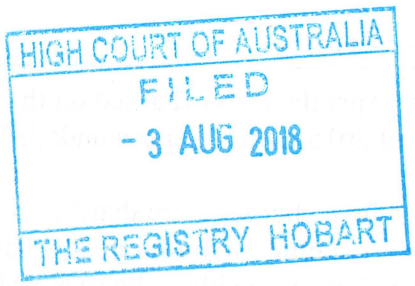
IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

No H2 of 2018

BETWEEN:

JOHN GRAHAM PRESTON
Appellant
- and -
ELIZABETH AVERY
First Respondent
SCOTT WILKIE
Second Respondent

RESPONDENTS' SUBMISSIONS



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PART I: CERTIFICATION

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

PART II: ISSUES

2. The question that arises in this proceeding is whether s 9(2) of the *Reproductive Health (Access to Terminations) Act 2013* (Tas) (**Reproductive Health Act**) impermissibly burdens the implied freedom of political communication to the extent that it prohibits 'a protest in relation to terminations that is able to be seen or heard by a person accessing or attempting to access premises at which terminations are provided' (**protesting prohibition**).[1]

PART III: SECTION 78B NOTICE

3. Notice was given under s 78B of the *Judiciary Act 1903* (Cth) on 5 April 2018.

PART IV: JUDGMENT BELOW

4. The Appellant appeals the decision of the Magistrates Court of Tasmania in *Police v Preston and Stallard*.[2]

PART V: FACTS

5. The Appellant was charged on three separate occasions, 5 and 8 September 2014 and 14 April 2015, with offences under s 9(2) of the Reproductive Health Act.[3]

6. The three charges were that '... at Hobart in Tasmania, [by] being within an access zone and engaging in prohibited behaviour by protesting in relation to terminations [the Appellant] was able to be seen or heard by [a person], accessing or attempting to access premises at which terminations are provided, (sic) located at 1A Victoria Street.'[4]

7. The first charge related to the Appellant holding placards[5] and handing out leaflets[6] near the entrance to the Specialist Medical Centre in Hobart. The second charge related to the same conduct, and included a difficult conversation between the Appellant and a woman wishing to access the Centre.[7] The third charge involved the Appellant and two other people holding placards outside the Centre and included the Appellant failing to comply with a police officer's direction to leave the immediate area under s 15B(1) of the *Police Offences Act 1935* (Tas).[8]

8. In proceedings before the Magistrates Court, the Appellant challenged the validity of the protesting prohibition on two bases. First, that it was contrary to the guarantee of religious freedom contained in s 46(1) of the *Constitution Act 1934* (Tas). Secondly,

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1 See para (b) of the definition of 'prohibited behaviour' in the Reproductive Health Act; cf *Public Health and Wellbeing Act 2008* (Vic) (**Public Health Act**) s 185D(1)(b).

2 (Unreported, Magistrates Court of Tasmania, Magistrate Rheinberger, 27 July 2016) (**Magistrate's Reasons**).

3 Core Appeal Book (**CAB**) 4 – 7.

4 See CAB 4 – 7.

5 See CAB 19 – 24.

6 See Book of Further Materials (**FM**) 25; Transcript 20.

7 CAB 26 – 27; Magistrate's Reasons 1 – 2 [5].

8 CAB 7.

that it infringed the implied freedom of political communication in the Commonwealth Constitution. The Magistrate rejected the Appellant's constitutional challenges and found all three of the charges proved.[9]

9. The Appellant appealed to the Supreme Court of Tasmania. The appeal was joined with the proceedings in *Clubb v Edwards and Anor* (**the Victorian proceedings**) and removed to the High Court by order of Gordon J on 23 March 2018. The Appellant filed an amended notice of appeal on 5 April, which now centres solely upon the implied freedom of political communication.

PART VI: ARGUMENT

A *Construing the Reproductive Health Act*

10. The Reproductive Health Act consists of five parts. Parts 2 and 3 make provision for a woman's right of access to terminations, and amendments to sch 1 to the *Criminal Code Act 1924* (Tas) (**the Code**) de-criminalising terminations that are undertaken by a medical practitioner with a woman's 'consent'.[10]

1 *Scheme of Part 2*

11. Part 2 of the Reproductive Health Act is directed at enabling women to have access to terminations, and ensuring that access is: informed; holistic (taking full account of a woman's circumstances); consensual; and safe.

12. Section 4 establishes a woman's right to access a termination treatment by a medical practitioner if she is not more than sixteen weeks pregnant.

13. Section 5(1) enables women to lawfully access termination services after sixteen weeks if a medical practitioner: (a) reasonably believes the pregnancy would involve greater risk of injury to the physical or mental health of the pregnant woman than if the pregnancy were terminated; and (b) has consulted with another medical practitioner that concurs with that assessment. Subsection (2) permits a medical practitioner in making that assessment to have regard to the woman's physical, psychological, economic and social circumstances. Subsection (3) requires, however, that at least one of the medical practitioners that makes an assessment under sub-s (1) is a specialist in obstetrics or gynaecology.

14. Section 6(1) relieves an individual of a legal duty to participate in treatment authorised by ss 4 and 5, if they have a conscientious objection to terminations. Subsections (2) and (3) of that section nevertheless impose a duty on a medical practitioner to perform a termination in an emergency: that is, where a termination is necessary to save the life of a pregnant woman or to prevent her serious physical injury. Subsection (4) goes on to also impose a duty on a nurse or midwife to assist a medical practitioner in those circumstances.

15. Section 7 requires a medical practitioner who has a conscientious objection to terminations to provide a woman with a list of prescribed health services from which she may seek advice, information or counselling on the full range of pregnancy options.

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[9] CAB 48; cf CAB 49 – 50; Magistrate's Reasons 23 [88].
[10] Cf *Criminal Code Act 1924* (Tas) sch 1 (**Code**) s 2A.

16. Section 8 makes it clear that 'a woman who consents to, assists in, or performs a termination on herself is not guilty of a crime or any other offence.' This puts beyond doubt that women are not, under any circumstances, to be regarded as criminals for making decisions about their own bodies in relation to pregnancy.[11]

17. The effect of s 9, which is at the centre of this appeal, is to create access zones that enable women, medical practitioners, and other persons to have unobstructed, unharried and safe access to premises where terminations are provided.

18. Section 9(2) makes it an offence for a person to engage in 'prohibited behaviour in an access zone.' An 'access zone' is defined in s 9(1) to mean 'an area within a radius of 150 metres from premises at which terminations are provided.' In the same subsection, 'prohibited behaviour' is then defined by reference to five classes of conduct:

(a) in relation to a person, besetting, harassing, intimidating, interfering with, threatening, hindering, obstructing or impeding that person; or

(b) a protest in relation to terminations that is able to be seen or heard by a person accessing, or attempting to access, premises at which terminations are provided; or

(c) footpath interference in relation to terminations; or

(d) intentionally recording, by any means, a person accessing or attempting to access premises at which terminations are provided without that person's consent; or

(e) any other prescribed behaviour.[12]

19. It is clear that each type of behaviour in paras (a), (c) and (d), if committed within a radius of 150 metres from premises at which terminations are provided, will give rise to the commission of an offence under s 9(2).

20. However, the protesting prohibition in para (b) is different, in that the area in which it operates is further limited by reference to the criteria that a protest can be 'seen' or 'heard' by a 'person *accessing* or *attempting* to *access* premises.'[13] In this context, in its ordinary usage, 'access' relates to gaining entry to premises.[14]

21. Consistently with this, the concept of 'attempting' to access premises is 'in ordinary parlance ... act[ing] with the purpose of bringing about that which [a person] is said to have attempted.'[15] That is, attempting to gain entry to premises. Contrary to the Appellant's submissions,[16] invoking the common law of attempts to construe the provision is neither warranted, nor useful. There is no question of an offence being committed by a woman attempting to gain entry to a terminations clinic.

22. Accessing premises involves no more than an act of passing through an entrance. So too, the words, 'attempting to access' mean no more than trying to pass through an entrance (including, for example, where the person finds the entrance locked or

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[11] Cf Code ss 134 –135 (repealed).
[12] Cf *R v Lewis* (1996) 139 DLR (4th) 480, 490 [25] (Saunders J).
[13] Tasmania, *Parliamentary Debates*, House of Assembly, 16 April 2013, 24 – 87 (Michelle O'Byrne) (**Second Reading Speech**) 50.
[14] *The Macquarie Dictionary.*
[15] *Trade Practices Commission v Tubemakers of Australia and Others* (1983) 47 ALR 719, 737 (Toohey J).
[16] Appellant's Submissions 8 [43].

obstructed, or is dissuaded from entering). The addition of 'attempt' in the provision ensures that it is engaged where a person wishing to enter the premises is for some reason (including as a result of a protest) unable to do so.

23. The protesting prohibition is, thus, effective for its purposes and must be construed consistently with the legitimate legislative purpose it is intended to achieve: to enable persons to access premises where terminations are provided unobstructed, uninjured and un-harried.[17] The Act achieves this purpose by enabling women to gain entry to premises where terminations are provided without having to see or hear a protester. Conceived in that way, nothing turns on whether a person is gaining or trying to gain entry. It will be submitted that the protesting prohibition may operate together with the conduct proscribed by para (a): see paras 69 – 72.

24. Subsections (3) and (4) deal with the prohibited behaviour of recording a person accessing or attempting to access premises where terminations are provided. Central to their purposes is preserving the privacy and dignity of women.[18] Subsection (4) enjoins the publication and distribution of a recording of a person accessing premises where terminations are provided, whether such a recording is lawful or not.

2 ***Scheme of Part 3***

25. Part 3 of the Reproductive Health Act amended the Code first by decriminalising the conduct of women obtaining terminations other than for certain limited medical reasons; and secondly, by inserting into the Code: s 178D, which criminalises abortions by persons, other than the pregnant woman, who are not medical practitioners; and s 178E, which criminalises abortions without a woman's consent.

26. Sections 134, 135, 164 and 165 of the Code were repealed by s 14(f) and (g). Sections 134 and 135, which were perennial provisions, formerly criminalised a woman obtaining an abortion, as well as, any provision of assistance to her for that purpose. Section 164, which was only inserted in 2001, provided for a medical termination where two medical practitioners were required to certify that 'pregnancy would involve greater risk of injury to the physical or mental health of the pregnant woman than if the pregnancy were terminated.' Section 165 created the crime of causing death of a child before birth. The elements of that crime were substantially the same as the crime of murder under s 158.

B *Legislative Context*

27. Although the Reproductive Health Act's scheme and text make clear its legislative intention,[19] this Court has emphasised in cases about the implied freedom that the wider context of an Act, in particular the mischief it is seeking to remedy,[20] and its historical background[21] can assume importance in assessing its constitutional validity.[22]

28. In the case of the Reproductive Health Act:

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[17] Second Reading Speech 50 – 51.

[18] Second reading Speech 50.

[19] Consistently with *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, 46 [47] (Hayne, Heydon, Crennan and Keifel JJ).

[20] See *McCloy v State of New South Wales* (2015) 257 CLR 178, 208 [51] (French CJ, Kiefel, Bell and Keane JJ), 244 – 246 [173] – [176] (Gageler J).

[21] See *Brown v State of Tasmania* (2017) 91 ALJR 1089, 1117 [143] (Kiefel CJ, Bell and Keane JJ); 1126 [191] (Gageler J); 1133 [340], 1134 – 1135 [244] – [247] (Nettle J), 1151 [321] (Gordon J).

[22] Ibid.

(1) the particular mischief to which it is directed is the provision of safe, legal and accessible reproductive health services to women;

(2) its wider legislative context discloses:

(a) an environment in which women were achieving poor health outcomes because they were not readily able to, and were stigmatised for, accessing terminations and related health services; and

(b) an inter-jurisdictional recognition of the reforms required to enable women to have lawful access to terminations; and

(3) the history informing the Act bears out its clear intention to reform criminal provisions rooted in Regency era religious and social sensibilities and the relative nascence of medical understanding about women's reproductive health.

1 ***Mischief***

29. The Minister for Health's Second Reading Speech ('Second Reading Speech') is centred upon the proposition that 'without the provision of a full range of safe, legal and accessible reproductive services, women experience poorer health outcomes.'[23] It makes clear that the Reproductive Health Act was directed at taking access to terminations outside the bounds of the criminal law, and reforming the law to promote health.[24]

30. In the Second Reading Speech the Minister observed that criminal laws 'act as a deterrent to the provision of safe and legal services.' Consequently, 'women in seeking a termination are forced to: continue a pregnancy against their will; travel to another jurisdiction for services; or seek unsafe and unregulated services – all at an increased risk to their health and wellbeing.'[25]

31. The Minister also identified that another significant obstacle to women accessing safe termination services was the 'stigma' and 'shame' associated with having to run the gauntlet of protestors in order to access medical clinics providing those services.[26] In considering this problem, the Minister advanced the view that:

> [S]tanding on the street outside a medical facility with the express purpose of dissuading or delaying a woman from accessing a legitimate reproductive health service is ... quite unacceptable.
>
> A democracy has many different freedoms, some of which conflict with each other. And the right to protest, if exercised without restraint, can interfere with other people's right to privacy and freedom from abuse.[27]

32. The Minister went on to refer to the Court's most recent decision about political communication in *Attorney-General (South Australia) v Adelaide City Corporation*[28]

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[23] Second Reading Speech 44.
[24] Second Reading Speech 44 – 49.
[25] Second Reading Speech 45.
[26] Second Reading Speech 50 – 51.
[27] Second Reading Speech 51.
[28] (2013) 249 CLR 1.

noting that, as a general principle, the Court affirmed that it is legitimate to restrict an individual's freedom of political communication in a public place where 'it is necessary to protect the freedoms of others.'[29] In this case the freedom to unobstructed, unharried and safe access to a terminations clinic from a public place like a footpath or road.[30]

33. From the speech it is clear that the Reproductive Health Act pursues an underlying principle that '[w]omen are entitled to access termination services in a confidential manner without the threat of harassment.'[31]

34. The mischief was also clearly identified in the *Information Paper Relating to the Draft Reproductive Health (Access to Terminations) Bill* prepared by the Department of Health and Human Services as part of a public consultation process for the Reproductive Health Act, which made clear that (emphases added):

> [t]he purpose of access zones is to ensure women may access and doctors may provide termination **without fear of intimidation, harassment, obstruction or similar**. Such behaviour **jeopardises the safety and wellbeing of the woman**, her friends, partners, families, and other support persons, as well as health service providers. The goal of improving accessible, equitable and timely services in Tasmania **would be compromised if a person or group of persons were permitted to harass and impede a woman accessing termination services**. This was recognised as an important issue by the Victorian Law Reform Commission. Across Australia, including Tasmania, **no other medical procedure attracts the number and persistence of protesters**.[32]

2 *Act's Wider Context*

35. The Reproductive Health Act's legislative scheme is in significant part a product of the decisions of Australian courts[33] and the experiences of governments; particularly in Victoria, New South Wales and the Australian Capital Territory.[34] It also draws on research and work concerning women's health undertaken by institutions in Australia and internationally.[35]

36. It is clear that in devising the scheme of the Reproductive Health Act the Tasmanian government had close regard to the Victorian Law Reform Commission's 2008 report[36] and research undertaken by Alexandra Humphries at the University of Melbourne which centred upon psychological distress caused by picketers outside terminations clinics.[37]

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[29] Second Reading Speech 51.

[30] Cf *Attorney-General (South Australia) v Adelaide City Corporation and Ors* (2013) 249 CLR 1, 44 [68] (French CJ), 64 [141] (Hayne J).

[31] Second Reading Speech 51.

[32] Department of Health and Human Services, *Information Paper Relation to the Draft Reproductive Health (Access to Terminations Bill* (March 2013), 14.

[33] Second Reading Speech 46; *R v Wald* (1971) 3 DCR (NSW) 25 (Levine J); *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47, 60 (Kirby ACJ); *Harriton v Stephens* (2006) 226 CLR 52, 124 [246] (Crennan J), 58 [1] Gleeson CJ, 58 [3] (Gummow) 113 [208] (Heydon), 106 [177] (Hayne J).

[34] Second Reading Speech 48 (cf *Abortion Reform Act 2008* (Vic)), 47 – 48 (cf Victorian Law Reform Commission, *Law of Abortion*, Final Report No 15 (2008) (***Victorian Law Reform Commission Report***)), 47 (cf *Health Act 1993* (ACT)).

[35] Second Reading Speech 47.

[36] See *Victorian Law Reform Commission Report*, 138 [8.257].

[37] Second Reading Speech 47 and 50.

37. Ms Humphries' research related to a sample of 158 pregnant women who attended the Fertility Control Clinic (**FCC**) located in Wellington Parade in East Melbourne. So far as women's exposure to protesters was concerned, her research found that:

(1) 85.4% of the women interviewed were exposed to protesters outside the FCC;

(2) 55.1% reported that the protesters had said things to them;

(3) 74.7% reported they had seen anti-abortion displays (such as posters and props);

(4) 60.1% of the women reported that protesters tried to hand them anti-abortion information;

(5) 20.3% of the women reported that protesters had attempted to block their entry into the FCC; and

(6) of the 135 women that had reported exposure to protesters, 132 experienced two or more forms of exposure.[38]

38. So far as women's psychological response to protesters was concerned, her research found that:

(1) women experienced a high-level of psychological stress prior to an abortion, with distress peaking immediately prior to the procedure;

(2) increased exposure to protestors pre-termination was associated with higher levels of anxiety;

(3) women who had disclosure (privacy) concerns experienced a heightened response to protesters, and suffered higher levels of pre-termination anxiety;[39]

(4) 77.8% of the women interviewed felt stigmatised by protesters; and

(5) 70.9% of women perceived the law's approval of protests outside the FCC stigmatised terminations.[40]

39. From Ms Humphries' research it is reasonably clear that protests outside reproductive health clinics that provide terminations, by depriving women of privacy and stigmatising them, is likely to heighten the already high-level of psychological stress women experience by accessing those medical services.[41] These findings are consonant with other research Ms Humphries refers to in the area, which records that:

(1) anti-abortion picketing has a considerable impact on women's post-abortion psychological adjustment;[42] and

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[38] Alexandra Humphries, 'Stigma, Secrecy and Anxiety in Women Attending for an Early Abortion' (Clinical Masters Thesis, University of Melbourne, 2011), 25.

[39] Alexandra Humphries, above n 38, 34 – 35.

[40] Alexandra Humphries, above n 38, 35.

[41] Alexandra Humphries, above n 38, 35.

[42] Alexandra Humphries, above n 38, 13; see Catherine Cozzarelli and Brenda Major, 'The Effect of Anti-Abortion Demonstrators and Pro-Choice Escorts on Women's Psychological Responses to Abortion' (1994) 13(4) *Journal of Social and Clinical Psychology* 404, 418.

(2) women suffer 'obvious physical signs of distress' in accessing clinics beset with protesters.[43]

40. Ms Humphries' findings also speak to an important comparative and interpretative point concerning the definition of 'prohibited behaviour' under s 185B(1)(b) of the *Public Health and Wellbeing Act 2008* (Vic) ('Public Health Act') and s 9(1)(b) of the Reproductive Health Act. It is respectfully submitted that:

(1) the drafting of ss 185B(1)(b) and 185D of the Public Health Act is extremely similar to s 9(1)(b) and (2) of the Reproductive Health Act; and

(2) the conception of what constitutes 'prohibited behaviour' in each Act, despite differences of wording, is relevantly the same. That is, the use in s 185B(2) of the Public Health Act of the word 'communication' instead of 'protest', and the addition of the words 'reasonably likely to cause distress or anxiety', are textual differences that results in no greater operation for s 9(1)(b) of the Reproductive Health Act.

Protests, even at their most mild are, and are intended to be, a provocative and confronting form of communication. As Ms Humphries' research bears out, quite apart from any associated adverse mental health outcomes, there is no question that protests outside termination clinics are reasonably likely to cause distress or anxiety to women accessing or attempting to gain access to those clinics.[44]

41. Further, it is also to be noted that like sub-s (1)(b), s 9(1)(a) and (c) – (e) of the Reproductive Health Act are largely reflected in the 'prohibited behaviour[s]' specified in s 185B(2)(a) and (c) – (e). Given the close, if not coterminous, operation of s 9(2) of the Reproductive Health Act and s 185D of the Public Health Act it may be accepted that the protective legislative intention and rationale of the two provisions are, in all material respects, the same.

3 *Act's Historical Context*

42. In the Second Reading Speech the Minister also importantly observed that it was not until 2001 that the Code was amended to include an exception to the crime of terminating a pregnancy.[45] Until that time, terminations were, subject to limited defences, illegal in Tasmania.

43. The Minister acknowledged that the inclusion of the medical exception in 2001 'was a significant step forward...' but '[d]espite these efforts, the passage of time has shown that criminal law continues to be a restrictive and inappropriate vehicle by which to regulate access to terminations.'[46] In arriving at this view, the Minister said '[i]t pays to recall that laws criminalising terminations in Tasmania are based on British laws of the 1800's.'[47]

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[43] Alexandra Humphries, above n 38, 12; see also Catherine Cozzarelli and Brenda Major, above n 42, 406.

[44] Alexandra Humphries, above n 38, 40 – 42; Catherine Cozarelli et al, 'Women's Experiences of Reaction to Abortion Picketing' (2000) 22(4) *Basic and Applied Social Psychology* 265, 269 – 270, 273; Catherine Cozzarelli and Brenda Major, above n 42, 421 – 423; cf *R v Spratt* (2008) 298 DLR (4th) 317, 333 – 334 [60] – [61] (Ryan JA).

[45] Second Reading Speech 44.

[46] Second Reading Speech 45.

[47] Second Reading Speech,45.

44. The Minister's reference was principally to ss 206 – 208 of the *Criminal Code (Indictable Offences) Bill 1880* (UK) (**Stephen Code**) upon which the Code provisions in ss 134 – 5 and 165 were based. Those sections of the Stephen Code were a simpler restatement of provisions in earlier British statutes criminalising abortions; for example: ss 58 and 59 of the *Offences Against the Person Act 1861* (UK) 24 & 25 Vict c 100 (**Lord Lansdown's Act**), which had effect at that time; and s 2 of the *Malicious Shooting or Stabbing Act 1803* (UK) 43 Geo 3 c 58 (**Lord Ellenborough's Act**), which was the first Act to criminalise abortions.

45. At the time those laws had effect, abortions were perceived as a significant social problem owing to religious influence that posited that foetuses had souls after 'quickening' and the high mortality rates associated with abortions likely due to unsterile procedures.[48] As the Minister in the Second Reading Speech observed:

> This was a different era – women were subject to religious and social mores that denied them many fundamental freedoms and equalities. The medical world too was vastly different: pre-electricity, pre-antibiotics and pre-anaesthetic. Both attitudes towards women was (sic) vastly different and medical practices have come far since then. And it is time our laws recognised this.[49]

46. There can be little doubt, therefore, that the Reproductive Health Act, as its text and legislative context confirm, was directed at eschewing early nineteenth century dogma and reforming the law set down in centuries past by Lord Ellenborough's and Lord Lansdown's Acts to be consistent with twenty-first century medical knowledge and practice respecting women's reproductive health, and a social outlook that recognises women as being capable of making decisions about their own bodies.

C *Implied Freedom of Political Communication*

47. It is respectfully submitted that the Reproductive Health Act is reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. This is contended on the grounds that the Reproductive Health Act:

(1) to the extent that it imposes a protesting prohibition in relation to terminations within an access zone, the burden on any political communication is indirect and only slight. This is so because the protesting prohibition:

(a) does not exclude protesters with the purpose of preventing or impeding political communication in relation to terminations; but to ensure the safety, wellbeing, privacy and dignity of persons, particularly pregnant women, accessing premises where those procedures are provided;

(b) does not target political communication, but applies to all types of protests in relation to terminations when a person is accessing or attempting to access a premises where those procedures are provided; and

(c) to the extent it affects political communication, it does not discriminate as to the content of that communication;

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[48] John Keown, *Abortion, Doctors and the Law: Some Aspects of the Legal Regulation of Abortion in England from 1803 to 1982* (Cambridge University Press, 1988) 20.

[49] Second Reading Speech 45.

(2) has the legitimate and compelling object of protecting the safety, wellbeing, privacy and dignity of persons accessing premises where terminations are provided; and

(3) is justified, in that: its objects are legitimate and compelling; its burden slight; and its means rationally relate to the attainment of its ends – which ends, being the safety and wellbeing of citizens, are also peculiarly the interest of government.

1 *Burden*

48. Although it is accepted that a protest in relation to terminations may in some cases contain political communication there is no direct evidence in this case that, on the occasions charged, the Appellant's protest was in relation to political matters.

49. The evidence at trial was that whilst the Appellant had in the past engaged in political lobbying[50] and protests[51] his protest in this matter was principally intended to challenge and engage the conscience of women entering the clinic for the purposes of having a termination,[52] with the hope of preventing the termination from occurring.[53]

50. The Appellant asserts that his protest was 'facially political' on the basis that some of the placards he displayed described Articles 3 of the Universal Declaration on Human Rights and Article 6 of the UN Convention on Rights.[54] However, as his evidence at trial made clear (emphases added):

> Yes. Again, the Universal Declaration of Human Rights I believe is *largely dependent upon Christian beliefs*, that human life *derives its value* from the fact that *we're made by God in his image*. And that Declaration commences by saying Recognition of the intrinsic dignity and of the equal and inalienable rights of every human life is the foundation of freedom, justice and peace in the world. The Article – Article Three then specifically says everyone has the right to life. *And I believe that they are in accordance with my Christian beliefs*.[55]

Even accepting that the protesting prohibition is capable of effectively burdening the implied freedom, it is respectfully submitted that the Appellant's resort to the placards could only be characterised as being in some way political at a very high level of abstraction so as to have very little, if any, meaningful interaction with the implied freedom. The link is so tenuous that the freedom is not, in fact, 'effectively burdened.'[56]

51. Accordingly, the Respondents gratefully adopt the Attorney-General for Victoria's submissions in the Victorian proceedings that because there was no evidence of political communication in that case, there is no evidence before the Court that the implied freedom was burdened.[57] That is also the case here.

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[50] FM 181 – 183; Transcript 176 – 178.
[51] FM 194; Transcript 189.
[52] FM 201, Transcript 196.
[53] FM 197; 201 – 202; Transcript 192; 196 – 197.
[54] Appellant's Submissions 6 [35], 4[19].
[55] FM 180 – 181; Transcript 175 – 176.
[56] Cf *Monis v The Queen* (2013) 249 CLR 92, 142 – 147 [108] – [124] (Hayne J).
[57] Victorian Submissions 8 [29].

52. Otherwise, if there is a relevant burden it is only indirect or slight, because an affected communication will only be political in the broadest sense.[58] The object of the Reproductive Health Act is not to regulate discussion of governmental or political matters; any effect it may have on them is incidental; and its practical operation will have nothing to do with them.[59] In fact, 'it is perhaps more accurate to say that the [protesting prohibition] restrict[s] movement and, consequentially, restricts [the Appellant's] ability to publicise his cause.'[60]

53. If that is accepted, a distinction may be drawn between laws directed at political communication, 'from those like [the Reproductive Health Act] which only incidentally affect communication, for example, by regulating the time, place or mode of communication.'[61] In the present case the restriction is on the place of communication and thus 'it need only be "reasonably necessary to achieve the competing public interest".'[62]

54. Even if it is accepted that the Appellant had a dual personal and political purpose in protesting outside a terminations clinic, the observation Gleeson CJ made in *Coleman v Power*[63] assumes currency, in that:

> Because the constitutional freedom in *Lange* does not extend to speech generally, but is limited to speech of a certain kind, many cases will arise, of which the present is an example, where there may be an artificiality involved in characterising conduct for the purpose of deciding whether the law, in its application to this case, imposes an impermissible burden upon the protected kind of communication.[64]

55. This artificiality pervades the assessment of any burden the Reproductive Health Act is said to impose. This is only compensated for if regard is had to the overwhelming personal religious ('moral') imperative involved in the Appellant protesting outside a terminations clinic (in pursuit of a principally personal emotional end)[65] as opposed to, for example, Parliament House (in pursuit of what may be accepted to be a principally political end).

56. This does not overlook that 'the extent of burden is a matter which falls to be considered in light of the [Reproductive Health Act's] effect on the freedom generally;'[66] rather, it illustrates the unlikelihood of anyone other than protesters, patients and medical staff wishing to command access to, and egress from, premises that provide terminations.[67] For protesters, the principal desire will be to hinder, delay, disrupt or dissuade patients from accessing those premises rather than to advance any peculiarly political point. (Matters to which a specious assertion of a 'silent and peaceful protest'[68] or, more accurately, 'a protest by silent and reproachful presence'[69] is no answer).

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58 *Coleman v Power* (2004) 220 CLR 1, 30 [28] (Gleeson CJ).
59 *Coleman v Power* (2004) 220 CLR 1, 30 [27] (Gleeson CJ).
60 *Levy v Victoria* (1997) 189 CLR 579, 617 (Gaudron J).
61 *Levy v Victoria* (1997) 189 CLR 579, 618 (Gaudron J).
62 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, 143 (McHugh J); See also *Cunliffe v Commonwealth* (1994) 182 CLR 272, 233, 234 – 235 (McHugh J).
63 (2004) 220 CLR 1.
64 *Coleman v Power* (2004) 220 CLR 1, 30 [27] (Glesson CJ).
65 FM 178 – 179; Transcript 173 – 174.
66 *Brown v Tasmania* (2017) 91 ALJR 1089, [90] (Kiefel CJ, Bell and Keane JJ).
67 Cf *Brown v Tasmania* (2017) 91 ALJR 1089, [90] (Kiefel CJ, Bell and Keane JJ).
68 Cf Appellant's Submissions 3, 6 [14(a)], [33].
69 *Brown v Louisiana* (1966) 383 US 131, 142.

57. Silent or not, peaceful[70] or not, the pamphlets distributed by the Appellant, quite apart from their quarrelsome medical claims[71] and the thinly-veiled threats of damnation, are disturbingly graphic: '[t]he children who are aborted are not hidden from [God]. He sees their little bodies as they are torn apart. He hears their silent scream. The darkness of the womb is a light to him, and he will bring into judgment the secret things that happen there.'[72]

58. The Appellant's object as a protester outside a terminations clinic is clear (emphases added):

> Our experiences so far has been that most, if not all, of the people who have *attempted to push past or step over us* have been able to do so and have *gained entry* to the *abortion death-houses*. Most of these places have two or three entrances and with the *low numbers of people participating* in the rescues it has meant there have been *just one to four people sitting in front of the doors*. Does this mean then that the action have been failure? We do not believe that that needs to be the conclusion drawn. *We would like to stop everyone from entering these places* and we hope that one day we will have *enough people involved to enable us to succeed in doing that*. It is possible that *because of our presence some people may have gone away without attempting to enter the abortion clinic* and *some of those who did enter may have been challenged by action to think again and may not have gone ahead with their abortion*.[73]

The Appellant's religious, personal motivation for protesting outside a terminations clinic is equally clear: '[a]s for God's people, we must do more than merely abstain from abortion ourselves. We must condemn the practice with vigour. We must strive to save the unborn children who are under threat.'[74]

59. As the Minister observed in the Second Reading Speech, 'there is nothing peaceful about shaming complete strangers about private decisions made about their bodies... [or] standing on the street outside a medical facility with the express purpose of dissuading or delaying a woman from accessing a legitimate reproductive health service.'[75] The Minister also importantly identified, consistent with the operation of the Act, that it:

> will not stop a religious sermon against terminations, in churches that fall within an access zone. Unless of course they broadcast it over a loud speaker in a public manner. It will not stop an exchange of views of personal views between mates at a restaurant or pub that falls within an access zone – unless of course they do the same thing.[76]

60. The Reproductive Health Act's operation in the case of the Appellant, not only provides a useful example of the statute's practical effect; considered in light and as a subset of related conduct prohibited by s 9(2), the facts of his case are an accurate, if not exhaustive, reflection of what is essentially a negligible burden.

61. This is so because there can be little doubt that the tension under the Reproductive Health Act is ever between the interests of protesters who for predominantly personal

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[70] See *R v Lewis* (1996) 139 DLR (4th) 480, 493 [30] – [32] (Saunders J).
[71] See FM 227 – 228; cf *R v Spratt* (2008) 298 DLR (4th) 317, 333 [59] (Ryan JA).
[72] FM 223.
[73] FM 229.
[74] FM 223.
[75] Second Reading Speech 51.
[76] Second Reading Speech 50.

moral reasons wish to protest outside terminations centres, and the privacy, dignity and safety of physically and mentally vulnerable patients, and medical staff wishing to have un-harried access to those premises.

62. It is in this context that the question of the extent to which the Reproductive Health Act affects the freedom is to be considered because it exposes the true effect of the law, and the extent to which it may limit the making or the content of political communications.[77] The operation of the Reproductive Health Act is tailored to be no greater than that required to attain its purpose of keeping protesters at an appropriate distance from patients and medical staff 'accessing or attempting to access premises where terminations are provided.' The Act only keeps protesters far enough away from women accessing premises where terminations are provided to ensure, for example, that things cannot be said to (or shouted at) them or done to them (ie being burdened with unwanted literature or shown graphic placards, or being required to push past, or step over protesters) so that their safety, privacy and dignity is maintained.[78]

63. Here again, the circumstances of the Appellant's case are telling. In cross examination at trial the police officer directing the Appellant to leave the area surrounding the terminations clinic's entrance tried to delimit 'the smallest [area] feasibly possible' having regard to the location of the clinic.[79] Without any apparent irony the Appellant observes at para [43] that protests 'at the 149 m mark would *almost never* be able to be seen or heard by a person in fact entering ... premises, especially so when as here, the premises are in the middle of the city' (emphasis added). That acceptance is revealing of the rationale behind the protesting prohibition's adaptable operation, as well as, one of the bases for its access zone's outward limit.[80]

2 *The Burden is Not Discriminatory*

64. The burden is not increased or made substantial because, as a practical matter, its operation principally captures anti-abortion protesters who have a peculiar interest and desire in being close to patients entering premises where terminations are provided. The Reproductive Health Act affects those whom it affects[81] and its provisions operate to capture protesters regardless of their point of view.[82]

65. Contrary to the Appellant's submissions at paras [14(c)] and [42] the word 'protest' in s 9(1)(b) is not to be read with the added words 'in opposition to terminations.' When the Minister observed in the Second Reading Speech that the protesting prohibition would 'stop a person from engaging in a vocal anti-choice protest', the observation was made as part of a non-exhaustive list of activities that would be prevented by the prohibition within an access zone.

66. 'Anti-choice' protest is an obvious example which does no more than frankly illustrate that it is persons of whom the Appellant is one that are, for example, motivated to travel

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[77] Cf *Monis v The Queen* (2013) 249 CLR 92, 209 [331] (Crennan, Kiefel, Bell JJ).

[78] Cf *R v Lewis* (1996) 139 DLR (4th) 480, 497 – 498 [51] – [52] (Saunders J); *R v Spratt* (2008) 298 DLR (4th) 317, 335 – 336 [68] (Ryan JA).

[79] FM 82; Transcript 77; cf *R v Spratt* (2008) 298 DLR (4th) 317, 329 – 330 (Ryan JA); *Van den Dungen v Netherlands* (1995) 80 Eur Comm HR 147, [2].

[80] Cf *R v Spratt* (2008) 298 DLR (4th) 317, 239, [38] – [39] (Ryan JA) referring to *R v Morgentaler* [1998] SCR 30, 107 (Beetz J).

[81] *McCloy v New South Wales* (2015) 257 CLR 178, 287 [333] – [334] (Gordon J).

[82] *McCloy v New South Wales* (2015) 257 CLR 178, 287 [334] (Gordon J).

interstate with the sole (or principal) purpose of 'shaming'[83] or 'condemning'[84] women for, or attempting to 'stop' them from, accessing reproductive health services.[85] It is not to the point that the protesting prohibition operates to capture one group wishing to express a political point of view at a place which engages the mischief the Reproductive Health Act is designed to address: see above para 34.[86]

3 *Legislative Purpose*

67. The Respondents gratefully adopt paras [34] – [46] of the Attorney-General for Victoria's submissions in the Victorian proceedings.

10 68. By keeping protesters at an appropriate distance from patients and medical staff entering and leaving premises that provide terminations the Reproductive Health Act 'is not inconsistent with the purpose of ensuring a greater degree of human safety.'[87] As an extension of that point, the same is submitted concerning its additional legislative purposes of maintaining the privacy, well-being and dignity of persons, particularly women, entering and leaving those premises. It is submitted that – apart from the legitimacy inherent in each of those purposes – each purpose is clearly 'in the interests of an ordered society.'[88]

4 *Reasonably Appropriate and Adapted*

20 69. On a proper construction of the proscription as to 'prohibited behaviour' in s 9(2), the protesting prohibition is strongly connected with, and operates in furtherance of, these purposes.[89] This can be most clearly seen in a comparison of the 'prohibited behaviour' proscribed by sub-s (1)(a) and the protesting prohibition in sub-s (1)(b).

70. Paragraph (a) which operates 'in relation to a person' is directed at prohibiting conduct amounting to 'besetting, harassing, intimidating, interfering with, threatening, hindering, obstructing or impeding' a person within a 150 metres of a premises where terminations are provided. The conduct comprised by that paragraph involves a person – most likely a protester (although it could include a spouse or other person) – actively 'besetting, harassing, intimidating, interfering with, threatening, hindering, obstructing or impeding' a person (again, most likely a woman or a member of staff) trying to
30 access premises where terminations are provided.

71. Paragraph (b) operates in relation to the subject of 'terminations'. Unlike paragraph (a) it does not necessarily operate to 150 metres. One of its effects, however, is, to the extent practically necessary in a given case, to create an environment in which conduct under para (a) is less likely to occur.[90] In addition, it is also effective in preventing protesters from stigmatising or ridiculing women with anti-abortion displays, signs or placards; and 'by [their] silent and reproachful presence' causing women to 'go … away

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[83] Appellant's Submissions 11 – 12 [56] – [58].
[84] FM 223.
[85] FM 229.
[86] *Brown v Tasmania* (2017) 91 ALJR 1089, [192] – [193] (Gageler J).
[87] *Brown v Tasmania* (2017) 91 ALJR 1089, [192] – [193] (Gageler J); *Attorney-General (South Australia) v Adelaide City Corporation and Ors* (2013) 249 CLR 1, 90 [221] (Crennan and Kiefel JJ).
[88] *Levy v Victoria* (1997) 189 CLR 579, 608 – 609 (Dawson J).
[89] *Unions of NSW v NSW* (2013) 252 CLR 530, 560 [60] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[90] Cf *R v Lewis* (1996) 139 DLR (4th) 480, 497 – 498 [51] – [52] (Saunders J); *R v Spratt* (2008) 298 DLR (4th) 317, 335 - 336 [68] (Ryan JA).

without attempting to enter the abortion clinic' or be 'challenged by action to think again and [not go] ahead with their abortion.'[91]

72. By keeping protesters at a distance where they cannot reproach women by their presence and cannot say or shout things at them as they enter premises providing terminations, the protesting prohibition is but one means 'obviously directed at the mischief' with which s 9(2) deals as a whole.[92]

73. That accepted, the Court 'do[es] not assume the power to determine that some more limited restriction than that imposed by an impugned law could suffice to achieve a legitimate purpose.'[93] Given the limited burden of the protesting prohibition on political communication, in the present case all that needs to be established is that its 'curtailment [of protest] was reasonably capable of being seen as appropriate and adapted to the aim pursued in the [Act].'[94]

74. The protesting prohibition only operates to the extent that a person accessing or attempting to access premises where termination are provided can see or hear a protester. By its terms, therefore, the protesting prohibition has no wider operation than the legitimate purposes it seeks to achieve. There is little more the prohibition could conceivably do to be reasonable whilst remaining practicable.

75. This appraisal does not change from the perspective of the protester. A protester cannot be in any genuine doubt about whether she or he is caught by the operation of the protesting prohibition. For instance, in the case of a so called 'silent and peaceful' protest, if the protester cannot see the entrance to a building where terminations are provided, they know they are not caught by the operation of the prohibition. To take issue with that proposition is to complain not about being unable to communicate a political point, but about not being able to have access to women[95] in order 'to stop [them] from entering ... abortion death-houses';[96] or 'challenge [women] by action to think again [about having] their abortion';[97] complaints which do not trade any currency with the implied freedom.

5 *The Law is Justified*

76. The Respondents join with the Attorney-General for Victoria's submission in the Victorian proceedings that all that is required by way of justification in the present case is 'that the means adopted by the law are rationally related to the pursuit of [its ends].'[98] The preceding submissions bear out this connection.

77. The level of justification required for a burden on the implied freedom needs to be 'calibrated to the nature and intensity of the burden.'[99] As submitted before, because the Reproductive Health Act only incidentally affects the implied freedom by placing a

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91 FM 229; cf *R v Spratt* (2008) 298 DLR (4th) 317, 334 [62] (Ryan JA).
92 *Unions of NSW v NSW* (2013) 252 CLR 530, 558 [53] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
93 *Levy v Victoria* (1997) 189 CLR 579, 598 (Brennan CJ).
94 *Levy v Victoria* (1997) 189 CLR 579, 614-615. (Toohey and Gummow JJ).
95 Cf *R v Spratt* (2008) 298 DLR (4th) 317, 334 [62] (Ryan JA).
96 FM 229.
97 FM 229.
98 *Tajjour v State of New South Wales* (2014) 254 CLR 508, 581 [151] (Gageler J) citing *Australian Capital Television v The Commonwealth* (1992) 177 CLR 106, 143 (Mason CJ).
99 *Brown v Tasmania* (2017) 91 ALJR 1089, 1120 [164] (Gageler J).

restriction on the place of communication, the burden 'need only be "reasonably necessary to achieve the competing public interest".'[100]

78. As a result of these submissions, we contend that the operation of the protesting prohibition is no greater than required to effectively achieve its important purposes.

6 *The Proportionality Tool*

79. The structured analysis suggested in *McCloy* produces no different result.

(a) *Suitable*

10 80. The preceding submissions bear out the suitability of the protesting prohibition for its legislative objects.

(b) *Necessary*

81. The Appellant's suggestions about 'equally practicable' and 'less burdensome' alternatives to the protesting prohibition are erroneous. A key reason for this appears to be the Appellant's preceding submission that shaming women is by some device a 'precursor to a change in [their] political opinion.'[101] This is followed by the startling conclusion that the legislative objective of preventing the public shaming and harassment of women attempting to access a lawful medical service is 'illegitimate'.[102]

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82. The Appellant maintains his submissions alongside and by reference to things parliamentarians in the past have said, which happened to use the word 'shame'. It seems reasonably clear that, in the Appellant's view, protesters (no doubt as part of their silent and peaceful demonstration) suggesting to women that they 'should be ashamed of [themselves]' or 'ought to hide [their] heads in shame' for attempting to access a legitimate medical health service is a circumstance about which the legislature may not legislate.[103] It is on this assumption that the Appellant makes a number of incongruous suggestions about 'equally practicable' and 'less burdensome' alternatives to the protesting prohibition.

30 83. The first suggestion offered by the Appellant is that the words 'and is reasonably likely to cause shame to such a person' be added to the wording of the protesting prohibition. Apparently, those words – notwithstanding that they contradict the Appellant's view that they pursue an illegitimate legislative object – would 'more closely tether the offence to its purpose thus rendering it better at effecting that purpose, while being less burdensome.'[104]

84. Contradiction aside, the obvious problem with this alternative is that it confines the legislature to a single legitimate legislative object in pursuit of the protesting prohibition. It has long been acknowledged by the Court that the legislature hardly every pursues one legislative object at all costs.[105] The protesting prohibition pursues a
40 number of related and legitimate objects; principal among them being to ensure that the

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[100] *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, 143 (McHugh J).
[101] Appellant's Submission 11 – 12[56].
[102] Appellant's Submissions 12 [58]; *Contra Levy v Victoria* (1997) 189 CLR 579, 608 – 609 (Dawson J).
[103] Appellant's Submissions 12 [58]; *Contra R v Lewis* (1996) 139 DLR (4th) 480, 518 [130] (Saunders J).
[104] Appellant' Submissions 13 [68].
[105] *Carr v Western Australia* (2007) 232 CLR 138, 142 – 3 [5] (Gleeson CJ); see also *Construction Forestry Mining and Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619, 632–3 [40]–[41] (Crennan, Kiefel, Bell, Gageler and Keane JJ).

privacy, dignity and safety of physically and mentally vulnerable patients, and medical staff wishing to have unobstructed, safe and un-harried access to premises providing terminations, is effectively maintained.[106] There is no warrant in reason or principle to confine the legislature to a single purpose, which in truth is simply an incident of several legitimate public purposes: see above para 67.

85. The Appellant's suggestion also misconceives the substance of the Minister's observations in the Second Reading Speech about protesters stigmatising women obtaining terminations. At the core of the research upon which the Minister's observations were based, it was accepted that individual women's health outcomes following interactions with protesters outside a terminations clinic were significantly affected by their 'privacy and disclosure concerns' and 'emotional response (i.e. shame, guilt, hostility etc.) [to protesters].'[107] As already submitted, the protesting prohibition creates an environment in which conduct under s 9(1)(a) is less likely to occur: see above paras 71 – 72. It also prevents the stigmatisation, denigration and ridiculing of women, whilst maintaining their privacy and dignity.

86. Clearly, the protesting prohibition is one of several methods set out in s 9 that the legislature employs to deal with the issues identified by the Minister in the Second Reading Speech. It proscribes a spectrum of conduct in order to achieve its legislative objects.

87. The second suggestion that the Appellant makes is that the protesting prohibition be subject of a defence if the defendant 'establishes that the protest in fact had no relevant adverse effect.'[108] The Appellant does not explain how the defence will operate in practice. Quite apart from the absurdity of possibly requiring women to submit to additional medical and psychiatric assessments, and to publicly relive and be subject to vigorous cross examination about the experience, the submission 'fail[s] to confront the proposition that occasions of political communication would not exhaust the operation of a generally expressed [defence] provision.'[109]

88. The availability of a defence 'would turn on the availability of a justification or explanation'[110] of the protesting, including the harassment of women and medical staff. That is, the operation of the protesting prohibition would depend upon whether it just so happens no psychological or physical harm eventuated to a person accessing or attempting to access premises where terminations are provided. This would of course be coupled with the fact that the symptoms of psychological harm do not necessarily become apparent at an arbitrary time, such as a hearing date.

89. The protesting prohibition is, first, directed at protesting 'regardless of the purpose or reason' of the protest and regardless of what the consequences of that protest are for an individual person.[111] Secondly, protesting within an access zone is only permitted if a person accessing or attempting to access premises where terminations are provided

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[106] Cf *R v Lewis* (1996) 139 DLR (4th) 480, [130] (Saunders J); *Hill v Colarado* 530 US 703 (2000), 717 (Stevens J); see also *Brown v Tasmania* (2017) 91 ALJR 1089, 1141 – 1142 [275] (Nettle J); 1111–1112 [99] – [102] (Kiefel CJ, Bell and Keane JJ), 1129 [212] – [213] (Gageler J), 1168 [413] (Gordon J).

[107] Alexandra Humphries, above n 38, 35 – 36; see also Catherine Cozarelli et al, 'Women's Experiences of Reaction to Abortion Picketing' (2000) 22(4) *Basic and Applied Social Psychology* 265, 422.

[108] Appellant's Submissions 13 [69(a)].

[109] *Tajjour v State of New South Wales* (2014) 254 CLR 508, 564 [87] (Hayne J).

[110] *Tajjour v State of New South Wales* (2014) 254 CLR 508, 565 [87] (Hayne J), 573 [123] (Crennan, Kiefel and Bell JJ).

[111] *Tajjour v State of New South Wales* (2014) 254 CLR 508, 565 [88] (Hayne J).

cannot hear or see the protest. It follows that a protesting prohibition which provides for a defence that uncertainly and fortuitously depends on a whether or not a particular victim in fact suffered harm 'would differ radically'[112] from, and defeat principal objects of, the protesting prohibition (for example, the object of maintaining a confined area in which women are not subjected to prohibited conduct).[113]

90. It is respectfully submitted that a law of the kind proposed by the Appellant would not achieve, to the same extent as the protesting prohibition, the ends to which it is directed, nor would it be as practicable as those adopted by the protesting prohibition.[114] At the very least:

> it is not possible to say that a law which proceeded from a different premise [that protesting can be excused if in fact it did not harm a particular person] could further the prevention' of harm to persons to the same extent as 'the [protesting prohibition] or that the means adopted by such a law would be as practicable as those adopted by [the protesting prohibition].[115]

91. The third suggestion of the Appellant that the protesting prohibition could contain a defence 'if the protest is engaged in which the consent of any person able to see or hear the protest'[116] is equally absurd as the first suggested defence, and fails for similar reasons. It is also worth noting that this second defence also involves the concept of the protesting prohibition being infringed, but the infringement being absolved by the subsequent consent of the victim.[117]

92. The fourth suggestion the Appellant makes is that protesting prohibition could 'carve out political communications'.[118] This argument invites the Court to consider that it is possible 'to reframe a law which does not directly regulate, but does effectively burden political communication by providing that that the law is not to apply in a way which would burden communication about government and political matters.'[119]

93. Two points may be made about the observation. First, 'observing no more than that a law could be redrafted to avoid intersection with the implied freedom cannot conclude the second *Lange* question.' Secondly,

> while it would be possible to reframe [the Protesting Prohibition] by carving out an exception from its operation for some (even all) political communication, it by no means follows that provision reframed in this way would be a less drastic means of achieving, to the same extent as the present law, the end to which [the protesting prohibition] is directed.[120]

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[112] *Tajjour v State of New South Wales* (2014) 254 CLR 508, 565 [89] (Hayne J), cf 572 – 573 [120] – [121] (Crennan, Kiefel and Bell JJ).

[113] Cf *Tajjour v State of New South Wales* (2014) 254 CLR 508, 573 [124]] (Crennan, Kiefel and Bell JJ).

[114] Cf *Tajjour v State of New South Wales* (2014) 254 CLR 508, 565 [90]; 571 [114] (Crennan, Kiefel and Bell JJ).

[115] *Tajjour v State of New South Wales* (2014) 254 CLR 508, 565 – 566 [90] (Hayne J), see also 571 – 572 [114] – [115], [119 – 120] (Crennan, Kiefel and Bell JJ).

[116] Appellant's Submissions 13 [69(b)].

[117] Although it is not, in its terms, confined to the victim; cf *Tajjour v State of New South Wales* (2014) 254 CLR 508, 573 [123] (Crennan, Kiefel and Bell JJ).

[118] Appellant's Submissions 13 [69(c)].

[119] *Tajjour v State of New South Wales* (2014) 254 CLR 508, 563 [83] (Hayne J).

[120] *Tajjour v State of New South Wales* (2014) 254 CLR 508, 564 [83] (Hayne J).

The reason for this can be seen in the submissions made about the Appellant's proposal of including certain defences to the protesting prohibition.[121] To exclude political communication would radically alter the character of the prohibition. It would also, practically speaking, render the enforcement of the prohibition impossible.[122]

94. The Appellant overlooks that:

> A law which is appropriate and adapted to the fulfilment of [a] legitimate purpose is not invalidated by limitations of legislative power implied from the terms and structure of the Constitution merely because the opportunity to discuss matters of government is thereby precluded.[123]

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95. The Appellant's other suggestions, which assume no relevance to the facts of this matter, may be dealt with summarily:

(1) 'the law could carve out communications in or near the Tasmanian Parliament' – in this case, the outer limits of the access zone did not extend to the Tasmanian Parliament;[124]

(2) 'the law could carve out communication by or with the authority of a candidate during an election or referendum' – in this case, there is no question of such facts having arisen.

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But even if there were, there is no rational reason why an electoral candidate should be able to harass or stigmatise women, or authorise others to do so, at a place where the protesting prohibition might operate. Both a candidate and a protester can communicate their political point during an election on the television or in the print media, outside the Tasmanian Parliament, or any other public place that is not subject of the protesting prohibition.[125]

That the Tasmanian legislature did not enact an exception of the kind contended for to the protesting prohibition is to do no more than to observe that the Tasmanian legislature favoured one legitimate legislative choice over another; and

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(3) 'the law could carve out protests made with the consent of the landowner' – in this case, given that the protest was in a public place, there can be no question of it arising.[126]

96. The Respondents gratefully adopt paras [59] – [61] of the Attorney-General for Victoria's submissions in the Victorian proceedings concerning the reasonable necessity for 150 metre access zones around premises that provide termination services.

97. It is also respectfully submitted that the 150 metre radius of 'access zones' distracts
40 from the relevant inquiry as to 'obvious and compelling' alternatives. So far as the

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[121] Cf *Tajjour v State of New South Wales* (2014) 254 CLR 508, 564 [83] (Hayne J).
[122] Cf *R v Spratt* (2008) 298 DLR (4th) 317, 338 - 341 [80] – [86] (Ryan JA) citing with approval *Hill v Colorado* 530 US 703 (2000), 729, 723 – 724, 716 (Stevens J).
[123] *Levy v Victoria* (1997) 189 CLR 579, 597 (Brennan CJ).
[124] FM [233].
[125] *McCloy v New South Wales* (2015) 257 CLR 178, 220 – 221[93] (French CJ, Kiefel, Bell and Keane JJ), 252 [198] (Gageler J), 294 – 295 [397] (Gordon J).
[126] Cf Appellant's Submissions 5 [27].

protesting prohibition is concerned, it only operates to the extent a protester can be seen or heard by a person accessing or attempting to access premises where terminations are provided. As the Appellant accepts, in a city environment, a protest will almost never be seen or heard at 150 metres.[127] By its own terms, the protesting prohibition only operates to the extent that its purpose requires. Therefore, there can be no 'obvious and compelling' alternative without denying the legislature the choice of an access zone entirely.

(c) ***Adequate in Balance***

98. It has already been submitted that the most accurate characterisation of the protesting prohibition is that it 'restrict[s] movement and, consequentially, restricted [the Appellant's] ability to publicise his cause.'[128] It has also been submitted that any affected communication by the Appellant would likely only be in the 'broadest sense' political.[129]

99. The burden on the implied freedom is, therefore, only slight and insubstantial. There can be little doubt that there is strong public interest in protecting women and staff accessing premises where terminations are provided.[130] That being so, 'any restriction on the freedom is more than balanced by the benefits sought to be achieved.'[131]

PART VII: ORDERS SOUGHT

100. The Respondents seek the following orders:

(1) the Appellant's appeal from the judgment of Magistrate Rheinberger made on 27 July 2016 (by her amended notice of appeal filed in Matter H2 of 2018 on 5 April 2018) be dismissed; and

(2) the Appellant pay the Respondents' costs.

PART VIII: ESTIMATE OF TIME

101. The Respondents estimate that they will require up to two hours for oral argument.

Dated 3 August 2018

Michael O'Farrell SC
Solicitor-General for Tasmania

Sarah Kay
Assistant Solicitor-General

[127] Appellant's Submissions 8 [43(c)].
[128] *Levy v Victoria* (1997) 189 CLR 579, 617 (Gaudron J); see also *McCloy v New South Wales* (2015) 257 CLR 178, 287 [333] – [334] (Gordon J).
[129] *Coleman v Power* (2004) 220 CLR 1, 30 [28] (Gleeson CJ).
[130] See *Victorian Law Reform Commission Report* 139 – 140 [8.271] – [8.273], which report was clearly considered by the Minister in the Second Reading Speech, 47.
[131] *McCloy v State of New South Wales* (2015) 257 CLR 178, 220 – 221 (French CJ, Bell and Keane JJ).