IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY

No. M46 of 2018

BETWEEN:

KATHLEEN CLUBB

Appellant

AND

ALYCE EDWARDS

First Respondent

AND

ATTORNEY-GENERAL FOR VICTORIA

Second Respondent

ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)
OUTLINE OF ORAL ARGUMENT

PART I: SUITABILITY FOR PUBLICATION

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

PART II: OUTLINE OF ORAL SUBMISSIONS

Object and purpose of the Act (*Western Australia's Submissions* [23]-[26]; cf. *Appellant's Submissions* [69], [72], [77], [80(a)])

2. The Appellant seeks to impermissibly downplay the object of Part 9A of the Act to deterring communications which cause or are apt to cause "mere discomfort" (AS [72], [77]).

3. The ascertainment of the object and purpose of the *Public Health and Wellbeing Act* 2008 (Vic) is to be determined as a matter of statutory construction.

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4. The purpose of Part 9A of the Act can be found in s.185A. Also relevant are the principles set out in s.185C and the Second Reading Speech. Each emphasize that the public is entitled to access legitimate health services (including abortions) and an object of Part 9A of the Act is therefore to ensure that members the public who need to access and leave premises at which abortions are provided, are able to do so in a manner which protects their safety and wellbeing and respects their privacy and dignity. The express words of the statute are directed to preventing communications causing distress or anxiety and not "mere discomfort".

The application of Act is neutral in its operation (Appellant's Submissions [41]-[43], [63(d)], [64], [76], [91])

5. Section 185D of the Act is facially neutral in its application and does not target or burden one side of the abortion debate more than the other. It does not consist of a "viewpoint restriction" or "viewpoint discrimination" (AS [42]-[43] & [76]).

6. Whilst s.185D (when read with s.185B) may cover communications by persons opposed to the carrying out of terminations, the provisions are sufficiently broad to cover (for example) persons expressing their support for a woman's right to have an abortion, and persons expressing their objection to or disapproval of the conduct and behaviour of persons carrying out the actions of the Appellant.

7. A law effecting a discriminatory burden is not invalid for that reason alone. Rather, it is relevant in the context considering whether the law is reasonably appropriate and adapted: *Brown v Tasmania* at 1110-1111 [92]-[95] (Kiefel CJ, Bell and Keane JJ) (Tab 21).

Vagueness (*Appellant's Submissions* [44])

8. There is no principle in Australian constitutional law that a law is void for reasons of vagueness: *Brown v Tasmania* at 1117-8 [148] (Kiefel CJ, Bell & Keane JJ; at 1173-4 [448] (Gordon J) (Tab 21).

9. The statutory language of s.185D of the Act is not vague in any meaningful manner. The matters referred to at [44(a)-(c)] of the Appellant's Submissions are matters properly addressed by the available evidence in any particular prosecution. The construction advanced by paragraph [44(d)] is incorrect. The

definition of prohibited behaviour relates to the person making the communication, and not the person receiving the communication.

No incoherence in the law (*Appellant's Submissions* [93])

10. The Appellant's reliance on Hayne J's reasoning in *Monis v The Queen* at 172-173 [212]-[215] (Hayne J) is misplaced (Tab 36). Although a person publishing defamatory matter could be guilty of an offence under s.185D and yet have a defence to defamation, s.185D is directed to vindicating wider societal interests, and the interests of persons aggrieved by a s.185D infringing communication can be protected by many laws other than defamation (e.g. the laws in ASS).

Relevance of the site (*Western Australia's Submissions* [34]-[37]; cf. *Appellant's Submissions* [35]-[37], [39]-[40], [59], [63(c)-(e)]

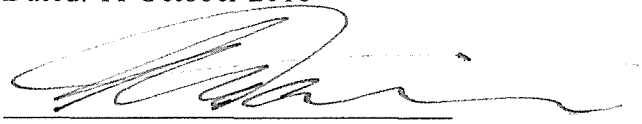
11. To the extent that any communication in relation to terminations can be regarded as a political communication, the efficacy and force of any such communication is not dependent on the communication being precisely at a place at which abortions are provided.

12. The prohibition against communicating in relation to abortions, within 150 metres of premises at which abortions are provided, in a manner that is reasonably likely to cause alarm or distress or anxiety to persons accessing or leaving that premises, does not meaningfully detract from the efficacy and persuasiveness of such communications influencing public opinion or "political or legislative change" in relation to abortion law and health policy.

13. Compare *Levy v Victoria* at 592-593 (Tab 33) where the Plaintiff was able to identify the effect that the law would have on political communication, including that, "televised images of the bloodied bodies of dead and wounded ducks" were more likely to attract public attention to their cause.

14. Compare also *Brown v Tasmania* 1102-1103 [32]-[33] (Tab 21) where the parties agreed that, "onsite protests have been a catalyst for granting protection to the environment in particular places". There are no such agreed facts here.

Dated: 11 October 2018



George Tannin SC