shall be prohibited by law. Harassment, intimidation and vilification of such persons shall also be prohibited by law.

**Article 1 (2):**

State parties undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, discrimination against sexual minorities and, to this end, shall declare an offence punishable by law:

- (a) All dissemination of ideas based on the superiority of heterosexual orientation or inferiority of homosexual orientation or which is otherwise based on hatred of homosexuals or group of sexual minorities;**
- (b) Incitement to discrimination against homosexuals as well as acts of hatred or violence or incitement to such acts against any homosexual or group of sexual minorities.**

**Art 2(1): 'Homosexual'** means a person who is attracted to members of the

same sex.

**Article 2(2):** 'Sexual minorities' means homosexual, lesbian, gay, bisexual and transgender.

**Article 2(3):** "*Harassment, intimidation or vilification*" means any gesture, any written, verbal or physical act that is reasonably perceived as being motivated either by any actual or perceived homosexual, lesbian, gay, bisexual or transgender orientation of a person and that a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming such person or placing such person in reasonable fear of physical or emotional harm.

After Australia became a signatory to the Treaty in January 2013, the Australian government enacted into law the *Sexual Orientation Discrimination Act 2013 (Cth)* which provides that:

*Sexual Orientation Discrimination Act 2013 (Cth)*

**Section 1: It is unlawful for a person to do an act otherwise than in private, if**

**(a) the act is reasonably likely:**

**(i) to vilify another person or group of persons, or**

**(ii) intimidate another person or group of persons, and**

**(b) the act is done because of the sexual orientation or gender identity of that person or group of persons.**

**For purposes of this section, vilify means to offend, insult or humiliate a person or a group of persons; intimidate means to cause fear of physical harm to a person or to the property of a person or to the members of a group of persons.**

**Section 1 does not apply to words, sounds, images or writing spoken, broadcast, published or otherwise communicated in the course of participating in the public discussion of any political, social, cultural, religious, artistic, academic or scientific matter.**

**Section 2: Any person who knowingly or recklessly does an act that is reasonably likely in all the circumstances to incite (through the expression of**

**insults, slander, acts of violence or otherwise) hatred towards or discrimination of, a person or group of persons on the ground of the sexual orientation or gender identity of the person or members of the group is guilty of an offence and is liable to imprisonment for a term not exceeding seven years.**

**Section 2 does not apply to communications which are true or acts done reasonably and in good faith.**

Arnie Dolt, a journalist, makes some controversial statements in The OZ (a conservative tabloid with widespread circulation) suggesting certain high profile gay men, such as Dim Hillson (a recently appointed Commissioner to the Australian Human Rights Commission), were not genuinely homosexual but were pretending to be gay so they could access benefits increasingly available to sexual minority groups, including prestigious appointments to human rights bodies. Dim Hilson and several prominent gay figures have brought a suit in the Federal Court against Arnie for breaching the *Sexual Orientation Discrimination Act 2013 (Cth)*. The Commonwealth DPP also charges Arnie with committing an offence under Section 2 of the Act. Arnie wishes to challenge the constitutionality of this law.

**Discuss the constitutional validity of Section 1 and Section 2 of the *Sexual Orientation Discrimination Act 2013 (Cth)* under s51(xxix) of the Constitution. [20 Marks]**

## **QUESTION TWO**

**This question is compulsory**

**Part A (15 Marks)**

In mid-2011, Prime Minister Gillard announced the winding back of Australia's participation in the conflict in Afghanistan. The Prime Minister indicated all troops would complete their tour of duty by June 2012. In May 2012, the Commonwealth passed the 'Demobilisation Of Military Personnel Act' (Cth Act) requiring employers (including State

governments) to give preference to former members of the armed services when hiring employees. The legislation was designed to assist returning military to re-integrate into the domestic economy.

The Leader of a minor party controlling the balance of power in the Australian Senate, Bobby DeVito, proclaimed that hard working Aussies were being denied jobs because of the preferential treatment given to returning service personnel. A march was held in Sydney to protest the preferential scheme. The Emperor, a protestor participating in the Sydney march, was wearing a T-Shirt emblazoned with the statement: 'F... the draft and the war in Afghanistan.' The Emperor yelled out to bystanders and police: 'This is what I think about the f...g affirmative action plan for soldiers who are over in Afghanistan murdering innocent civilians.' He then proceeded to 'moon' the police by taking down his shorts to display his buttocks. Several of the bystanders laughed but a policeman arrested the Emperor for violating a state law prohibiting offensive speech and conduct.

Discuss the constitutionality of the Commonwealth Act **10 marks**

Discuss whether the Emperor has any basis for challenging his arrest under the state law. **5 marks**

## Part B [5 Marks]

### You must answer this question

'Except in the case of the defence power during the time of war or emergency, the constitutional validity of a law or of an administrative act cannot be made to depend upon the opinion of Parliament, the government or any other person that the law or act is within or relates to the subject matter of a power.'

Discuss? **5 marks**



## **PART B**

**You must answer only TWO questions in Part B.**

**Suggested Time allocation for Part B: 1 hour**

### **QUESTION THREE**

Explain how vertical fiscal imbalance has been enhanced by the High Court's interpretation of the various spending powers, including sections 81, 96, 51 (ii), and 90. **10 MARKS**

### **QUESTION FOUR**

In *ACTV v Commonwealth* (1992) 177 CLR 106, Mason CJ recognised a “guarantee of freedom of expression in relation to public and political affairs must necessarily be implied from the provision which the Constitution makes for a system of representative government.” Discuss the arguments in favour of, and against, implying a right of political communication in the Constitution. **10 MARKS**

### **QUESTION FIVE**

According to Professor William Rich, what are the differences and similarities between the institutional structures created by the Australian and American Constitutions? On what basis does he assert that similar structural themes and culture have resulted in remarkably similar approaches to constitutional law? **10 Marks**

## QUESTION SIX

In the pre- *Cole* era there were two different interpretations of Section 92 of the Australian Constitution. Under the individual rights or laissez-faire theoretical approach, a law would be found violative of Section 92 if the regulation directly restricted trade and commerce rather than indirectly. This became known as the criterion of operation test. What criticisms were levelled against this approach to interpreting Section 92 by the court in *Cole v Whitfield* (1988) 165 CLR 360?

**10 MARKS**

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**END OF EXAMINATION QUESTION PAPER**