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

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ANNOTATED SUBMISSIONS OF THE FERTILITY CONTROL CLINIC (A FIRM)

APPLICANT TO INTERVENE, ALTERNATIVELY TO BE HEARD AS AMICUS CURIAE

Filed on behalf of the Fertility Control Clinic: Date of this document: 25 May 2018

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I Internet publication

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

II Basis of appearance

2. The partners trading as the Fertility Control Clinic (**FCC**) conduct a private abortion clinic in East Melbourne. That clinic is the subject of the safe access zone in which the appellant committed the offence the subject of the appeal. On the grounds in Section III below, the FCC seeks leave to intervene, alternatively to be heard as amicus curiae, in support of the first and second respondents on the constitutional validity of s 185D, read with paragraph (b) of the definition of "prohibited behaviour" in s 185B, of the *Public Health and Wellbeing Act 2008* (Vic) (**Act**).

III Why leave to intervene or to be heard as amicus curiae should be granted

Principles applicable to the grant of leave

3. An applicant to intervene must demonstrate "a substantial affection" of its legal interests.[1] This need not be a direct affection, but does need to rise higher than the kind of indirect or contingent affection that follows merely "from the extra-curial operation of the principles enunciated in the decision of the Court".[2] An applicant to intervene who asserts only an indirect interest must ordinarily also satisfy the Court that it will offer submissions of assistance.

4. An amicus curiae may be heard on a different basis, namely, when the Court is "of the opinion that it will be significantly assisted thereby" and where any costs to the parties or delay occasioned by the amicus being heard are not disproportionate to the assistance expected to be given.[3]

5. The occasions for a favourable exercise of the discretion to permit a non-party, with only an indirect interest in the proceeding, to intervene or to be heard as amicus curiae are not limited to cases in which the parties are unable or unwilling adequately to

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[1] *Levy v Victoria* (1997) 189 CLR 520 (***Levy***) at 602 (Brennan CJ).

[2] *Roadshow Films Pty Ltd v iiNet Limited* (2012) 248 CLR 37 (***Roadshow Films***) at [2] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

[3] *Levy* (1997) 189 CLR 520 at 604-605 (Brennan CJ); *Roadshow Films* (2012) 248 CLR 37 at [4] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

assist the Court in arriving at the correct determination. Leave may be granted where the applicant is "willing to offer the Court a submission on law or relevant fact which will assist the Court in a way in which the Court would not otherwise have been assisted".[4]

6. Submissions offered by an intervener or amicus curiae might more readily be of assistance to the Court in a case requiring the ascertainment of constitutional facts, being a species of legislative facts that are "ordinarily general and do not concern the immediate parties".[5] In such cases, the Court may "invite and receive assistance from the parties to ascertain the [constitutional] facts, but it is free also to inform itself from other sources"; it must ultimately ascertain those facts "as best it can".[6] The Court may reach the necessary conclusions of fact "largely on the basis of its knowledge of the society of which it is a part".[7] It may therefore be appropriate to hear an intervener or an amicus if the distinctive perspective, interest or emphasis that they bring will assist the Court to arrive at a more complete understanding of the facts relevant to constitutional validity.

Principles applied to the Fertility Control Clinic

7. The proprietary and other legal interests of the FCC will be substantially affected by the outcome of the litigation. Its proposed submissions will be useful and different from those of the parties.

Substantial affection of FCC's legal interests

8. The litigation substantially, if indirectly, affects the FCC's legal interests arising from its proprietary interest in the premises[8] within the safe access zone the subject of the charge against the appellant. It also affects the interests of its partners and employees in pursuing at those premises their vocations, providing healthcare services in a safe and secure environment, and the interest of the partners arising from their obligation to ensure a safe workplace for their employees.

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[4] *Levy* (1997) 189 CLR 520 at 604 (Brennan CJ).

[5] *Re Day* (2017) 340 ALR 368 at [20]-[26] (Gordon J); *Maloney v The Queen* (2013) 252 CLR 168 at [352]-[353] (Gageler J).

[6] *Gerhardy v Brown* (1985) 159 CLR 70 at 142 (Brennan J).

[7] *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559 at 622 (Jacobs J); see also *Thomas v Mowbray* (2007) 233 CLR 307 at [633]-[635] (Heydon J).

[8] The FCC, through a service trust, has a leasehold interest in the premises.

9. The prohibition imposed by s 185D applies only within a safe access zone, being an area surrounding premises at which abortions are provided. The offence at issue in this appeal was committed within the safe access zone around the FCC's premises (**CAB 276, 291**). The impugned provisions regulate the space that it is necessary for a person to traverse to access the FCC's premises; they regulate conduct, such as loud "singing, praying and yelling", that has the capacity to affect in an immediate way the FCC's occupation and use of the premises (**CAB 11** [19]; **CAB 14** [31]).

10. Furthermore, the FCC in fact uses the premises to provide abortions and other healthcare services to patients: (**CAB 8** [8]; **CAB 30** [SA2]). Evidence in the proceeding about the effect of "prohibited behaviour" on the ability of patients to seek services at the FCC indicates that the validity of those provisions substantially affects the FCC's interest in its partners and employees being able to practise their vocations of providing healthcare services. The significant aspects of that evidence include: health service providers declining to refer patients to the FCC because of the distressing protest activity (**CAB 16** [42]); adverse impact of protest activity on staff working hours (**CAB 17** [46]); the resignation of staff and inability to attract new doctors to work at the FCC because of the protest activity (**CAB 20** [56]); and an adverse impact on the ability to provide professional services in a safe and supportive environment (**CAB 14** [31]; **CAB 17** [45]).[9] The evidence of the impact of prohibited behaviour on FCC staff and, for example, the evidence of the FCC having engaged a security guard who accompanies staff outside the premises (**CAB 20** [59]), indicates the substantial affection of the FCC's interest in providing a safe workplace for its employees.

11. An important witness in the proceeding, Dr Susie Allanson (**CAB 6-242**), has been a clinical psychologist at the FCC for more than 25 years. While it is accepted that a witness will not, by virtue of that status, ordinarily have a sufficient interest to intervene in proceedings, this is a case where the ascertainment of constitutional facts will likely proceed by reference to Dr Allanson's evidence. The Court may be assisted by the intervention of the FCC, which can offer an informed and distinctive perspective and emphasis in relation to those facts.

[9] Section 185B(2) of the Act specifically disapplies part of the definition of prohibited behaviour in respect of employees or other service providers, underscoring the interest of those persons in the validity of the provisions.

Proposed submissions to be useful and different

12. The FCC's proposed submissions are set out in Section V. They do not repeat the submissions of the Attorney-General for Victoria (**A-GVS**), which the FCC otherwise adopts and supports. Confining itself to submissions that are useful and different, the FCC addresses selected issues, not addressed or emphasised by the Attorney-General for Victoria, which arise in connection with the question whether the impugned provisions are reasonably appropriate and adapted to the fulfilment of a legitimate end in a manner which is compatible with the constitutionally prescribed system of representative and responsible government.

13. The main points of distinction between the FCC and the Attorney-General for Victoria are as follows:

(a) the FCC makes a different submission on the construction of the words "distress or anxiety" (see below at [24]-[30]);

(b) the FCC makes a different submission on the significance of the geographical limitation of the prohibition in s 185D (see below at [31]-[37]);

(c) the FCC relies upon an additional legitimate end to support the impugned provisions (see below at [39]-[43]);

(d) the FCC makes additional submissions as to the justification for the impugned provisions by reference to facts derived from the evidence of the FCC's Dr Allanson, and thereby brings a distinctive perspective and emphasis to the analysis of the constitutional facts (see below at [44]-[50]); and

(e) the FCC makes a further and different submission as to why recourse to the three-part analytical tool of proportionality may not be necessary or appropriate in the circumstances of this case (see below at [52]-[57]).

IV Applicable provisions

14. The applicable statutory provisions are contained within Part 9A of the Act.

V Proposed argument

Summary

15. The impugned provisions of the Act regulate at most, and then only incidentally, a narrow subset of possible communications about government or political matters:

those "in relation to abortions" that are conveyed "in a manner that ... is reasonably likely to cause distress or anxiety". Those provisions do so only within narrowly drawn geographical bounds: "safe access zones" centered upon the very places where the individuals sought to be protected from distress or anxiety are most vulnerable to that harm. The purposes of the law in protecting the safety, wellbeing, privacy and dignity of people accessing services or employed at abortion clinics, and more generally in supporting women's access to health services and reproductive health choices, are compatible with the maintenance of the constitutionally prescribed system of representative government. Any burden on speech is slight and the justification for it is compelling. The third *Brown/McCloy* question, assuming it to be reached, should therefore be answered "Yes", in favour of the validity of the impugned provisions.

16. The third *Brown/McCloy* question is reached if affirmative answers are given to the first and second questions: (1) whether the law effectively burdens the freedom of communication about government or political matters; and (2) whether the purpose of the law is compatible with the maintenance of the constitutionally prescribed system of representative government. The third *Brown/McCloy* question is then: (3) whether the law is reasonably appropriate and adapted to advance the legitimate purpose of the law in a manner that is also compatible with the maintenance of the constitutionally prescribed system of representative government.[10]

17. Like the Attorney-General for Victoria (A-GVS [28]), the FCC accepts that s 185D does burden the implied freedom because it prohibits communicating inside a safe access zone in relation to abortion in a manner that is reasonably likely to cause distress or anxiety, even if the communication is about government or political matters. Like the Attorney-General for Victoria (A-GVS [36]-[41]), the FCC submits that the purposes of the law are legitimate in the requisite sense. The first and second *Brown/McCloy* questions must therefore be answered affirmatively.

18. These submissions focus on the resulting question whether the law is reasonably appropriate and adapted. They focus for that purpose upon exposing the slightness of

[10] *Brown v Tasmania* (2017) 91 ALJR 1089 (***Brown***) at [104] (Kiefel CJ, Bell and Keane JJ), [156] (Gageler J), [236] (Nettle J), [315]-[325] (Gordon J); *McCloy v New South Wales* (2015) 257 CLR 178 (***McCloy***) at [2] (French CJ, Kiefel, Bell and Keane JJ).

the burden that is imposed on political communication, and the weightiness of the justification for that burden.

19. As to the slightness of the burden: the prohibition, consistent with being tailored to the legitimate ends of the Act, is limited to communicating in a manner that is reasonably likely to cause "distress or anxiety" and within a targeted geographical scope. There is no reason to think that premises where abortions are provided are an important locus for *political* communication.

20. As to the weightiness of the justification: there is, in addition to the ends stated in s 185A and A-GVS [35], a wider purpose of ensuring *access* to lawful abortion services (see also A-GVS [41]). The evidence of the FCC's Dr Allanson demonstrates the compelling justification for the impugned provisions, including in relation to that wider purpose.

21. As to the relationship between the burden and the justification: the assistance offered by the analytical tool of three-part proportionality may be affected by the apparent balance or imbalance between the extent of the burden on the freedom of political communication and the weight of the legitimate end identified to justify the burden. Where, as here, there is a slight burden and a weighty justification, the Court is able to reach a conclusion as to validity, and adequately explain that conclusion, without recourse to three-part proportionality.

Slightness of the burden

22. It is accepted that s 185D, read with paragraph (b) of the definition of "prohibited behaviour", may in some circumstances (even if not in this case)[11] limit the making of political communications,[12] and so as a general proposition effectively burdens freedom of political communication. That burden is slight. It is limited by the confinement of the prohibition to communicating in relation to abortions in a manner "reasonably likely to cause distress or anxiety" and within the defined "safe access zones".

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[11] The FCC adopts the submission of the Attorney-General for Victoria that there is no indication that the communication the subject of the charge in this case involved a political communication, noting that not all communication about abortion is political in nature: A-GVS [29]; [31].

[12] *Monis v R* (2013) 249 CLR 92 at [108] (Hayne J); *Brown v Tasmania* (2017) 91 ALJR 1089 at [180] (Gageler J).

23. Those two narrowing features of the impugned provisions lead to the conclusion that the burden on political communication is slight, not simply because they ensure that the prohibition affects only limited occasions of political communication, but because they ensure that the prohibition poses little risk to the free flow of information that is indispensable to the functioning of the constitutionally prescribed system of representative government.[13]

Reasonably likely to cause distress or anxiety

24. The target of paragraph (b) of the definition of "prohibited behaviour" is not all communication in relation to abortion *per se,* but communication about abortions in a manner "reasonably likely to cause distress or anxiety". Distress and anxiety are not defined in the Act. They should be given their natural and ordinary meaning appropriate to the context,[14] and thus be taken to refer to the mental states of suffering, sorrow or uneasiness of mind.

25. The words should not be qualified by any intensifier such as "serious" or "substantial". While in some cases the specific statutory language, or requirements of interpretation legislation, will mandate a narrow construction of this kind,[15] the validity of s 185D and the relevant part of 185B of the Act does not depend on a narrowing gloss on the words distress and anxiety. For the following reasons, there is no occasion to further narrow the scope of the definition of prohibited behaviour by qualifying the words "distress or anxiety".

26. *First*, "distress" and "anxiety" are, in their ordinary unqualified meaning, mental states apt to lead to potentially serious adverse health outcomes, both immediate and consequential (see below at [47]). That is particularly the case given the context in which paragraph (b) of the definition of "prohibited behaviour" comprehends the distress or anxiety likely being experienced: by a person seeking to access abortion services[16] or other health services at the clinic, or by a person working or performing

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[13] *McCloy* (2015) 257 CLR 178 [245] (Nettle J); *Tajjour v New South Wales* (2014) 254 CLR 508 at [145] (Gageler J).

[14] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [48], [53] (French CJ, Hayne, Heydon, Crennan and Kiefel JJ).

[15] See, eg, *Brown* (2017) 91 ALJR 1089 at [71] (Kiefel CJ, Bell and Keane JJ).

[16] Noting the requirement that the communication be able to be "seen or heard by a person accessing, attempting to access or leaving premises at which abortions are provided" in paragraph (b) of the definition, and the purpose in s 185A(a)(i).

duties at the clinic.[17] For such persons, distress or anxiety are likely to have a particularly serious impact (**CAB 15** [37]-[38]; **CAB 16** [40]-[41]). No further limitation would therefore be necessarily or appropriately imputed to the legislature.

27. *Secondly*, the law imposes an objective standard by applying only to communications "reasonably" likely to cause distress or anxiety. That objective standard operates as a limitation on the reach of the prohibition such that there is no need for a further limitation by qualifying "distress or anxiety".

28. *Thirdly*, principles of construction associated with the principle of legality have no relevant application to the words "distress or anxiety" in the Act. The legislature can be seen by those words to have balanced the fundamental rights of one group (patients seeking access to premises where lawful medical services are provided) with those of another group (persons exercising a right of free speech): see the Statement of Compatibility.[18] The Court would not suppose that Parliament did not intend to encroach upon the right to freedom of speech when the Act is manifestly directed to that very encroachment (albeit limited) in favour of a competing right of a different group of individuals. The principle of legality is more typically engaged when a statute encroaches on individual rights by conferring intrusive administrative powers on the executive government, such as powers of arrest,[19] powers of inquiry,[20] powers of investigation,[21] powers of search,[22] power to control entry to Australia,[23] and powers of control in prisons.[24] Where the legislature has a manifest purpose of protecting individual rights, implicitly acknowledging that this may limit other rights, the principle of legality does not require any departure from that purpose. Section 32 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), which "applies

[17] See the purpose in s 185A(a)(ii).

[18] Victoria, Legislative Assembly, *Hansard*, 22 October 2015, pp 3972-3973.

[19] *North Australian Aboriginal Justice Agency Limited v Northern Territory* (2015) 256 CLR 569.

[20] *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1.

[21] *X7 v Australian Crime Commission* (2013) 248 CLR 92.

[22] *Coco v The Queen* (1994) 179 CLR 427.

[23] *Potter v Minahan* (1908) 7 CLR 277.

[24] *R v Home Secretary; Ex parte Simms* [2000] 2 AC 115.

to the interpretation of statutes in the same way as the principle of legality but with a wider field of application" does not require any different approach.[25]

29. If a narrow construction of "distress or anxiety" were necessary in order for paragraph (b) of the definition of "prohibited behaviour" to be constitutionally valid, then that narrow construction would, of course, be required by s 6 of the *Interpretation of Legislation Act 1984* (Vic).[26] For the reasons advanced by the Attorney-General for Victoria and by the FCC, that step of reading down is not reached even when the phrase, "distress or anxiety", is given its natural, ordinary and relatively wide meaning.

30. The limitation of the impugned prohibition to communications reasonably likely to cause distress or anxiety underscores the low risk to the free flow of information indispensable to the functioning of representative government. This is not a law concerned merely with the civility of political discourse.[27] It is concerned with more harmful mental states than mere offence or insult: the facts before the Court describe the immediate, and consequential, impact of distress and anxiety upon women seeking abortions and staff at premises where abortions are provided (see below at [47]-[48]).

Geographical confinement to safe access zone

31. The confinement of the operation of s 185D to "safe access zones" as defined is a further significant limitation upon the scope of the impugned prohibition and the burden that it places on political communication. There are only 11 major premises in Victoria where abortions are provided (**CAB 8** [7]). Individuals can therefore engage in political communication about abortions (including communication likely to cause distress or anxiety) very widely throughout Victoria.

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[25] *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359 at [85] (Redlich, Osborn and Priest JJA); *Momcilovic v The Queen* (2011) 245 CLR 1 at [565]-[566] (Crennan and Kiefel JJ).

[26] Section 6(1) of the *Interpretation of Legislation Act 1984* (Vic) provides:

> "Every Act shall be construed as operating to the full extent of, but so as not to exceed, the legislative power of the State of Victoria, to the intent that where a provision of an Act, or the application of any such provision to any person, subject-matter or circumstance, would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid provision to the extent to which it is not in excess of that power and the remainder of the Act and the application of that provision to other persons, subject-matters or circumstances shall not be affected."

[27] Cf *Coleman v Power* (2004) 220 CLR 1 at [199] (Gummow and Hayne JJ); *Monis* (2013) 249 CLR 92 at [199] (Hayne J).

32. The selection of abortion clinics as the location for the imposition of the prohibition in s 185D can be seen to be directed to protecting a group of vulnerable people in the very locations where they are most vulnerable. The vulnerability arises from their circumstances as women seeking abortions, often with complex medical histories including poor mental health (**CAB 15-16** [39]). That vulnerability is exacerbated by the necessity for them to attend the premises of healthcare providers to seek relevant medical services.[28] In the case of staff members, the vulnerability arises by virtue of the premises being their workplace. Patients and staff alike are, in this way, "captives" to the targeted communications of anti-abortion individuals. To some extent, people must "often [be] 'captives' outside the sanctuary of the home, but this does not mean that they must be captives everywhere".[29] It was open to the legislature to identify premises where abortions are provided, and their immediate surroundings, as a location where patients and staff need not be captives to those advancing an unwelcome message in a manner likely to cause distress or anxiety. Like the home, premises where sensitive medical services are provided on a confidential basis to vulnerable patients are and should be recognised as places for the conduct of private affairs that are amenable to protective regulation consistent with the implied freedom of political communication.

33. This is not a case where the geographical circumscription of the burden in truth *targets* political communication. The Court will look to the practical operation of s 185D, informed by relevant facts as best they can be found. There are no facts suggesting that abortion clinics are significant sites of *political* communication. There has, of course, been a very long history of so-called "protest" outside the FCC (**CAB 9** [11], **CAB 10** [14]-[15]), but it is not established that the protests ever had the requisite character of *political* communication or, more importantly, that any *political* characteristic of the communication was aided by the communication being made *at the FCC*.

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[28] See also Victoria, Legislative Assembly, *Hansard*, 22 October 2015, p 3973 (Statement of Compatibility), p 3975 (Second Reading Speech).

[29] *Monis* (2013) 249 CLR 92 at [322] (Crennan, Kiefel and Bell JJ).

34. It is, of course, necessary that "a wide view be taken of the operation of the freedom of political communication".[30] But not every communication, and not even every communication on a topic of public interest, is a communication about government or political matters. 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'".[31] For example, communications about the decisions, reasoning or conduct of judges are not, without more, ordinarily characterised as communications on government or political matters. What is required is some connection between the communication and the acts or omissions of the legislative or executive branches of government.[32] Similarly, a Full Court of the Federal Court 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 it lacked sufficient connection with "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".[33]

35. The significance of the *locality* of the abortion clinic is that it provides the most effective occasion for protesters to seek to influence the private medical decisions of women seeking abortions and the private vocational decisions of doctors and others providing abortion services. That is not an occasion to seek to influence those individuals in their capacity as fellow citizens and voters. The law recognises the private and intimate character of the doctor-patient relationship, including through the duties of confidence imposed on the doctor.[34] Consistent with that longstanding common law position, Victorian law today recognises that "[a] woman's decision to undergo an abortion is an intensely personal one [which] falls within the sphere of private life and personal autonomy recognised by the right to privacy in section 13 of the charter".[35]

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[30] *Unions NSW v New South Wales* (2013) 252 CLR 530 (***Unions NSW***) at [25] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

[31] *McCloy* (2015) 257 CLR 178 at [2] (French CJ, Kiefel, Bell and Keane JJ).

[32] *Hogan v Hinch* (2011) 243 CLR 506 at [92]-[94] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ)

[33] *Brown v Classification Review Board (Rabelais Case)* (1998) 154 ALR 67 at 87 (Heerey J); see also at 98 (Sundberg J).

[34] See *Breen v Williams* (1996) 186 CLR 71 at 92.3 (Dawson and Toohey JJ), 107.9 (Gaudron and McHugh JJ).

[35] Victoria, Legislative Assembly, *Hansard*, 22 October 2015, p 3973 (Statement of Compatibility).

36. It is not open, given the evidence in the present case, to assume that protesters congregate at abortion clinics because of their significance to any *political* aspect of their communications. The Magistrate found that the appellant "approached a young couple entering the [FCC]" and "attempt[ed] to engage [them] by speaking to them and handing over a pamphlet"; the appellant told police that she believed she had "the right to offer [her] help to women" (**CAB 295**). "Helping" women by seeking to dissuade them from having abortions is not political communication: it lacks sufficient nexus with the acts or omissions of the legislative or executive arms of government.

10 37. The circumstances are therefore quite different from those in *Brown*, where it was the case that "the primary means of bringing environmental issues to the attention of the public and politicians [was] to broadcast images ... of that part of the environment sought to be protected"[36] and that "[o]nsite protests have been a catalyst for granting protection to the environment in particular places".[37] There is nothing to suggest that "onsite" protests at abortion clinics have a similar salience and there is reason to think that they do not: the significance of a protester being "onsite" at an abortion clinic is not that it enables him or her to communicate more effectively on government or political matters. It is that it enables more effective communication directed to influencing a private and personal medical decision.

20 *Conclusion as to burden*

38. The impugned prohibition is narrowly drawn, both in terms of the communications it prohibits and in terms of the locations where it applies. It poses little risk to the free flow of information that is indispensable to the proper functioning of representative government and in that sense imposes only a slight burden on the freedom of political communication.

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[36] *Brown* (2017) 91 ALJR 1089 at [32] (Kiefel CJ, Bell and Keane JJ).

[37] *Brown* (2017) 91 ALJR 1089 at [33] (Kiefel CJ, Bell and Keane JJ); see also at [191]-[192] (Gageler J), [240] (Nettle J).

Weightiness of the justification

An additional purpose of the law

39. The Court is to identify the "true purpose" or purposes of the Act "by the ordinary processes of statutory construction".[38] That task therefore starts with, but is not determined solely by, the text of the statute, which must be read in its context including such extrinsic material as may be of assistance in ascertaining the meaning of the text.[39]

40. The statutory context, including relevant extrinsic material, indicates that the purposes stated expressly in s 185A of the Act are supplemented by an additional and wider purpose, in the sense that they further and are underpinned by that additional and wider purpose. That purpose is one of *access* to lawful medical services: ensuring that the infliction of distress or anxiety outside premises where abortions are provided does not deter women from seeking in their own best interests, and does not deter healthcare providers from providing, abortion-related health services.

41. That wider purpose, implicit in the language of s 185A, is explicit in the principles applied to Pt 9A by s 185C, which refers to the entitlement of "the public" to access health services, including abortions, and to enter and leave relevant premises without interference and in a manner which protects their safety and wellbeing and respects their privacy and dignity.

42. The wider purpose is also articulated in the relevant extrinsic material. The Victorian Law Reform Commission anticipated that purpose when it identified the policy issues in relation to safe access zones as engaging "what is arguably a broader issue of equitable access to health care" (**CAB 438** [8.265]). With more specificity, the Explanatory Memorandum states that the impugned offence is designed to eliminate behaviour that is detrimental not only to the health and wellbeing of individuals seeking reproductive health services, or that of staff at abortion clinics, but also "the health and wellbeing of the wider Victorian community" because the behaviour sought to be eliminated has "the wider community impact of dissuading people from

[38] *Unions NSW* (2013) 252 CLR 530 at [47], [50] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

[39] *Thiess v Collector of Customs* (2014) 250 CLR 664 at [22] (French CJ, Hayne, Kiefel, Gageler and Keane JJ).

seeking medical assistance".[40] Consistent with that explanation, the Minister for Health in her Second Reading Speech:[41] referred to the objective of ensuring that "all women can access health services that provide abortions";[42] identified evidence of the existing deterrents to women that the Act was seeking to address;[43] and explained that the offence provisions "target specific behaviours that are aimed at deterring people from accessing or providing legal medical services".[44]

43. The wider public purpose served by s 185D is relevant to the justification for the burden on the freedom of political communication. The Act is directed not only to the protection of those individuals who in fact access abortion clinics, but rather to ensuring that *any* individual (whether a prospective patient or provider) can decide whether to access an abortion clinic undeterred by the prospect of being confronted by communications reasonably likely to cause them distress or anxiety. Even if the burden of s 185D were not sufficiently justified by the protection of patients and staff from that likelihood of distress and anxiety (a proposition that the FCC, like the Attorney-General for Victoria, rejects), it can in any event be justified by the legitimate end of protecting *access* to lawful abortion services for all women in Victoria.

Reasonable necessity of the burden

44. This is a case where the proposition that the Act goes no further than is reasonably necessary for the advancement of its legitimate ends (both as stated in s 185A and centrally relied upon by the Attorney-General for Victoria, and as submitted above at [39]-[43]) is significantly supported by evidence, especially from the FCC's Dr Allanson (**CAB 6-242**), as to the true weight and extent of the ends sought to be advanced by the Act.

45. Dr Allanson is a clinical psychologist with over 30 years' experience, including more than 25 years at the FCC (**CAB 7** [3]), and relevant postgraduate qualifications (**CAB 8** [4]).

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[40] Explanatory Memorandum to the Public Health and Wellbeing Amendment (Safe Access) Bill 2015 (Vic) at p 3.

[41] Victoria, Legislative Assembly, *Hansard*, 22 October 2015 at pp 3974-3977.

[42] Victoria, Legislative Assembly, *Hansard*, 22 October 2015 at p 3974.

[43] Victoria, Legislative Assembly, *Hansard*, 22 October 2015 at p 3975.

[44] Victoria, Legislative Assembly, *Hansard*, 22 October 2015 at p 3977.

46. Dr Allanson gives extensive evidence of historical behaviour outside the FCC (**CAB 9-13** [11]-[27]), which exemplifies the behaviour to which the Act can be seen to be directed. She gives evidence of the impact of this behaviour on patients and their companions, on staff, and on potential patients and staff.

47. In relation to patients: Dr Allanson explains the unique vulnerability of women contemplating or attending for treatment at the FCC (**CAB 15-16** [39]) and the apparent negative effect of protest activity outside the clinic upon their physical and mental state (**CAB 16** [40]). The distress and anxiety felt by patients is a significant mischief in itself. But, as Dr Allanson explains, it also has consequential impacts on patients' "discomfort during treatment and recovery" (**CAB 16** [41]). Dr Allanson gives expert evidence of the kind of "safe, supportive environment" that is necessary to provide effective psychological and psychotherapeutic treatments and opines that the "presence of protesters undermined this" (**CAB 17** [45]; see also **CAB 14** [31]). She refers to her experience of patients delaying seeking medical assistance because of protest activity outside the FCC (**CAB 16-17** [43]), experience which is supported by a body of expert findings (**CAB 17-18** [47]-[49]), and opines that "delayed access to health care may result in significant health consequences" (**CAB 18** [50]) including because several services provided at the FCC "are safer and more effective when delivered promptly" (**CAB 17** [44]).

48. In relation to staff: Dr Allanson gives first-hand evidence of the effect on her of protest activity at the FCC including "stress ... sleep disruption, nightmares, nocturnal teeth grinding, anxiety, anger, migraine and tension in [her] neck and shoulders" (**CAB 15** [37]; see also **CAB 14** [28]-[30]). She gives evidence of similar kinds of effects on other staff (**CAB 19-20** [52]-[56]). There is secondary evidence to suggest that staff, because they necessarily empathise with their patients, are "often more aware of being affected by the distress of their patients" (**CAB 165**.34-35).

49. In relation to the wider public purpose of the Act: Dr Allanson's evidence highlights the necessity of the impugned provisions in addressing the legitimate end of ensuring access to lawful abortion services in Victoria. Dr Allanson reports of patients telling her of the "physical and emotional barriers posed by the protestors" (**CAB 16** [40]) and, even more concretely, of health service providers declining to refer patients to the FCC because of the presence of protesters (**CAB 16** [42]-[43]). Dr Allanson's evidence is also that staff members have left the FCC because of the protestors and

that it is "notoriously difficult to attract new doctors to work at FCC". As Dr Allanson explains, "reduc[ing] the number of medical professionals willing to work in reproductive health care facilities ... may ... indirectly reduce women's access to essential health services" (**CAB 19-20** [56]).

50. Importantly, Dr Allanson's evidence is also probative of the inefficacy of other measures to achieve the ends now sought to be achieved by Pt 9A of the Act. In particular, Dr Allanson explains the unsuccessful efforts of the FCC to stop the protest activity by recourse to existing law (**CAB 13** [23]-[27]; **CAB 129-135**).

Conclusion as to justification

51. In light of the purposes of law, including the wider purpose explained above at [39]-[43], the burden imposed on political communication by the impugned provisions can readily be seen to be supported by a compelling justification.

Recourse to three-part proportionality testing?

52. As the Attorney-General for Victoria submits (A-GVS [47]), by reference to statements in *Brown*, the "three-part" analytical tool of proportionality may or may not be necessary or useful in a given case. As the Attorney-General for Victoria also submits (A-GVS [48]-[51]), it may not be necessary or useful to have recourse to proportionality in this case because the burden on political communication is slight, and the justification for that burden is compelling.

53. By way of amplification of that submission, the FCC seeks to offer one explanation of why the finer-grained tools of three-part proportionality analysis may more likely be necessary or useful where there is a finer balance between the burden imposed by an impugned law and the justification proffered for the burden.

54. It seems now to be settled that proportionality does not involve any different test from that stated in *Lange* and modified in *Coleman*. Rather, proportionality has been seen in some cases to be a necessary or useful means of explaining the Court's reasons for reaching a conclusion, within the *Lange/Coleman* rubric, as to the reasonable necessity of a burden on the implied freedom. Kiefel CJ, Bell and Keane JJ recently acknowledged the relationship between three-part proportionality and the "need for transparency in reasoning".[45] Similarly, French CJ, Kiefel, Bell and Keane JJ referred

[45] *Brown* (2017) 91 ALJR 1089 at [125] (Kiefel CJ, Bell and Keane JJ).

to Professor Dr Gertrude Lübbe-Wolff's description of proportionality testing as "designed to ... help control intuitive assessments, [and] make value judgments explicit" rather than necessarily to "intensify" judicial control of state action.[46]

55. In cases where there is an apparent imbalance between the burden on political communication and the proposed justification for that burden, there is likely to be less need for recourse to the strictures of three-part proportionality analysis in order to reach, and adequately explain, a conclusion as to validity or invalidity. A slight burden will readily be justified and explained in light of a compelling justification, just as the striking down of a substantial burden will readily be justified and explained if only a weak justification is offered by the party defending the law. But in those cases where the burden and putative justification appear to be more finely balanced, then the three-part proportionality analysis might be a useful vocabulary to expose to scrutiny the value judgments necessarily to be made by the Court in adjudicating the constitutional validity of the burden, in light of the finely balanced justification.

56. This approach to proportionality might be reconciled with the "gradations in the measure of appropriateness and adaptedness" that inhere in the approach to judicial review taken by Gageler J in recent cases, namely, review that is "calibrated to the nature and intensity of the burden".[47] In those cases where closer scrutiny (on account of the substantial burden) is to be given to an apparently weighty justification, or where lighter scrutiny (on account of the slighter burden) is to be given to an apparently less weighty justification, then the three-part proportionality analysis might be of assistance in explaining the unavoidably value-laden sufficiency or insufficiency of the "degree of fit between means ... and ends".[48]

57. In the present case, which as explained above involves a slight burden and a compelling justification, the Court can uphold the validity of the impugned provisions, consistent with answering the third *Brown/McCloy* question, without necessary recourse to three-part proportionality testing. If three-part proportionality testing is undertaken, then the law will in any event be shown to be valid for the reasons advanced by the Attorney-General for Victoria (A-GVS [52]-[63]).

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[46] *McCloy* (2015) 257 CLR 178 at [77] (French CJ, Kiefel, Bell and Keane JJ).

[47] *Brown* (2017) 91 ALJR 1089 at [164] (Gageler J).

[48] *Brown* (2017) 91 ALJR 1089 at [165] (Gageler J).

Conclusion

58. For the foregoing reasons, s 185D, read with paragraph (b) of the definition of "prohibited behaviour" in s 185B, of the Act is reasonably appropriate and adapted to the advancement of the legitimate ends of the Act in a manner that is compatible with the constitutionally prescribed system of representative government. The removed grounds of appeal should be dismissed.

Costs

59. The FCC does not seek any order as to costs and submits that none should be made against it.

VI Estimate of Time

60. The FCC, if it is granted leave to intervene or to be heard as amicus curiae, seeks no more than 15 minutes to make such oral submissions as may be of assistance to the Court.

Date: 25 May 2018

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