

BETWEEN:

**KATHLEEN CLUBB**

Appellant

and

**ALYCE EDWARDS**

First Respondent

**ATTORNEY-GENERAL FOR VICTORIA**

Second Respondent

**OUTLINE OF ORAL ARGUMENT — ATTORNEY-GENERAL FOR VICTORIA**

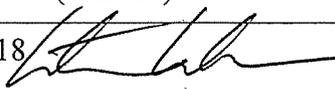
This outline is suitable for publication on the internet.

1.	<b>Factual background to the law</b> a. The Statement of Compatibility and the Second Reading Speech. b. The affidavit material.	VicAG [12]-[27]
2.	<b>The statutory regime:</b> The “communication prohibition” in the <i>Public Health and Wellbeing Act 2008</i> (Vic): s 185D, read with s 185B. a. purpose b. prohibited behaviour - “anxiety or distress”, not “discomfort” c. safe access zone d. <i>mens rea</i>	VicAG [10]; VicAGReply [11]- [15], [20]-[22]  Cf Appellant [12]-[15]  1st Res Reply [2.10]
3.	<b>The foundations of the implied freedom and the nature of <u>political</u> communication</b> a. For communication to be political in the constitutional sense, it must have a sufficient nexus with the constitutional system of representative and responsible government. - <i>Lange</i> at 560-561, 566-567 - <i>APLA</i> at 361-362 [68] b. The fact that a topic is controversial, or regulated, or capable of being regulated, does not make all communication about the topic “political” in the constitutional sense. c. Not all speech in relation to abortion is political communication in the constitutional sense.	VicAG [30]-[33]

<p>4.</p>	<p><b>Effective burden</b></p> <p>a. Although the law does not target or burden only political communication, the law is capable of capturing and thus burdening political communication.</p> <ul style="list-style-type: none"> <li>- <i>Brown</i> at 1110 [90]</li> </ul> <p>b. Ms Clubb’s speech: no evidence it was “political” in the relevant sense. However, the Court should reject the Commonwealth’s submission that the implied freedom analysis can be avoided.</p> <ul style="list-style-type: none"> <li>- <i>Tajjour</i> at 561 [73]-[75], 568 [102], 569 [104]</li> <li>- <i>Monis</i> at 210 [335]</li> <li>- <i>Coleman v Power</i></li> </ul>	<p>VicAG [28]</p> <p>VicAG [29] Cth [4], [10]-[16]</p>
<p>5.</p>	<p><b>The nature of the burden</b></p> <p>a. A limited restriction, tailored to its purpose.</p> <ul style="list-style-type: none"> <li>- <i>Levy</i> at 608-609, 614-615, 618-619, 647-648</li> <li>- <i>Brown</i> at 1169 [420]</li> </ul> <p>b. The communication prohibition does not target <u>political</u> communication — the burden is incidental.</p> <p>c. The communication prohibition does not discriminate based on viewpoint.</p> <p>d. The freedom does not guarantee a captive audience.</p>	<p>VicAG [31]-[32] VicAG Reply [6]-[10]</p> <p><i>Cf</i> Appellant [42]-[43], [64]</p> <p>VicAG [45]</p>
<p>6.</p>	<p><b>Legitimate end</b></p> <p>a. A legitimate end can involve the protection of the legitimate claims of individuals to live peacefully and with dignity within an ordered and democratic society.</p> <ul style="list-style-type: none"> <li>- <i>ACTV</i> at 169</li> <li>- <i>Levy</i> at 596-597, 608, 611, 619-620, 627, 635-636</li> <li>- <i>Brown</i> at 1112 [101]-[102], 1141-1142 [275]</li> </ul> <p>b. The communication prohibition is directed to protecting the safety, wellbeing, dignity and privacy of persons accessing premises where abortions are provided. That is both legitimate and compelling.</p> <ul style="list-style-type: none"> <li>- It is responding to demonstrated harms.</li> <li>- It is <u>not</u> directed to “civility of discourse”.</li> <li>- <i>Cf Coleman v Power, Monis</i></li> </ul>	<p>VicAG [34]-[45]</p>
<p>7.</p>	<p><b>No need for stepped proportionality analysis</b></p> <p>a. A stepped proportionality analysis is one tool of analysis, but is not always required.</p> <ul style="list-style-type: none"> <li>- <i>McCloy</i> at 213 [68]</li> <li>- <i>Brown</i> at 1115 [125], 1116 [131], 1119 [158]-[159], 1143 [279]-[280], 1177-1178 [473]</li> </ul>	<p>VicAG [48]-[51]</p>

	<p>b. A stepped proportionality analysis is not required here. The law is valid because it has a rational connection with its compelling justification.</p>	
8.	<p><b>Suitable for purpose</b></p> <p>Given the evidence about the harm caused to women accessing services, and to staff, by communications about abortion that occur as they approach the clinic, a restriction on such communications within sight or hearing of a clinic is suitable to achieve the purpose.</p> <ul style="list-style-type: none"> <li>- <i>Tajjour</i> at 571 [112]</li> <li>- <i>McCloy</i> at 217 [80], 232 [132]</li> </ul>	<p>VicAG [53] VicAG Reply [16]-[17]</p>
9.	<p><b>Necessary / alternative means</b></p> <p>a. Any alternative must be “obvious and compelling”, and “equally effective” in achieving the legitimate end.</p> <ul style="list-style-type: none"> <li>- <i>McCloy</i> at 211 [58], 217 [81]</li> <li>- <i>Brown</i> at 1117 [139], 1143-1144 [282]</li> </ul> <p>b. Not a “lowest common denominator” requirement — room for reasonable legislative choice as to how best to achieve the purpose.</p> <ul style="list-style-type: none"> <li>- <i>McCloy</i> at 217 [82], 292-293 [359]</li> </ul> <p>c. Not a requirement that the State adopt the least restrictive measure possible.</p> <p>d. Bearing in mind the nature of the harms in issue and the end sought to be achieved, none of the postulated alternatives would be as effective.</p>	<p>VicAG [54]-[61] VicAG Reply [18]-[19]</p>
10.	<p><b>Balancing / strict proportionality</b></p> <p>a. For a law to be invalid at this step of the analysis, its restriction on speech must be “undue”: meaning “grossly disproportionate” or “manifestly excessive”.</p> <ul style="list-style-type: none"> <li>- <i>McCloy</i> at 218 [86]</li> <li>- <i>Brown</i> at 1146 [290]</li> </ul> <p>b. Given the compelling justification supported by evidence, the incidental effect on political communication, and the tailored time/manner/place restriction, the law does not go too far. It is not grossly disproportionate or manifestly excessive. It is not an undue restriction on political communication.</p>	<p>VicAG [62]-[63]</p>
11.	<p><b>The Attorney-General’s submissions are consistent with case law in other comparable jurisdictions</b></p> <ul style="list-style-type: none"> <li>- <i>Connolly v DPP</i> (UK)</li> <li>- <i>R v Spratt</i> (Canada)</li> </ul>	<p>VicAG [46]</p>

Dated: 9 October 2018

  
Kristen Walker

  
Kathleen Foley

  
Simona Gory