IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M46 of 2018

BETWEEN:

KATHLEEN CLUBB
Appellant

and

ALYCE EDWARDS
First Respondent

ATTORNEY-GENERAL FOR VICTORIA
Second Respondent

ANNOTATED SUBMISSIONS OF THE ATTORNEY GENERAL FOR NEW SOUTH WALES, INTERVENING

Part I Certification

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

Part II Basis of intervention

2. The Attorney General for New South Wales ("NSW Attorney") intervenes in these proceedings pursuant to s 78A of the Judiciary Act 1903 (Cth) in support of the respondents.

Part III Argument

3. In determining whether s 185D of the Public Health and Wellbeing Act 2008 (Vic) contravenes the implied freedom of communication on government and political matters, the test to be applied, as modified in Brown v Tasmania (2017) 91 ALJR 1089 ("Brown") at [104], [155]-[156], [277], [481], is as follows:

   a. Question 1: Does the law effectively burden the freedom in its terms, operation or effect?

Date of Document: 25 May 2018
Filed by:
L Armstrong, Crown Solicitor
Level 5, 60-70 Elizabeth Street
SYDNEY NSW 2000
DX 19 SYDNEY

Tel: (02) 9224 5249
Fax: (02) 9224 5255
Ref: Paolo Buchberger

b. Question 2: If "yes" to question 1, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

c. Question 3: If "yes" to question 2, is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

Question 1: The burden

4. Question 1 is directed to whether the statute in fact burdens the freedom, by reference to the operation and practical effect of the provision in question: Brown at [61] and [150] per Kiefel CJ, Bell and Keane JJ, [180] per Gageler J, [237] per Nettle J. The focus is on "how the statute affects the freedom generally" as opposed to the "operation of the statute in individual cases" (although examples of the statute's practical effect may illustrate the nature of the burden): Brown at [90] per Kiefel CJ, Bell and Keane JJ. That is because the freedom is not a personal right; it is a limitation on legislative power: Brown at [90]. The question is whether the effect of s 185D is to prohibit, or put some limitation on, the making or the content of political communications: Brown at [180] per Gageler J; McCloy v New South Wales (2015) 257 CLR 178 ("McCloy") at [126] per Gageler J; Unions NSW v State of New South Wales (2013) 252 CLR 530 ("Unions NSW") at [119] per Keane J; Monis v The Queen (2013) 249 CLR 92 ("Monis") at [108] per Hayne J. Once a burden is established, the extent of the burden is "a matter which falls to be considered in relation to the assessments required by the second limb of *Lange*": Brown at [90]; Unions NSW at [40] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.

5. Not every communication, and not even every communication on a topic of public interest, is a communication protected by the freedom. That is because the freedom is implied only "in order to ensure that the people of the Commonwealth may 'exercise a free and informed choice as electors'": McCloy at [2] per French CJ, Kiefel, Bell and Keane JJ; see also Lange v Australian Broadcasting Corporation (1997) 189 CLR 520 at 560-561; Levy v Victoria (1997) 189 CLR 579 ("Levy") at 594-595 per Brennan CJ, 607-608 per Dawson J, 622-623 and 625-626 per McHugh J, 644 per Kirby J. What is required is some connection between the communication and the

acts or omissions of the legislative or executive branches of government: Hogan v Hinch (2011) 243 CLR 506 at [92]-[93] per Gummow, Hayne, Heydon, Crennan, Kiefel, Bell JJ. The Full Court of the Federal Court has held that an article in a student newspaper offering "a step by step guide to shoplifting" was not a communication on government or political matters, notwithstanding its critique of capitalism because, inter alia, it said nothing about "the conduct of holders of elected or appointed office or the policies which should be followed by them" and was "not addressed to readers in their capacity as fellow-citizens and voters": Brown v Members of the Classification Review Board of the Office of Film and Literature (1998) 82 FCR 225 at 246; see also at 257-258.

6. Section 185D, read with s 185B(1), relevantly prohibits communication by any means that:

   a. is in relation to abortions;

   b. occurs in a manner that is able to be seen or heard by a person accessing, attempting to access, or leaving premises at which abortions are provided (which would include clients and employees);

   c. is reasonably likely to cause distress or anxiety; and

   d. takes place within a "safe access zone", defined as an area within a radius of 150 metres from premises at which abortions are provided.

7. The second and fourth elements reveal that the communications prohibited by s 185D lack the necessary nexus with federal voting choices. Communications occurring in such circumstances are not addressed to law or policy makers. Nor are they designed to encourage the recipients – predominantly clients and employees – in their capacity as "fellow-citizens and voters", to vote or lobby against abortion. Rather, as the Attorney-General for Victoria submits at [31], such communications are designed to deter clients from having an abortion, which is a personal and private medical choice. The communications are unlikely to reach an audience wider than the immediate witnesses because s 185D also prohibits the recording of persons accessing, attempting to access, or leaving the premises without their consent (see para (d) of the definition of "prohibited behaviour" in s 185B(1)). In this respect the communications are different to those in Levy, where the plaintiffs' aim was to raise public awareness by recording and televising their protests: at 592, 625, 631.

8. For those reasons, the communications prohibited by s 185D are not communications about government or political matters. The freedom is not burdened.

Question 2: Compatibility of purpose

9. While ascertaining the purpose of a statute is a question of construction, that does not mean that the question is "confined to attributing meaning to the statutory text"; rather, "[t]he level of characterisation required by the constitutional criterion of object or purpose is closer to that employed when seeking to identify the mischief to redress of which a law is directed'": Brown at [208] per Gageler J. The purpose is "not what the law does in terms but what the law is designed to achieve in fact": Brown at [209] per Gageler J. The purpose is sometimes expressly stated in the statute, but more often it will emerge from an examination of context: Brown at [209] per Gageler J; see also [321] per Gordon J. Even if the purpose of an individual provision is narrow, it may serve a broader statutory purpose and thus serve a legitimate end for the purposes of the implied freedom, provided it is connected to that purpose and serves it in some way: Unions NSW at [50] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.

10. Section 185A states that the purpose of Part 9A is to provide for safe access zones so as to "protect the safety and wellbeing and respect the privacy and dignity of" people accessing the services provided at the relevant premises and employees and other persons who need to access those premises in the course of their duties and responsibilities. This general statement may, insofar as the relevant prohibition in s 185D is concerned, be distilled into two purposes. The first – the "narrow" purpose of s 185D – is to protect clients and employees from the emotional and psychological harm that might arise as a direct result of the prohibited communications. This harm has been explained in the Submissions of the Attorney General for Victoria, with reference to the evidence, at [17]-[25].

11. The second – the "broader" purpose – is to ensure that clients are not deterred by such communications from accessing medical services (which may include services other than abortion, such as contraception and ultrasound: **AB 8** and **AB 28-44**). This broader purpose is reflected in s 185C, which provides, as a "principle" applying to Part 9A, that "the public is entitled to access health services, including abortions". It is also confirmed by the extrinsic materials. In the Second Reading Speech, the Minister said the Public Health and Wellbeing Amendment (Safe Access Zones) Bill

2015 was "designed to support women's reproductive health choices by ensuring that all women can access health services that provide abortions without fear, intimidation, harassment or obstruction": at 3974. Conduct targeting health services "can also have impacts on women's health and wellbeing", because some clients may be "too afraid to attend clinics when anti-abortion groups are out the front, or to return for follow-up appointments because of their experience when previously accessing the clinic": at 3975. The offence provisions "target specific behaviours that are aimed at deterring people from accessing or providing legal medical services...[S]tanding on the street outside an abortion clinic with the aim or effect of shaming or stigmatising women who are trying to access a legitimate reproductive health service, or staff who work there, is not acceptable": at 3977.

12. Both the narrow and broad purposes of s 185D are compatible with the maintenance of the constitutionally prescribed system of representative and responsible government: compare Levy, where the purpose of ensuring public safety was accepted as legitimate – at 599 per Brennan CJ, 608-609 per Dawson J, 614 per Toohey and Gummow JJ, 619 per Gaudron J, 627 per McHugh J, 647 per Kirby J.

13. The appellant submitted below that s 185D is "directed to the freedom" (see Monis at [349] per Crennan, Kiefel and Bell JJ) because its real object is to ban political communication, and specifically political communication that is anti-abortion. This echoes the plaintiffs' submissions in Brown, where the object of the impugned provisions was sought to be characterised as the prevention of on-site protests: at [97] per Kiefel CJ, Bell and Keane JJ. That submission was not accepted by the Court in Brown (at [99], [217], [276], [413]-[414]) and should be rejected here.

14. First, s 185D is not limited to anti-abortion communications. Even a pro-abortion communication could cause distress or anxiety, depending upon the particular language, tone and imagery employed by the person communicating the message.

15. Secondly, even if it is accepted that the burden of s 185D will fall more upon anti-abortion than pro-abortion communication, and is to that extent discriminatory, that does not deprive s 185D of a legitimate object: Brown at [92] per Kiefel CJ, Bell and Keane JJ; [276] per Nettle J. Section 185D is "directed towards the harm that the conduct of particular kinds of [communications] may cause": Brown at [99] per Kiefel CJ, Bell and Keane JJ. That is confirmed by the requirement that the

communication be able to be seen or heard by persons accessing or leaving the premises and that the communication be reasonably likely to cause "distress or anxiety". Section 185D prohibits certain communications not because they are considered undesirable per se but because they "are seen as the potential source of such harm": Brown at [99]. It is "not to be inferred that the purpose of [s 185D] is to deter protests more generally, even if that is the effect of...the measures it employs in seeking to achieve its purpose": Brown at [99].

Question 3: Proportionality

16. Question 3 is, in broad terms, directed to whether the restriction is justified. In answering this question, the three-part test of "suitability", "necessity" and "adequacy" applied by the plurality in McCloy is no more than an analytical tool to assist in determining the rationality and reasonableness of the legislative restriction: Brown at [158]-[159] per Gageler J, [279]-[280] per Nettle J, [473] per Gordon J; McCloy at [4], [68], [72] per French CJ, Kiefel, Bell and Keane JJ.

(a) Suitability

17. The "suitability" element requires that there be a rational connection between the impugned provision and the statute's purpose: Brown at [132]-[133] per Kiefel CJ, Bell and Keane JJ, [281] per Nettle J; McCloy at [80] per French CJ, Kiefel, Bell and Keane JJ. As submitted at [15] above, the "prohibited communications" are defined in a manner that targets those communications which are likely to cause harm to clients and employees. There is a direct connection between the prohibited conduct and the harm sought to be addressed.

(b) Necessity

18. "Necessity" involves determining "whether there are alternative, reasonably practicable, means of achieving the same object but which have a less restrictive effect on the freedom": Brown at [139] per Kiefel CJ, Bell and Keane JJ; see also McCloy at [57] per French CJ, Kiefel, Bell and Keane J; Unions NSW at [44] per French CJ, Hayne, Crennan, Kiefel and Bell JJ. The alternative means must be equally effective in achieving the legislative purpose: McCloy at [81] per French CJ, Kiefel, Bell and Keane JJ; Tajjour v New South Wales (2014) 254 CLR 508 at [114] per Crennan, Kiefel and Bell JJ.

19. This "does not involve a free-ranging enquiry as to whether the legislature should have made different policy choices": Brown at [139] per Kiefel CJ, Bell and Keane JJ; see also [282], [286] per Nettle J. For that reason, any alternative means must be "obvious and compelling": McCloy at [58] per French CJ, Kiefel, Bell and Keane JJ; Monis at [347] per Crennan, Kiefel and Bell JJ. This high threshold ensures that courts do not "exceed their constitutional competence by substituting their own legislative judgments for those of parliaments": McCloy at [58].

20. In the court below, the appellant submitted that an alternative means of achieving the same object would be to reduce the 150 metre exclusion zone. The Statement of Compatibility for the Public Health and Wellbeing Amendment (Safe Access Zones) Bill 2015 indicates that the reason for the 150 metre exclusion zone is that protesters have followed women to and from their cars and public transport and followed staff to local shops: at 3973-3974; see also Second Reading Speech at 3976. It is reasonable to suppose that clients and employees are less likely to be able to park their car, or alight at a bus stop, within say 50 metres of the premises than within 150 metres of the premises. If a person were protected from communications for the first 50 metres of the walk to their car, but vulnerable to communications for the remainder, this would be a less effective means of serving the purposes described above. A reduction of the exclusion zone is not an "obvious" alternative, nor is its "practicability compelling": Brown at [139] per Kiefel CJ, Bell and Keane JJ. While reasonable minds may differ about the appropriate extent of the exclusion zone, "[o]nce within the domain of selections which fulfil the legislative purpose with the least harm to the freedom, the decision to select the preferred means is the legislature's": McCloy at [82] per French CJ, Kiefel, Bell and Keane JJ.

21. The appellant also submitted below that paragraphs (a), (c) and (d) of the definition of "prohibited behaviour" achieve the same purpose as paragraph (b) with a less restrictive effect. That submission should be rejected for the reasons given by the Attorney-General for Victoria at [55]-[58].

(c) Adequacy of the balance

22. The third stage of the analysis involves comparing the burden against the importance of the purpose and the benefit to be achieved: McCloy at [87] per French CJ, Kiefel, Bell and Keane JJ. The question is not whether the balance struck by the legislation is

"optimal" or "right", but whether it is "adequate". That word signifies that there is an "outer limit beyond which the extent of the burden on the implied freedom of political communication presents as manifestly excessive by comparison to the demands of legislative purpose": Brown at [290] per Nettle J.

23. The extent of the burden is relevant at this stage of the analysis because it will affect the degree of justification required: Brown at [121], [128] per Kiefel CJ, Bell and Keane JJ, [164] per Gageler J, [325] per Gordon J; McCloy at [87] per French CJ, Kiefel, Bell and Keane JJ.

24. Here, the extent of the burden is relatively minor. For the reasons given at [7] above, the communications affected by s 185D are unlikely to be political communications. Further, s 185D only regulates the place and manner of communications about abortion. It prohibits the making of such communications in safe access zones, but not in any other place. Even within safe access zones, it only prohibits communications that can be seen or heard by persons accessing, attempting to access, or leaving the relevant premises. Section 185D would not prohibit, for example, a sermon about abortions conducted inside a church within a safe access zone provided that it could not be heard outside the church: Second Reading Speech at 3976.

25. The burden is justified by the purposes of s 185D. The purpose of s 185D is not merely to protect persons from offence, hurt feelings or "transient emotional responses": cf Monis at [181] per Hayne J. As submitted above, s 185D is designed to protect persons, who are likely to be in an emotionally vulnerable state (see the Second Reading Speech at 3975), from emotional and psychological harm arising from the communications and to ensure that they are not deterred from accessing medical services. The importance of the purpose is underlined by the history of anti-abortion protest activity in Victoria: see Statement of Compatibility at 3973; Second Reading Speech at 3975.

Part IV Estimate of time

26. The NSW Attorney estimates that 15 minutes will be required for the making of oral submissions on his behalf.

Date: 25 May 2018

per M G Sexton SC SG
T: 02 8093 5502
F: 02 8093 5544
E: michael.sexton@justice.nsw.gov.au

10

Z C F Heger
T: 02 9101 2307
F: 02 9232 7626
E: heger@elevenwentworth.com