

**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

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**APPELLANT'S SYNOPSIS OF ARGUMENT**

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## Part I: Certification

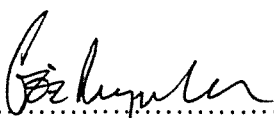
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## Part II: Argument


2. The initial issue is the construction of s.185B of the Act, especially:
  - (i) “communicating by any means in relation to abortions”;
  - (ii) “reasonably likely to cause distress or anxiety”.
3. The second question is whether the impugned law effectively burdens the freedom in its terms, operation or effect: *McCloy* [2] *Brown* [61]. That question relates to the manner in which the impugned provision affects the freedom generally rather than to the operation of the provision in this particular case: *Brown* [90].
4. A law effectively burdens the freedom if it prohibits or puts some limitation on the making or content of political communication: *Brown* [180] (citing various cases). This is a qualitative question to be answered by reference to the legal operation and practical effect of the law: *ibid*. The impugned law easily satisfies this initial test.
5. The burden on the freedom imposed by the impugned provision is substantial: it strikes at peaceful protest and demonstration; it applies to protests “on-site”; it is content based; it is discriminatory ie aimed at and biased against a particular viewpoint (*viz* anti-abortion protest); it relates to abortion (a topic of high political controversy); it is direct and substantial; there is no qualification (except s 185B(2) and the definition of “premises”) or defence; there are likely to be a substantial number of relevant premises; it is a strict liability offence. And it is apt to chill communications not strictly caught by its terms. The analysis in *Preston* requires some small adjustments.
6. The second question is: is the purpose of the *impugned provision* legitimate in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative government? See *McCloy* [2]; *Brown* [104], [277].

7. VS [34] asserts that the Part has four purposes each of which relates to certain persons (“the relevant persons”): people accessing services provided at premises where abortions are provided; those who are employed at such premises; those who need to access such premises in the course of their duties.
8. Those four purposes are: (i) to respect the privacy of the relevant persons; (ii) to respect the dignity of the relevant persons; (iii) to protect the [physical] safety of the relevant persons; (iv) to protect the [psychological] wellbeing of the relevant persons.
9. None of these purposes is the purpose of the impugned provision (para (b)). Nor are the prevention of possible infractions of dignity or hurt feelings purposes which are compatible: AS [72]-[75].
10. The purpose of (b) is to eliminate any possibility of upset or hurt feelings to the relevant persons caused by peaceful communications in relation to abortion near premises where abortions are provided. That is not a compatible purpose.
11. The third question is the issue of reasonable proportionality. The test in *Lange* (as modified by *Coleman v Power*) is whether the impugned provision is reasonably appropriate and adapted to advance the relevant purpose in a manner compatible with the constitutionally prescribed system of government.
12. Ms Clubb repeats the Preston synopsis at [13]-[16].
13. Even if the purpose of the impugned provision is one (or more) of the four purposes identified at [8] above, the burden on the freedom caused by paragraph (b) has not been justified (and is not justifiable) particularly bearing in mind the following:
  - (i) the nature and extent of the burden on the freedom;
  - (ii) the extent to which the mischief (and its scope) have been established by evidence;
  - (iii) whether and how the law advances its purposes;

- (iv) the extent to which the law is tailored to the achievement of the purpose;
- (v) whether the law goes further than is reasonably necessary to advance the purpose;
- (vi) the extent to which the purpose is advanced by other statutory provisions (including provisions in the Act containing the impugned provision) and the common law;
- (vii) the importance of the precise mischief the alleviation of which is the law's purpose;
- (viii) whether there are other reasonably practicable means of achieving the law's purpose which are less restrictive of the freedom;
- (ix) the extent to which the law derogates from relevant common law rights and freedoms.

  
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G. O'L. Reynolds

  
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F. C. Brohier

  
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D. P. Hume