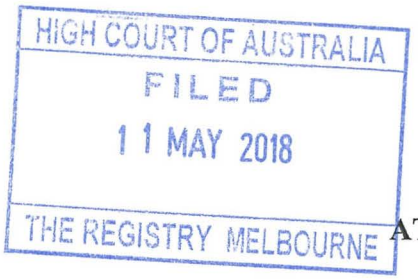
IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M46 of 2018

BETWEEN:

KATHLEEN CLUBB
Appellant

and



ALYCE EDWARDS
First Respondent

ATTORNEY-GENERAL FOR VICTORIA
Second Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA

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 185D of the *Public Health and Wellbeing Act 2008* (Vic) (the **Public Health Act**) impermissibly burdens the implied freedom of political communication in so far as it prohibits communicating in relation to abortions in a "safe access zone" 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 and is reasonably likely to cause distress or anxiety[1] (the **communication prohibition**).

PART III: SECTION 78B NOTICE

3. Notice was given under s 78B of the *Judiciary Act 1903* (Cth) on 4 April 2018.

PART IV: JUDGMENT BELOW

4. The appellant has appealed the decision of the Magistrates' Court of Victoria in *Edwards v Clubb* (Unreported, Magistrates' Court of Victoria, Bazzani M, 11 October 2017, Case Number G12298656) [**AB 512-515**].

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[1] See paragraph (b) of the definition of "prohibited behaviour" in s 185B(1) of the Public Health Act.

Filed on behalf of the Second Respondent
Victorian Government Solicitor's Office
Level 25, 121 Exhibition Street
Melbourne VIC 3000
Contact: Anesti Petridis

Dated: 11 May 2018
Tel: 03 8684 0444
Fax: 03 8684 0449
Email: Anesti.petridis@vgso.vic.gov.au
Ref: 1749209

PART V: FACTS

5. The appellant was charged with an offence under s 185D of the Public Health Act. The charge was that "[t]he accused at East Melbourne on the 4/8/16 did engage in prohibited behaviour namely communicating about abortions with persons accessing premises at which abortions are provided while within a safe access zone, in a way that is reasonably likely to cause anxiety or distress".[2]

6. The appellant had approached a couple at the entrance of the East Melbourne Fertility Control Clinic. She was carrying two pamphlets. She spoke to the couple and handed them a pamphlet, which the male member of the couple declined.[3]

7. The appellant challenged the validity of the communication prohibition on the basis that it infringed the implied freedom of political communication. The constitutional question was dealt with as a preliminary issue. In determining the constitutional issue the Magistrate accepted into evidence and relied upon two affidavits filed by the Victorian Attorney-General, who had intervened in the proceeding:[4] the Affidavit of Dr Susie Allanson, a Clinical Psychologist with more than 26 years of experience at the East Melbourne Fertility Control Clinic;[5] and the affidavit of Dr Philip Goldstone, the Medical Director of Marie Stopes Australia (which operates a network of reproductive health clinics that provide abortion services).[6] Those affidavits provided evidence of the harm to which the legislation was directed, which is addressed in greater detail in Part VI below.

8. The Magistrate rejected the appellant's constitutional challenge[7] and proceeded to hear the charge. The Magistrate found the charge was proven.[8]

9. The appellant then appealed to the Supreme Court of Victoria. Grounds 1 and 2 of that appeal concerned the validity of the communication prohibition. Those grounds were removed to the High Court by order made on 23 March 2018. The appellant subsequently filed an amended notice of appeal in this proceeding.

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2 Charge Sheet [**AB 276**].

3 Magistrate's Reasons (on the charge) at 3 [**AB 295**].

4 Magistrate's Reasons (on validity) at 6 [**AB 286**]. The appellant did not seek to cross-examine Dr Allanson or Dr Goldstone: Transcript from Magistrates' Court hearing at 115.27-29 [**AB 278**].

5 Affidavit of Dr Susie Allanson affirmed on 21 July 2017 (**Allanson Affidavit**) [**AB 7-21**].

6 Affidavit of Dr Philip Goldstone affirmed on 26 July 2017 (**Goldstone Affidavit**) [**AB 244-248**].

7 Magistrate's Reasons (on validity) at 9 [**AB 289**].

8 Magistrate's Reasons (on the charge) at 4 [**AB 296**]. The Magistrate heard evidence from the prosecution; no evidence was led by the appellant: Magistrate's Reasons (on the charge) at 2 [**AB 294**].

PART VI: ARGUMENT

A. THE STATUTORY PROVISIONS

10. Part 9A of the Public Health Act creates "safe access zones" around premises at which abortions are provided. The purpose of Pt 9A is set out in s 185A and is, relevantly, to protect the safety and wellbeing, and to respect the privacy and dignity, of persons accessing services at abortion clinics and persons employed by such clinics. Those matters are also reflected in s 185C, which sets out the principles applying to Pt 9A.

11. Section 185D is the relevant offence-creating provision in Pt 9A. It provides that "[a] person must not engage in prohibited behaviour within a safe access zone". The penalty is 120 penalty units, or imprisonment for a term not exceeding 12 months. "Prohibited behaviour" and "safe access zone" are defined in s 185B(1):

(1) "***Prohibited behaviour***" is defined by reference to five paragraphs. Relevantly, paragraph (b) provides that prohibited behaviour means: [9]

> subject to subsection (2), communicating by any means in relation to abortions 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 and is reasonably likely to cause distress or anxiety;

(2) "***Safe access zone***" is defined as "an area within a radius of 150 metres from premises at which abortions are provided".

B. THE LEGISLATIVE CONTEXT

12. It is critical to an assessment of the validity of the communication prohibition to have regard to the legislative context, especially the historical background (which includes the decriminalisation of abortion in Victoria in 2008) and the type of harm the legislation was designed to address.[10]

13. It is convenient to begin with the Minister for Health's explanation of the purpose for the enactment of "safe access zones" on the second reading of the Public Health and Wellbeing Amendment (Safe Access Zones) Bill 2015 (Vic). The Minister said the Bill was designed "to support women's reproductive health choices by ensuring that all

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9 By s 185B(2), paragraph (b) of the definition of prohibited behaviour does not apply to an employee or other person who provides services at premises at which abortion services are provided.

10 See, eg, *Brown v Tasmania* (2017) 91 ALJR 1089 at 1117 [143] (Kiefel CJ, Bell and Keane JJ), considering the history of environmental protests and the effectiveness of existing statutory measures to address the harm to which the impugned law was directed; see also at 1126 [191] (Gageler J), 1133 [240], 1134-1135 [244]-[247] (Nettle J), 1151 [321] (Gordon J).

women can access health services that provide abortions without fear, intimidation, harassment or obstruction".[11]

14. In the statement of compatibility for the Bill, the Minister explained that there was a "long history" of anti-abortion protesters engaging in disruptive activities and worse outside abortion clinics and hospitals that perform abortion.[12] The Minister described women attending clinics (and their support people) being subjected to "harassing and intimidatory conduct", and staff having experienced "sustained harassment and verbal abuse over many years".[13] The most extreme case in Victoria involved the fatal shooting in 2001 of a security guard at the East Melbourne Clinic.[14]

15. In 2008 the Victorian Law Reform Commission (the **VLRC**) published a report titled "Law of Abortion".[15] The VLRC had been asked to provide legislative options to decriminalise abortions performed by medical practitioners, and it made a number of recommendations directed to that issue.[16] The report also raised the issue of "bubble zones" around abortion clinics and hospitals, referring to concerns "that the safety and wellbeing of patients and staff were being jeopardised by intimidation and harassment from protestors".[17] The VLRC suggested that the Attorney-General consider a legislative response to the issue, observing that the safety and wellbeing of women using abortion services is a matter of "significant importance".[18]

16. In 2008 the Victorian Government decriminalised abortion by enacting the *Abortion Law Reform Act 2008* (Vic), implementing the VLRC's recommendations.[19] As the Minister observed in the second reading speech, the Government adopted a "wait and see" approach regarding safe access zones — to see whether decriminalisation of abortion would lead to a reduction in "the protests, obstruction and harassment of women and staff accessing abortion services"; however, that did not occur.[20]

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11 Victoria, Legislative Assembly, *Parliamentary Debates*, 22 October 2015 (**Second Reading Speech**) (Ms Hennessy, Minister for Health) at 3974.

12 Victoria, Legislative Assembly, *Parliamentary Debates*, 22 October 2015 (**Statement of Compatibility**) at 3973.

13 Statement of Compatibility at 3973.

14 Allanson Affidavit at [21], [36] [**AB 12, 15**].

15 Victorian Law Reform Commission, *Law of Abortion: Final Report* (2008) (**VLRC Report**).

16 VLRC Report at 6-8.

17 VLRC Report at 138 [8.257].

18 VLRC Report at 139-140 [8.271]-[8.273]. The VLRC noted that "bubble zones" were outside its terms of reference.

19 Second Reading Speech at 3974.

20 Second Reading Speech at 3975.

17. The Minister referred in her second reading speech to a study conducted in 2011 which found that, in relation to one Victorian clinic, 85% of women reported seeing abortion protesters outside the clinic; 74% reported seeing anti-abortion displays, such as posters or props; 55% reported that protesters had said things to them; 60% reported that protesters had tried to hand anti-abortion information to them; and 20% reported that someone had tried to block their entry to the clinic.[21]

18. The second reading speech gives examples of the range of conduct in which anti-abortion protesters in Victoria have engaged. The conduct described includes: congregating outside the clinic; displaying "distressing and sometimes graphic" images and props; handing out upsetting materials; and engaging in acts of "disturbing theatre" such as displaying a blood-splattered doll in a pram.[22]

19. As already stated, the anti-abortion protesters also targeted staff working at the clinics. The statement of compatibility records that staff "have experienced sustained harassment and verbal abuse over many years, often being followed to or from the premises, or being physically blocked from entering the premises".[23]

20. These activities created an environment of conflict, fear and intimidation outside clinics where abortions are performed (noting that such clinics may offer a range of reproductive health services, not just abortion[24]). The activities were harmful in a variety of ways. Dr Allanson deposed that she has observed women, children and their partners arriving at the clinic crying or trying to hold back tears, shaky and sometimes angry and agitated.[25] Patients have told her that they feel angry, frightened, guilty, and distressed by the activities of the protesters.[26]

21. The evidence of Dr Allanson and Dr Goldstone is consistent with the evidence before the Court of Appeal for British Columbia in *R v Spratt*,[27] a case involving a constitutional challenge to safe access legislation. The Court said the evidence was

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21 Second Reading Speech at 3975. It appears that the study referred to by the Minister is that same as that contained in Exhibit SA19 to the Allanson Affidavit [**AB 240**].

22 Second Reading Speech at 3976. See also the conduct described in the Allanson Affidavit at [16]-[22] [**AB 10-12**].

23 Statement of Compatibility at 3973.

24 For example, the East Melbourne Clinic provides contraception, PAP tests, sexually transmitted infection screening and treatment, vasectomies, and pregnancy ultrasound and counseling, in addition to pregnancy termination: Allanson Affidavit at [8] [**AB 8**] and Exhibit SA2 [**AB 28-44**].

25 Allanson Affidavit at [40] [**AB 16**].

26 Allanson Affidavit at [40] [**AB 16**]. Dr Goldstone also deposed to the distressing impact of anti-abortion protest activity on patients: Goldstone Affidavit at [7] [**AB 246**].

27 (2008) 298 DLR (4th) 317.

that the protesters' actions outside the abortion clinic evoked emotions in women attending the clinic ranging from "mild distress to absolute fear".[28] Their evidence is also consistent with several studies of the impact of abortion protesters.[29]

22. Concern about the effect of anti-abortion protesters on women accessing abortion services, and on staff, was the immediate cause for the enactment of Pt 9A. The Minister explained (emphasis added):[30]

> Women accessing legal abortion services are entitled to have their privacy respected, to feel safe and to be treated with dignity. **However, there have been numerous incidents of women and their support people being confronted by persons outside clinics seeking to denounce their decision. This extends to harassing and intimidatory conduct, following people to and from their private vehicles or public transport, forcing written material upon them despite a clear unwillingness to receive that information, and verbal abuse.** Women and their support people have reported that they have found such conduct very distressing and in many cases psychologically harmful. This is compounded by the fact that many women seeking abortion services are highly vulnerable to psychological harm by reason of the circumstances that have contributed to their decision to undergo an abortion.

23. The harm that anti-abortion protesters caused particularly to women at a vulnerable time in their lives was recognised by the Minister. She said:[31]

> It is unreasonable for anti-abortion groups to target women at the very time and place when they are seeking to access a health service, or to target health service staff. The impact of such actions on these women must be understood within the context of their personal circumstances. Many are already feeling distressed, anxious and fearful about an unplanned pregnancy, or a procedure that they are about to undergo. To be confronted by anti-abortion groups at this time is likely to exacerbate these feelings. It is intimidating and demeaning for women to have to run the gauntlet of anti-abortion groups outside health services.

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28 (2008) 298 DLR (4th) 317 at [60].

29 Dr Allanson's and Dr Goldstone's evidence is consistent with studies that are exhibited to the Allanson Affidavit, including: Foster et al, "Effect of abortion protesters on women's emotional response to abortion" (2013) 87 *Contraception* 81 (Exhibit SA17 to the Allanson Affidavit) [**AB 203**]; Hayes and Lowe, "'A Hard Enough Decision to Make': Anti-Abortion Activism outside Clinics in the Eyes of Clinic Users" (2015) at 4, 12-13, 20-21 (Exhibit SA16 to the Allanson Affidavit) [**AB 173**]. See also *Spratt* (2008) 298 DLR (4th) 317 at [60] ("The women expressed fear not only about a violent or traumatic interaction with the protestors, but also about a loss of confidentiality").

30 Statement of Compatibility at 3973.

31 Second Reading Speech at 3975.

24. It is evident from the second reading speech that there was also concern about other harmful consequences caused by anti-abortion protesters and their activities — in particular, "impacts on women's health and wellbeing".[32] The Minister gave the example of health services reporting "that some patients are 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".[33]

25. It is not only the effect that anti-abortion protesters have on women seeking abortions and other medical services that is the object of Pt 9A. The Minister explained that staff of abortion clinics "have also been severely affected by the daily harassment they endure. Facing this day after day, year after year, has had a negative impact on their mental health. This affects their working life to the point that some staff members are too afraid to leave their office to get a coffee unless a security guard is present".[34] These negative impacts were experienced by Dr Allanson, Dr Goldstone and some of their colleagues when protesters were a constant presence outside their respective clinics.[35]

26. It should also be noted that a further reason for the enactment of Pt 9A was given by the Minister in the second reading speech, namely that the law as it existed at that time was not adequate to protect women and staff:[36]

    (1) The Minister referred to a decision of the Supreme Court of Victoria refusing to make an order requiring the City of Melbourne to take action in relation to anti-abortion protesters under statutory nuisance provisions.[37]

    (2) The Minister also referred (in the statement of compatibility) to difficulties enforcing the criminal law in relation to the conduct of anti-abortion protesters.

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32 Second Reading Speech at 3975.

33 Second Reading Speech at 3975.

34 Second Reading Speech at 3975.

35 Allanson Affidavit at [28]-[38], [52]-[56] [**AB 13-15, 19-20**] and Exhibit SA14 (psychiatric report of Dr White dated 22 July 2014) [**AB 161**]; Goldstone Affidavit at [12] [**AB 247-248**]. Dr Goldstone's evidence was that staff at Marie Stopes Australia clinics located in NSW (where there is no safe access zone legislation) continue to experience negative impacts: at [14] [**AB 248**].

36 Second Reading Speech at 3975.

37 The decision is *Fertility Control Clinic v Melbourne City Council* (2015) 47 VR 368.

27. Other difficulties in relying on the law as it existed prior to the enactment of Pt 9A included the following:

(1) the law of trespass did not apply to protesters who remained on public land;

(2) much of the conduct in which protesters engaged (while causing distress or anxiety) would not warrant a criminal charge;[38] and

(3) offences under the *Summary Offences Act 1966* (Vic) involved their own complications — for example, the offence of obstructing a footpath (s 4(e)) requires, in the case of an "assemblage of persons", the court to be satisfied that the obstruction was "undue" (s 5).

10 **C. SECTION 185D IS VALID**

Step 1: Does the law burden the freedom?

28. Whether a law burdens the freedom is to be answered by considering "how the statute affects the freedom generally".[39] The question is not to be answered by reference to the operation of the statute in individual cases, although "such evidence may provide useful examples of the statute's practical effect" (as recognised by the plurality in *Brown v Tasmania*).[40] The Attorney-General accepts that the communication prohibition may, in some cases, burden the freedom of political communication because a "communication about abortion" may in some circumstances concern a political matter that is the subject of the implied freedom.

20 29. However, the Attorney-General does not accept that the communication prohibition, in its application to Ms Clubb in this case, burdened the implied freedom, because there is no evidence that her conduct involved political communication. It may be accepted that Ms Clubb's communication concerned abortion.[41] However, as explained further below, not all communication about abortion is political communication.

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38 Assault, for example, would not be available unless the conduct involved the application of force: *Crimes Act 1958* (Vic), s 31. Stalking, a crime under s 21A of the *Crimes Act*, is also unlikely to apply in the ordinary case, given that it requires proof of an "intention of causing physical or mental harm to the victim, including self-harm, or of arousing apprehension or fear in the victim for his or her own safety or that of any other person": s 21A(2).

39 *Brown* (2017) 91 ALJR 1089 at 1110 [90] (Kiefel CJ, Bell and Keane JJ); see also at 1123 [180] (Gageler J), 1132 [237] (Nettle J).

40 (2017) 91 ALJR 1089 at 1110 [90] (Kiefel CJ, Bell and Keane JJ).

41 Magistrate's Reasons (on the charge) at 4-5 [**AB 296**].

30. Where a law burdens the freedom it is important, in considering the validity of the law, to assess the nature and extent of the burden.[42] In this case the Attorney-General makes two points:

(1) *First*, the impugned legislation is not directed to political communication.

(2) *Second*, any effect on political communication is insubstantial.

31. As to the first point, although the communication prohibition operates by reference to communication about abortion, not all communication about abortion is political. A medical professional speaking on the topic from a medical perspective at a health conference will not (usually) be engaging in political communication. A woman and her doctor speaking to each other about the procedure are not (usually) engaging in political communication. Something more is required for communication about abortion to be characterised as "political". In the context of anti-abortion protesters outside abortion clinics, while it may be accepted that some individuals might be engaging in political communication, in other cases the aim is to deter women from having an abortion, often through imposing guilt and shame.[43] This latter type of communication is not political communication, although it may represent deeply and sincerely held personal beliefs. It is communication directed at influencing a personal and private medical choice. It is not directed at public debate, nor at ensuring that the people of Commonwealth can "exercise a free and informed choice as electors".[44]

32. In the United States, which protects a much broader right to free speech than the implied freedom protected by the Constitution, the Supreme Court has accepted that anti-abortion "protest speech" targeted at specific individuals is more amenable to government regulation than generally directed political protest.[45] In *Madsen v Women's Health Center Inc*, the Supreme Court upheld aspects of an injunction

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42 *Brown* (2017) 91 ALJR 1089 at 1118 [150] (Kiefel CJ, Bell and Keane JJ); *Monis v The Queen* (2013) 249 CLR 92 at 146 [124] (Hayne J), citing *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 143 (Mason CJ), *Hogan v Hinch* (2011) 243 CLR 506 at 555-556 [95]-[96] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) and *Wotton v Queensland* (2012) 246 CLR 1 at 16 [30] (French CJ, Gummow, Hayne, Crennan and Bell); 212 [342] (Crennan, Kiefel and Bell JJ).

43 Second Reading Speech at 3975, 3977. Magistrate's Reasons (on validity) at 9 [4] [**AB 289**]. See also *R v Lewis* (1996) 139 DLR (4th) 480 at [105]: the protest activity of the respondent was designed to "engage the conscience of women entering the clinic in an effort to change the decision to have an abortion and with the expectation of creating guilt if an abortion is performed". See also Ledewitz, "Civil Disobedience, Injunctions, and the First Amendment" (1990) 19 *Hofstra Law Review* 67 at 89: the aim of protesters "is to shame or disturb women seeking abortions so that they change their minds".

44 *Lange* (1997) 189 CLR 520 at 560 (the Court). And, in the UK context, see *Connolly v Director of Public Prosecutions* [2008] 1 WLR 276 at 286-287 [32] (Dyson LJ, with Stanley Burnton J agreeing).

45 See Jacobs, "Nonviolent Abortion Clinic Protests: Reevaluating Some Current Assumptions about the Proper Scope of Government Regulations" (1996) 70 *Tulane Law Review* 1359 at 1425-1427, 1431.

imposing a buffer zone around a clinic's entrance, noting the "distinction between the type of focused picketing [directed primarily at staff and patients of the clinic] and the type of generally disseminated communication that cannot be completely banned in public places".[46] Similarly, in *Frisby v Schultz* the Supreme Court upheld a law imposing a buffer zone around the homes of doctors who performed abortions. The conduct of protesters could be regulated because they "do not seek to disseminate a message to the general public, but to intrude upon [a] targeted resident".[47]

33. The second point, that the effect of impugned law on political communication is, as a practical matter,[48] insubstantial, follows from the fact that, outside a safe access zone, people may protest and express their views about abortion however they choose. In particular, activities such as protesting on the steps of Parliament, advertising in the media, writing to elected representatives, or other communications directed at changing public opinion about abortion laws or aimed at influencing elected representatives are not affected by the law. All that is involved in s 185D is a confined "time, manner and place" restriction.[49]

Step 2: Is the law purpose of the law legitimate?

The purpose of the law

34. The first step in the analysis is to identify the purpose of the law. Here, the legislative purpose for the creation of safe access zones is stated expressly[50] in s 185A:

> (1) *first*, to protect the safety and wellbeing of people accessing services provided at premises at which abortions are provided, as well as employees and other persons needing to access the premises in the course of their duties; and
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> (2) *second*, to respect the privacy and dignity of such persons.

35. The legislative purpose may in summary be described as the protection of persons accessing and leaving abortion clinics.

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46 512 US 753 at 769 (1994).

47 487 US 474 at 486 (1988).

48 *Brown* (2017) 91 ALJR 1089 at 1118 [150] (Kiefel CJ, Bell and Keane JJ) ("The inquiry ... is necessarily one about its operation and *practical* effect") (emphasis in original).

49 *Brown* (2017) 91 ALJR 1089 at 1169 [420] (Gordon J).

50 Purpose is determined by a process of statutory construction, which may include reference to extrinsic materials: *Brown* (2017) 91 ALJR 1089 at 1111 [96] (Kiefel CJ, Keane and Bell JJ), 1128 [208]-[209] (Gageler J), 1152 [321] (Gordon J); *McCloy v New South Wales* (2015) 257 CLR 178 at 232 [132] (Gageler J). In light of the express statement of purpose in s 185A, reference to extrinsic material is unnecessary in this case. But if regard were had to that material it would support the purpose identified here: eg, Second Reading Speech at 3974-3975.

The purpose of the law is legitimate

36. A legislative object is "legitimate" if it is compatible with the system of representative and responsible government established by the Constitution.[51] The purpose does not *itself* need to be the maintenance or enhancement of that system; laws often pursue objects not directly related to the constitutional system of government.[52] "[W]here conduct has effects beyond the communication of ideas or information, there are likely to be legitimate reasons to regulate that conduct".[53]

37. In this case the legislation is expressly directed to conduct with effects beyond the communication of information — to fall within the prohibition, the communication must be "reasonably likely to cause distress or anxiety". The expressed object of protecting the safety and wellbeing of, and respecting the privacy and dignity of, persons accessing lawful medical services, as well as the staff and others accessing the premises in the course of their duties, is plainly a legitimate end.

38. Medical practitioners are entitled to provide, and patients are entitled to access, any lawful medical service in a safe and orderly way, without fear, harassment or intimidation. Just as business owners are entitled to "get on with their businesses",[54] persons attending an abortion clinic, whether as a patient, support person or staff member, are entitled to access and leave the premises safely and without interference or harassment.[55] Legislation directed to that end is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. Indeed, ensuring the safety of members of society furthers that system.[56]

39. In addition, ensuring respect for the privacy and dignity of those accessing premises at which abortions are provided is a legitimate end. Dignity is the "most central of all

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51 *Brown* (2017) 91 ALJR 1089 at 1112 [102] (Kiefel CJ, Bell and Keane JJ), 1119 [156] (Gageler J), 1141 [271] (Nettle J), 1151 [320] (Gordon J).

52 *Brown* (2017) 91 ALJR 1089 at 1151-1152 [320]-[321] (Gordon J); *Monis* (2013) 249 CLR 92 at 148 [128] (Hayne J).

53 *Brown* (2017) 91 ALJR 1089 at 1168 [416] (Gordon J).

54 *Brown* (2017) 91 ALJR 1089 at 1141-1142 [275] (Nettle J); see also at 1111-1112 [99]-[102] (Kiefel CJ, Bell and Keane JJ), 1129 [212]-[213] (Gageler J), 1168 [413] (Gordon J).

55 See, in a comparative context, *Lewis* (1996) 139 DLR (4th) 480 at [92]: "Equitability and facilitation of access to health services is a valid legislative objective"; *Hill v Colorado* 530 US 703 (2000) at 717 (the right to free passage "applies ... perhaps with greater force ... to access to a medical facility").

56 See, eg, *Levy* (1997) 189 CLR 579 at 608-609 (Dawson J).

human rights".[57] And the preservation of privacy for persons attending abortion clinics is important not only in and of itself, but also because, without it, there will be persons who need the services the clinic provides but decide to delay, or not to seek those services at all.

40. Moreover, the communication prohibition is not directed at preventing "hurt feelings" or to secure "the civility of discourse", purposes of a kind that troubled some members of this Court in *Coleman v Power*[58] and *Monis v The Queen.*[59] It is directed to protecting the safety and wellbeing, and the privacy and dignity, of persons attending the clinics. In the statement of compatibility, the Minister referred to the psychological harm caused to some women attending clinics and to some staff arising from the conduct of protesters (including verbal abuse).[60]

41. In addition, there are other public interests at stake. The harm caused by anti-abortion protesters does not arise only from the suffering of anxiety and distress itself (although that is an important aspect, and one to which the State is entitled to respond). Anti-abortion communication outside a clinic may deter or delay women from seeking abortion services; there may be adverse medical effects;[61] it contributes to the shame and stigma associated with abortion; and it constitutes intrusion into a private medical decision.[62] Protection against these harms, individually and cumulatively, provides a more than sufficient basis for concluding that the communication prohibition is directed towards a legitimate end.

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57 *Monis* (2013) 246 CLR 92 at 182 [247] (Heydon J), quoting Barak, *The Judge in a Democracy* (2006) at 85. See also *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218 at 266 (Brennan J).

58 (2004) 220 CLR 1 at 78-79 [199] (Gummow and Hayne JJ), 91 [238]-[239] (Kirby J); see also at 54 [105] (McHugh J).

59 (2013) 249 CLR 92 at 168-169 [199] (Hayne J), 196-197 (Crennan, Kiefel and Bell JJ).

60 Statement of Compatibility at 3973.

61 Delay in seeking access to medical services is significant. From a medical point of view, once a woman has made a decision to have an abortion, the sooner the procedure is performed the better, as this reduces risk of complications: Allanson Affidavit at [50] [**AB 18**]; Goldstone Affidavit at [11] [**AB 247**]. Further, the risks associated with an abortion procedure increase if the patient suffers from additional stress or anxiety: Goldstone Affidavit at [10] [**AB 247**]. See also Jacobs, "Nonviolent Abortion Clinic Protests: Reevaluating Some Assumptions about the Scope of Government Regulations" (1996) 70 *Tulane Law Review* 1359 at 1423. Protest activity may also impede the effective provision of services to patients. Staff must spend resources and time providing counselling to mitigate the impact of protest activity: Foster et al, "Effect of abortion protesters on women's emotional response to abortion" (2013) 87 *Contraception* 81 at 83, 86; Allanson Affidavit at [41] [**AB 16**].

62 See *Lewis* (1996) 139 DLR (4th) 480 at [100] (referring to the invasive effects of protest activity upon the privacy of women seeking abortion services and the accompanying "deterioration in dignity", citing *Ontario (Attorney-General) v Dieleman* (1994) 117 DLR (4th) 449 at 678-679).

42. It is not correct for the appellant to assert, as she did below,[63] that the law targets anti-abortion political speech and, for that reason, is not directed to a legitimate end.

43. *First*, "[n]o decision of this Court holds that a law effecting a discriminatory burden [on the freedom] is, for that reason alone, invalid".[64] Even if anti-abortion political speech were targeted by the law (which is not conceded — the communication prohibition would also apply to pro-abortion communication in the zone if it was likely to cause distress and anxiety), that does not negate the proposition that the law is directed to a legitimate and compelling end, namely the protection of persons accessing abortion clinics, for the reasons given above.

10 44. *Second*, the practical burden of the law does not fall on political speech. As already noted, political communication about abortion is permitted; just not in the safe access zone (to the extent that it falls within the communication prohibition). What is denied to protestors is the capacity to confront women who are seeking to access abortion services (and their companions), and the staff who provide those services.

45. In that regard, the appellant may be correct that s 185D prevents her from most effectively communicating her message, which is by targeting women who are seeking to access abortion services so as to dissuade them from doing so. But that does not provide an answer to the constitutional question of validity.[65] Indeed, it is precisely this "targeting" that causes the most harm. The women and staff seeking to access a
20 clinic are a "captive audience" to the protesters. If they are to access the clinic they cannot turn away or avoid the communications, no matter how distressing or unpleasant. The implied freedom does not guarantee a right to a captive audience. As Nettle J observed in *Brown*, the implied freedom is "a freedom to communicate ideas to those who are willing to listen, not a right to force an unwanted message on those who do not wish to hear it".[66]

Comparative jurisprudence

46. The foregoing is consistent with the jurisprudence in Canada, Europe and the United States. Courts in those jurisdictions have accepted that the regulation of abortion protest activity (including activity falling short of harassment or intimidation) through

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63 Magistrate's Reasons (on validity) at 9 [5] [**AB 289**].

64 *Brown* (2017) 91 ALJR 1089 at [92] (Kiefel CJ, Bell and Keane JJ).

65 *Brown* (2017) 91 ALJR 1089 at 1169 [416] (Gordon J).

66 (2017) 91 ALJR 1089 at 1141 [275]. See also *Hill v Colorado* 530 US 703 (2000) at 715-718.

the establishment of safe zones is a legitimate state objective and therefore a legitimate limitation on the right of free speech.

(1) In *Spratt* the British Columbia Court of Appeal concluded, in relation to a safe access zone law that prohibited, among other things, protest activity and "sidewalk interference" within a prescribed zone: "[There is] no doubt that the objective of equal access to abortion services, enhanced privacy and dignity for women making use of those services and improved climate and security for services providers ... constitute a valid state objective".[67]

(2) In *Van den Dungen v Netherlands* the European Commission on Human Rights found that a court injunction preventing the applicant from protesting against abortion within 250 metres of an abortion clinic was "aimed at the protection of the rights of others" and had a "legitimate aim".[68]

(3) In *Madsen* the United States Supreme Court upheld the validity of an injunction preventing anti-abortion protesters from entering into a 36 foot buffer zone around an abortion clinic. The Court stated that the injunction was justified by governmental interests, including protecting a pregnant woman's freedom to seek lawful medical or counselling services.[69]

(4) Similarly, in *Hill v Colorado* the United States Supreme Court upheld the validity of a law establishing, around any health care facility, a zone within which a person was prohibited from approaching another person in order to engage with them, protest (orally or with signs) or offer them pamphlets without that person's consent. The Court found that there was a legitimate State interest in "protecting the health and safety of [its] citizens", especially in relation to access to health care facilities and "the avoidance of potential trauma to patients associated with confrontational protests".[70]

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67 (2008) 298 DLR (4th) 317 at [71]-[72]. The Supreme Court of Canada refused leave to appeal. See also *Lewis* (1996) 139 DLR (4th) 480 at [90]-[102].

68 (1995) 80 D&R 147.

69 512 US 753 at 768 (1994). However, the Court held invalid that part of the injunction that prohibited protesters from approaching patients and potential patients within a 300 metre buffer zone without the patient's consent.

The legitimacy of the State's interest in ensuring public safety and order and protecting a woman's freedom to seek pregnancy services was also recognised in *McCullen v Coakley* 573 US ___ (slip op) at 19 (2014), although the Court held that a blanket ban on standing on a sidewalk within 35 feet of an abortion clinic burdened more speech than was necessary to achieve those interests.

70 530 US 703 at 715 (2000). The operation of the law was not confined to abortion clinics, though the legislative history made clear that it was "primarily motivated" by activities near abortion clinics.

Step 3: Is the law justified?

47. In addressing whether an impugned provision is reasonably appropriate and adapted to achieve its legitimate end, the "three-part test" of suitability, necessity and adequacy, applied by the plurality in *McCloy*, is an analytical tool that may be of assistance.[71] However, that tool is not "a rule derived from the Constitution itself"[72] and it is not always necessary to undertake that analysis.[73]

48. The Attorney-General contends that it is not necessary to undertake three-part proportionality testing in this case, because any burden on the implied freedom is minimal, and the burden was imposed to further a legitimate — indeed a compelling — legislative purpose: the protection of those entering and leaving abortion clinics.

49. In considering whether a law is justified, it is necessary and appropriate to take into account the extent of the burden.[74] The measure of the justification needs to be "calibrated to the nature and intensity of the burden".[75] Or, as the plurality in *Brown* observed, "a slight burden on the freedom might require a commensurate justification".[76] As explained above at paragraphs 30 to 33, the communication prohibition, in its scope and practical operation, involves only a slight or insubstantial burden on political communication. It poses little risk to the maintenance of representative and responsible government that is at the heart of the implied freedom.[77]

50. The minimal burden must be considered in light of the importance of the objects of the law, which are not only legitimate but compelling. In this regard, the communication prohibition bears similarities to the impugned regulation in *Levy*.[78] In upholding the validity of that regulation, several members of the Court emphasised the importance of the regulation's purpose (ensuring a "greater degree of safety of persons in hunting

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71 *McCloy* (2015) 257 CLR 178 at 195-196 [4], 213 [68], 215 [72] (French CJ, Kiefel, Bell and Keane JJ); *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027 at 1038-1039 [37] (French CJ and Bell JJ), 1043 [62] (Kiefel J); *Brown* (2017) 91 ALJR 1089 at 1142 [278] (Nettle J).

72 *McCloy* (2015) 257 CLR 178 at 213 [68] (French CJ, Kiefel, Bell and Keane JJ).

73 *Brown* (2017) 91 ALJR 1089 at 1115 [125], 1116 [131] (Kiefel CJ, Bell and Keane JJ), 1119 [158]-[159] (Gageler J), 1143 [279]-[280] (Nettle J), 1177-1178 [473] (Gordon J).

74 *Brown* (2017) 91 ALJR 1089 at 1114 [118], 1115 [128] (Kiefel CJ, Bell and Keane JJ), 1120 [164] (Gageler J), 1146 (Nettle J), 1152 (Gordon J). See also *Tajjour v New South Wales* (2014) 254 CLR 508 at 580-581 [151] (Gageler J).

75 *Brown* (2017) 91 ALJR 1089 at 1120 [164] (Gageler J); see also at 1114-1115 [118]-[128] (Kiefel CJ, Bell and Keane JJ).

76 (2017) 91 ALJR 1089 at 1115 [128] (Kiefel CJ, Bell and Keane JJ).

77 *Brown* (2017) 91 ALJR 1089 at 1120-1121 [164]-[165] (Gageler J).

78 (1997) 189 CLR 579.

areas during the open season for duck") and considered that the "degree" of curtailment of the implied freedom was reasonable having regard to that purpose.[79] Reference was made to the "public interest" in the "personal safety of citizens"[80] and the regulation being reasonable "in the interests of an ordered society".[81]

51. In the present case, the Attorney-General submits that all that is required by way of justification is "that the means adopted by the law are **rationally related** to the pursuit of [its end]" (emphasis added).[82] Here, there is ample evidence of a rational connection between the legislative purpose — to prevent harmful conduct that may cause women seeking medical services, and clinic staff, to suffer anxiety and distress — and the communication prohibition. That is sufficient to justify the indirect and insubstantial burden the law imposes on the freedom.

Proportionality testing: the law is justified

52. In the event the Court considers it useful in the circumstances of this case to apply a three-step proportionality analysis, the Attorney-General submits that the same conclusion is reached: the law is justified.

Suitability

53. As explained above, the communication prohibition is suitable to its object.

Necessity

54. The communication prohibition is no broader than is necessary to achieve its object. It is not possible to eliminate the communication prohibition — or reduce its scope — and still retain the effectiveness of the law.

55. In the court below the appellant contended that the communication prohibition is unnecessary because conduct that constitutes harassment or has the effect of impeding women from accessing abortion clinics is already covered by other aspects of the definition of "prohibited behaviour". The appellant also challenged the apparent breadth of the communication prohibition, observing that it extends to non-violent protest that might capture prayer vigils, "peaceful" protest, silent protest and the like.

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79 *Levy* (1997) 189 CLR 579 at 608-609 (Dawson J), 614 (Toohey and Gummow JJ), 647-648 (Kirby J).

80 *Levy* (1997) 189 CLR 579 at 614-615 (Toohey and Gummow JJ).

81 *Levy* (1997) 189 CLR 579 at 608-609 (Dawson J).

82 *Tajjour* (2014) 254 CLR 508 at 581 [151] (Gageler J), citing *ACTV* (1992) 177 CLR 106 at 169 (Deane and Toohey JJ), *Levy* (1997) 189 CLR 579 at 618-619 (Gaudron J) and *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 200 [40] (McHugh J). See also *Brown* (2017) 91 ALJR 1089 at 1127 [200]-[202] (Gageler J).

56. The potential breadth of the conduct caught by the communication prohibition may be accepted. Part 9A is designed to prevent activity that falls short of harassment (in the legal or conventional sense) or that might not *physically* prevent women from accessing the clinic. That activity may nonetheless be likely to cause anxiety or distress. The appellant also overlooks the fact that non-violent — even "polite" or "silent" — communication about abortion that targets women seeking to access abortion services can cause anxiety and distress.[83]

57. These issues were expressly dealt with in the statement of compatibility for the Bill, in which the Minister observed that provisions only prohibiting "intimidating, harassing or threatening conduct" or conduct "which impedes access to premises" would be "inadequate" to protect women and staff.[84] In particular, as the Minister observed, a more limited prohibition would not protect women and staff "from the harmful effect of the otherwise peaceful protests given their sustained nature and the background of extreme conduct against which they occur".[85] By way of example of "peaceful" conduct that is nevertheless likely to cause distress and anxiety, Dr Allanson deposed that protesters at the East Melbourne Fertility Control Clinic would "pray, sing or yell directly outside FCC consulting rooms", which could be heard inside the clinic and caused Dr Allanson and her patients "significant discomfort".[86]

58. In *R v Lewis*, the British Columbia Supreme Court rejected a similar argument that a law which prohibited "protest" (defined as including any act of disapproval relating to abortion) and "sidewalk interference" (defined to include advising or persuading a person to refrain from making use of abortion services, or informing a person concerning abortion issues) in an "access zone" was overly broad. The Court stated:[87]

> While non-violent, even passive, expression of disapproval is captured by this Act, the evidence establishes that such activity, in the context of well-known history of vigorous protest and the vulnerable nature of many of those who enter the clinic, is contrary to the well-being, privacy and dignity of those using the clinics' services.

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83 See, eg, Hayes and Lowe, "A Hard Enough Decision to Make: Anti-Abortion Activism Outside Clinics in the Eyes of Clinic Users" (2015) at 27 (Exhibit SA16 to the Allanson Affidavit) [**AB 199**] (finding that even where the conduct of protestors was "polite", women reported feeling intimidated and insecure). And, as observed in *Spratt* (2008) 298 DLR (4th) 317 at [60], women may be concerned "not only about a violent or traumatic interaction with the protesters, but also about a loss of confidentiality", noting that one of the express purposes of Pt 9A is to protect privacy.

84 Statement of Compatibility at 3973.

85 Statement of Compatibility at 3973. See also Second Reading Speech at 3976.

86 Allanson Affidavit at [12], [19], [31] [**AB 9, 11, 14**].

87 *Lewis* (1996) 139 DLR (4th) 480 at [130].

59. Next, the area of the safe access zone (150 metres) is precisely defined[88] and is reasonably necessary in light of the objects of Pt 9A. In explaining that a zone of 150 metres had been determined to be appropriate, the Minister stated that protesters had followed women and their support persons to and from their cars and public transport, and that there had been "many instances of staff being followed to local shops, and subjected to verbal abuse". The Minister observed that "[s]uch conduct has often occurred well beyond 150 metres".[89]

60. It may be accepted that there is no firm "science" to determine the appropriate size of a safe access zone. Here, the size of the zone is within a range that may reasonably be thought to be necessary to achieve the legislative objective.[90] Once that is accepted, it is not appropriate for a court to substitute its view as to the preferable size of the zone for that of the Parliament.[91]

61. Nor could reducing the zone be considered an "obvious and compelling alternative",[92] especially in light of the extrinsic materials and other evidence directed to the legislative selection of 150 metres as the appropriate distance. Even if it were possible to reduce the size of the zone and still maintain the law's effectiveness, any reduction in size would neither diminish the practical burden on political speech nor "significantly enhance the expression of the protesters, the objective of which is to address the women as near as possible to the clinic doors".[93]

Adequate in its balance

62. In the context of a ban on campaign financing, four members of the High Court, when considering the element of "balance", made the following observation:[94]

> In this case, the third stage of the test [adequate in its balance] presents no difficulty for the validity of the impugned provisions. The provisions do not affect the ability of any

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88 Cf the areas in issue in *Brown*, discussed at (2017) 91 ALJR 1089 at 1104 [46], 1107-1108 [67]-[76] (Kiefel CJ, Bell and Keane JJ).

89 Statement of Compatibility at 3974.

90 In *Van den Dungen* (1995) 80 D&R 147 (discussed above in paragraph 46(2)), the European Commission on Human Rights held that an injunction that prevented Mr Van den Dungen from being within 250 metres of a specified abortion clinic was proportionate.

91 *Tajjour* (2014) 254 CLR 508 at 550 [36] (French CJ); *McCloy* (2015) 257 CLR 178 at 217 [82] (French CJ, Kiefel, Bell and Keane JJ) ("Once 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").

92 *Brown* (2017) 91 ALJR 1089 at 1143-1144 [282] (Nettle J); and to like effect at 1117 [139] (Kiefel CJ, Bell and Keane JJ).

93 *Lewis* (1996) 139 DLR (4th) 480 at [127].

94 *McCloy* (2015) 257 CLR 178 at 220-221 [93] (French CJ, Kiefel, Bell and Keane JJ).

person to communicate with another about matters of politics and government nor to seek access to or to influence politicians in ways other than those involving the payment of substantial sums of money. The effect on the freedom is indirect. By reducing the funds available to election campaigns there may be some restriction on communication by political parties and candidates to the public. On the other hand, the public interest in removing the risk and perception of corruption is evident. These are provisions which support and enhance equality of access to government, and the system of representative government which the freedom protects. The restriction on the freedom is more than balanced by the benefits sought to be achieved.

63. Similar observations may be made here.[95] For the reasons already given, the provisions do not materially affect the ability of any person to communicate with others about matters of politics and government. Any effect on the freedom is incidental. The public interest in protecting those accessing abortion clinics from harm is evident. The provisions further the constitutional system of government. Any restriction on the freedom is more than balanced by the benefits sought to be achieved.

PART VII: ORDERS SOUGHT

64. The Attorney-General seeks the following orders:

(1) The appellant's appeal from the judgment of Bazzani M made on 11 October 2017 (by her amended notice of appeal filed in Matter No M46 of 2018 on 4 April 2018) be dismissed.

(2) The appellant pay the respondents' costs, including reserved costs.

PART VIII: ESTIMATE OF TIME

65. The Attorney-General estimates that he will require two hours for oral argument.

Dated: 11 May 2018

KRISTEN WALKER
Solicitor-General for Victoria
Telephone: (03) 9225 7225
Facsimile: (03) 9670 0273
k.walker@vicbar.com.au

KATHLEEN FOLEY
Owen Dixon Chambers
Telephone: (03) 9225 7999
Facsimile: (03) 9225 7728
kfoley@vicbar.com.au

SIMONA GORY
Chancery Chambers
Telephone: (03) 8600 1724
Facsimile: (03) 9225 8395
simona.gory@vicbar.com.au

95 See also *Lewis* (1996) 139 DLR (4th) 480 at [132]-[149] and *Spratt* (2008) 298 DLR (4th) 317 at [91], where the safe access zone laws under challenge were held to be proportionate.