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

APPELLANT'S SUBMISSIONS

Filed on behalf of the Appellant
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PART I: CERTIFICATION

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

PART II: STATEMENT OF ISSUES

2. The *Public Health and Wellbeing Act 2008* (Vic) **(the Act)** purports to prohibit communications on a politically-controversial topic – abortion – where those communications are reasonably likely to cause discomfort to a person. The prohibition applies in a location where, notoriously, communications on that topic are likely to occur and be most politically resonant. The prohibition applies whether or not discomfort is caused and irrespective of the political significance of the communication in the circumstances. The issue raised by this appeal is whether a prohibition of that kind is compatible with a constitution which protects a freedom of political communication. This Court should answer that question no.

PART III: SECTION 78B

3. Notice has been given under s 78B of the *Judiciary Act 1903* (Cth).

PART IV: JUDGMENT BELOW

4. The two judgments below are unreported. They appear at pages 282-289 and 293-296 of the Core Appeal Book (**CAB**).

PART V: BACKGROUND

Statutory background

5. Section 185D of the *Public Health and Wellbeing Act 2008* (Vic) **(the Act)** states:

> A person must not engage in prohibited behavior within a safe access zone.
>
> Penalty: 120 penalty units or imprisonment for a term not exceeding 12 months.

6. A "safe access zone" is "an area within a radius of 150 metres from premises at which abortions are provided": s 185B(1).

7. "Prohibited behaviour" is defined in s 185B(1). The kind of "prohibited behavior" relevant to this appeal is that identified in paragraph (b) of the definition, namely:

> ***prohibited behavior*** means –
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> ...
>
> (b) 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 ...

8. These submissions refer to s 185D in its operation with paragraph (b) of the definition of "prohibited behaviour" as **the Communication Prohibition**.

9. Sub-section (2) states that "[p]aragraph (b) of the definition of ***prohibited behaviour*** does not apply to an employee or person who provides services at premises at which abortion services are provided".

10. "Abortion" is defined by reference to the *Abortion Law Reform Act 2008* (Vic): s 185B(1). Accordingly, "abortion" means:

> intentionally causing the termination of a woman's pregnancy by –
> (a) using an instrument; or
> (b) using a drug or a combination of drugs; or
> (c) any other means.

11. The definition of abortion covers the termination of pregnancy whether or not caused by a health professional or with the consent of the woman.

Factual background

12. The events the subject of these proceedings occurred on 4 August 2016 at "the East Melbourne Fertility Control Clinic" (**the Clinic**).

13. The Magistrate made the following findings of fact about those events (CAB 294-6):

> Mrs Clubb [the appellant] was first seen by police at the eastern boundary of the Clinic just after 10am. Inspector Cartwright asked her to desist from breaking the law.
>
> Within minutes, the Accused was seen by multiple police to enter the safe access zone, pamphlets in hand, and stand some 5 metres from the entrance to the Clinic. The Accused was arrested after she approached a young couple, entering the Clinic, at approximately 10:30am. Video of the event, shown to me, shows Mrs Clubb attempting to engage the couple by speaking to them and handing over a pamphlet. Video of the event, shown to me, shows Mrs. Clubb attempting to engage the couple by speaking to them and handing over a pamphlet.
>
> The male of the couple is seen to speak and obviously decline the offering of the pamphlet and move, with the young woman, away. There is no evidence of duress or violence of any kind. The engagement between the Accused and the couple is brief and appears polite.
>
> ...
>
> ... I am satisfied beyond any doubt that it was her intention to engage that couple in discussion relevant to abortion. I am satisfied that she has communicated with them for that sole purpose ...

14. The appellant was charged in the Magistrate's Court of Victoria with an offence in the following terms (CAB 276):

> The accused at East Melbourne on the 4/8/16 did engage in prohibited behavior namely communicating about abortions with persons accessing premises at which abortions are

provided within a safe access zone, in a way that is reasonably likely to cause anxiety or distress.

15. On 23 November 2017, the appellant was convicted.

16. The Magistrate's reasons reveal a number of matters relevant to this appeal.

17. The Magistrate identified the definition of "distress" in s 185B by reference to the *Macquarie Dictionary*. According to the Magistrate, "distress" encompassed "[a]nguish, suffering, pain, agony, ache, infliction, torment, torture, discomfort, heartache". Of those synonyms, the Magistrate found that the appellant's conduct was "reasonably likely to cause ... discomfort": CAB 295. The Magistrate did not find that the appellant's conduct was reasonably likely to cause anxiety. Nor did the Magistrate find that s 185D was relevantly concerned only with conduct reasonably likely to cause *serious* discomfort. On the Magistrate's construction, it was not necessary for there to be a "serious psychological response": cf WAS [28].

18. The only finding as to mens rea made by the Magistrate was a finding that the appellant had an intention of engaging in discussion relevant to abortion. The Magistrate made no other findings of mens rea. For example, she made no finding that the appellant knew or suspected that the communication was reasonably likely to cause distress. [1] Reading the Magistrate's reasons fairly, she must have been of the view either that the offence had no mens rea element or, if it did, that the only mens rea element was that there be a purpose of communicating in relation to abortion. The former interpretation is the more likely once one has regard to the prosecutor's written "submissions on the law" which identified what the prosecution needed to prove without referring to any mens rea element: see Submissions of the Chief Commissioner of Police, Exhibit 8 at [3].

19. The Magistrate found that the appellant intended to engage the couple "in discussion relevant to abortion" (CAB 296), but otherwise made no findings as to the content of the communications intended to be engaged in by the appellant. On the Magistrate's findings, the communications may have had a content which on any view was political – for example, the communications may have related to lobbying the federal government in respect of funding for abortion drugs. Or they may not. There was some evidence before the Magistrate that the appellant was "seeking to draw attention to the issue of abortion": Exhibit 6, photograph 2. There was, however, no occasion for the Magistrate to make findings as to whether the communications had a clearly political content once she had found (as described below) that s 185D did not effectively burden the freedom of political communication. It is not open to make a positive submission that the appellant's communication was not political: cf VS[2] [29], CS[3] [4].

20. It is convenient at this point to address a point raised by the Commonwealth Attorney-General at CS [4] and [10]-[16].[4] He submits that ss 185B and 185D could, if

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1 The prosecutor made a submission on the law to that effect: Submissions of the Chief Commissioner of Police dated 2 August 2017 at [3], [13].

2 Submissions of the Attorney-General for the State of Victoria dated 11 May 2018 (**VS**).

3 Submissions of the Attorney-General for the Commonwealth dated 25 May 2018 at [4] (**CS**).

4 See also Submissions of the Attorney-General for Queensland's submissions (**QS**) at [5], [42]-[51].

necessary, be read down so as not to apply to communications on political or governmental matters. He submits that so read down the provisions would validly apply to the appellant's conduct. The Commonwealth Attorney-General's submission contemplates that ss 185B and 185D can be read as if they provided at least for an offence to the following effect:

> A person must not within a safe access zone communicate 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 *if the communication is not a political communication.* (emphasis added)

21. It may be doubted that it is an appropriate exercise of judicial power to interpolate words into ss 185B and 185D in the way that is necessarily implicit in the Commonwealth's submission. That issue can, however, be put to one side. If the offence had the meaning necessarily asserted by the Commonwealth, the appeal should be allowed: the prosecutor did not prove beyond reasonable doubt that the communications were not political communications and the Magistrate made no findings in that regard. Whether the communications had a political content simply was not an issue once the Magistrate had found that the Communication Prohibition did not effectively burden the freedom. On the Commonwealth's approach either the appeal should be allowed and the appellant acquitted or, alternatively, the appeal allowed and the matter should be remitted for re-trial on the basis of a provision correctly construed. Either way, the Commonwealth's submission proves too much.

22. It is not for the appellant to establish on the balance of probabilities (or at all) an element of the offence. However, to the extent that the issue arises, this Court would find that the communication was political in the requisite sense. The only evidence of intent – Exhibit 6 – indicates that the intention was manifestly political ie to draw attention to the issue of abortion. Further, the topic of abortion itself is inherently political for reasons developed below: to change one mind on the ethics of abortion is apt to change the person's mind on the politics of abortion. Further, for the reasons advanced below, protest on the topic of abortion outside abortion facilities is also inherently political, particularly when 20 police officers are present.[5] The appellant's communications were appreciably more political than the "personal campaign related to particular officers of the Townsville Police" considered in *Coleman v Power* (2004) 220 CLR 1[6] (***Coleman***) or the street preaching considered in *Attorney-General for the State of South Australia v Adelaide City Corporation* (2013) 249 CLR 1.

Procedural history

23. As indicated, the appellant was convicted in the Magistrate's Court of Victoria. The Magistrate delivered two judgments, one dated 6 October 2017 and addressing validity (CAB 282-289) and the other dated 23 December 2017 and addressing guilt (CAB 293-296).

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5 CAB 294.

6 See at [1].

24. The Magistrate rejected the appellant's challenge to the validity of s 185D. The basis of that rejection appeared to be that the law did not effectively burden the freedom: CAB 288-289. In so holding, the Magistrate appeared to apply a dictionary definition of "political" and to find that communications on abortion did not fall within that dictionary definition: CAB 288.

25. The appellant appealed to the Supreme Court of Victoria: CAB 504-5. Grounds 1 and 2 of the Notice of Appeal concerned the validity of s 185D in its present operation. Ground 3 concerned whether there was evidence capable of supporting the conviction. On 23 March 2018, Gordon J removed the first two grounds into this Court. The appeal as removed into this Court is now constituted by an Amended Notice of Appeal which appears at CAB 512-515. The thrust of the Amended Notice of Appeal is that the learned Magistrate erred in finding that the Communication Prohibition was valid. The relief sought is in the nature of declaratory relief (order (a)), the quashing of the conviction (order (b)) and costs (order (c)).

PART VI: ARGUMENT

Introduction

26. Section 185D of the Act impermissibly burdens freedom of political communication so far as it purports to proscribe communications that are reasonably likely to cause distress of anxiety.

27. The validity of s 185D falls to be determined by reference to the test articulated in *McCloy v State of New South Wales* (2015) 257 CLR 168 (***McCloy***) at [2]-[4] as modified in *Brown v Tasmania* (2017) 91 ALJR 1089 at [104].

The legal operation of the Communication Prohibition

28. The starting point is to identify the legal operation of s 185D when read with paragraph (b) of the definition of "prohibited behaviour". Section 185D is, in terms, a prohibition on engaging in certain conduct enforceable by criminal sanction.

29. The Court can notice the following features of the Communication Prohibition.

    (a) The prohibition is in terms directed to *communications*.

    (b) The prohibition applies to communications *by any means*. It applies to in-person speech. It applies to speech by mobile phone. It applies to communicative actions. It applies to protests. It applies to non-verbal communications such as the holding of placards or standing as part of a protest.

    (c) The communication need not be on the topic of abortions. It is sufficient if the communication is "in relation to abortions". This Court has said that the words "in relation to" are of wide import: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [87] (McHugh, Gummow, Kirby and Hayne JJ).

    (d) The prohibition applies whether or not the communication is in fact seen or heard. It is sufficient if it is "able to" be seen or heard.

(e) The prohibition applies to oral communications the making of which can be seen even if not able to be heard.

(f) The prohibition applies even if the recipient of the communication consents to it.

(g) The prohibition applies in public places and not just on private land.

(h) The prohibition applies in places that the communicator has a freedom to be in.

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(i) The prohibition applies to places where abortions are administered by way of a drug. It therefore applies to the many premises at which RU486 is administered.[7] Those premises may be a private residence. They may be a university or other place of public debate.

(j) The premises need not be premises at which abortions are lawfully provided.

(k) There is no a priori limit to the number of places in Victoria which can be a "Safe Access Zone".

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(l) The prohibition was intended to apply from the *perimeter* of the premises[8] and it applies a further 150m out from that perimeter. At its smallest, the Safe Access Zone is 70,650m^2 per premises.

(m) The hypothetical person who must be able to see or hear the communication need not be a person accessing or leaving the premises for the purposes of an abortion: cf WAS [26]. The hypothetical person might, for example, be a patient accessing the premises for treatment other than an abortion.

30 (n) The prohibition applies whether or not distress or anxiety is in fact caused.

(o) The prohibition applies whether or not distress or anxiety is in fact intended.

(p) The prohibition applies irrespective of whether the communicator is a "professional" protestor. It applies, for example, to a family member accompanying a person to a doctor who says something near the doctor that is reasonably likely to cause the person discomfort. It also applies to a counsellor retained by the patient to advise in relation to the arguments against termination.

40 (q) The prohibition does not carve out political communications. No such carve-out could be implied or read in in circumstances where there is an express carve-out in sub-section (2).

(r) The prohibition applies to communications by Members of Parliament.

(s) The prohibition applies during election periods and referendums.

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7 Note Parliament of Victoria, Legislative Council, *Hansard* (24 November 2015) 4784-5 (referring to approximately 100 General Practitioners being trained to provide RU486).

8 Parliament of Victoria, Legislative Council, *Hansard* (24 November 2015) 4790.

(t) The prohibition applies where the communicator is seeking to discourage a person from obtaining an unlawful abortion.

(u) The prohibition is, in terms, both a *content* prohibition (applying to communications in relation to abortions) and a *place* regulation (applying to communications in the safe access zone). The prohibition is not just a "time, manner and place" restriction: cf VS [33];

30. Further, on the Magistrate's construction, there is no mens rea element attaching to the circumstance that the communication is reasonably likely to cause distress or anxiety, the content of the communication or the legal character of the "Safe Access Zone".

31. Paragraph (b) refers to conduct which is "reasonably likely to cause distress or anxiety". In their ordinary connotation, "distress" and "anxiety" involve a less severe impingement on another's state of mind than conduct referred to in paragraph (a) of the definition of "prohibited behavior", such as conduct which is harassing, intimidating or threatening. On the Magistrate's construction, the relevant mental state would encompass mere "discomfort". It would also appear to include other reasonably minor mental states such as "heartache".

The practical operation of the Communication Prohibition

32. The Court can take notice of a number of features of the practical operation of the Communication Prohibition.

33. ***First***, the topic of abortions – in particular, whether they should occur and whether they should be lawful – is a topic of political debate in Australia and has been for many years. As the Victorian Law Reform Commission has said (CAB 447):

> No issue has attracted more public attention, passionate opinion, and ink than abortion. Abortion is an ethical issue primarily because it involves ending the life of a fetus. It therefore raises challenging questions about the status of a fetus and the interrelationship between a pregnant woman and a fetus.... Historically the debate pits opponents of abortion against those who argue that abortion is a matter of personal choice for the woman contemplating it. One line of argument is based on a belief that the fetal interests are paramount, the other is based on the view that a woman's autonomy is paramount

34. ***Secondly***, the *ethics* of abortion is intertwined with the *politics* of abortion. A person who believes it is morally repugnant to terminate a pregnancy is reasonably likely to support abortion-restrictive policies. Conversely, a person who believes it is morally repugnant to restrict a woman's right to terminate a pregnancy is reasonably likely to support abortion-facilitative policies. A communication on the ethics of abortion is inevitably political in its practical effect. It is no different in that respect to a communication on the ethics of animal rights, gay marriage, euthanasia or discrimination – once a mind is changed on the ethics, the politics will often follow. The submissions of the respondents and interveners which posit a rigid distinction between ethical and political communications are contrary to lived experience.

35. ***Thirdly***, it is and has been a characteristic feature of debate concerning abortions in Australia (and worldwide) that many of those who have views on the issue express those views outside or near premises at which abortions can be obtained. The *place* at which the debate takes place is a characteristic aspect of the communications comprising the debate.

36. The communicative power of on-site protests is not limited to persons actually present at the site. Television and social media, amongst others, mean that on-site protests are typically amplified. This point was recently emphasised by Gageler J in *Brown v Tasmania* (2017) 91 ALJR 1089 at [117].

37. ***Fourthly***, political communications about abortions are often at their most effective when they are engaged in at the place at which abortions are provided. That is because major stakeholders who can influence political debate are typically present there: users, health professionals and protestors. That is also because the minds of those stakeholders at that place are intensely focused on the issue. Australian history is replete with examples of political communications which were effective because they were conducted in a place where the issue was present and viscerally-felt. The Court can, for example, notice the 1965 freedom ride, protests at the waterfront, the Eureka Stockade, Jabiluka mine and Tasmanian forestry protests[9] amongst others.

38. ***Fifthly***, persons entering or leaving premises at which abortions are provided are especially vulnerable to distress or anxiety. One consequence is that many, perhaps most, communications about abortions seen or heard by such persons are apt to cause that person distress or anxiety. A prohibition on communications in relation to abortions is therefore likely to proscribe or deter all or almost all communications in relation to that topic.

39. ***Sixthly***, to proscribe political communications in relation to abortion near to abortion facilities is to proscribe those communications in the very place that they are typically most effective. It is therefore only of limited relevance to observe that s 185D does not proscribe communications in relation to abortions outside safe access zones: cf VS [33]. A law prohibiting the freedom ride would not be thought to impose only an insubstantial burden on political communication merely because the riders were able to express their views in Sydney.

40. ***Seventhly***, it is reasonable to believe that a not insignificant portion of the protestors near abortion clinics believe that communicating near abortion clinics is the best way for them to influence public opinion. This is a further reason why it is beside the point to observe that the communications can still take place elsewhere. To use the language of McHugh J *Levy v Victoria* (1997) 189 CLR 579 at 625,[10] s 185D prevents protestors from "putting their message in a way that they believ[e] would have the greatest impact on public opinion".

41. ***Eighthly***, the persons who communicate in relation to abortions outside abortion premises are characteristically persons who oppose abortions and wish to express views consistent with that viewpoint. The Court can form this view by way of judicial

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9 Note *Brown* at [191] (Gageler J).

10 Which was adopted by Nettle J in *McCloy* at [240].

notice. Alternatively or in addition, the Court can form this view by inference from the evidence of Dr Allanson at CAB 9-13 and the Victorian Law Reform Commission Report.[11]

42. This eighth point has additional significance. It means that s 185D in its present operation is not only a content and place restriction; it is also, in its practical operation, a *viewpoint* restriction. It burdens one side of the debate on abortion substantially more than the other.

43. The viewpoint discrimination imposed by the Communication Prohibition is underscored by the apparent operation of the exception in s 185B(2). Those who work at abortion clinics – who may be supposed generally to hold views favourable to abortion – are exempt from the prohibition.

44. ***Ninthly***. an important part of the practical operation of s 185D is its vagueness. That vagueness arises from a number of matters.

(a) It is inherently difficult to predict whether conduct is apt to cause distress or anxiety, particularly once those concepts extend to mere discomfort. That which is apt to cause distress or anxiety to one person would not be apt to cause distress or anxiety to many others.

(b) There is no bright line between communications which are "in relation to abortions" and those which are not. Is a communication seeking a vote for a political party which the speaker knows to be pro-life a communication in relation to abortions? Is a communication seeking better employment standards for health professionals who provide abortions a communication in relation to abortions? Examples could be multiplied.

(c) The limits of the "Safe Access Zone" are inherently unclear. The issue is the vagueness of the concept of "premises at which abortion services are provided".[12] "For example, if abortions are provided at a large hospital, it is unclear whether the zone extends 150 metres beyond the perimeter or limits of the hospital or just the building (or room) where abortions are provided. The same is the case if abortions are provided at a university or a shopping complex. As was recently said in *Brown*[13] in respect of "business premises", "[t]he principal problem, practically speaking for both police officers exercising powers under the ... Act and protesters is that it will often not be possible to determine the boundaries of [premises]". This issue is compounded because there is no "list" of the places at which abortions are provided. Further, nothing in the Magistrate's reasons suggests she considered that the offence could be proven only if the accused knew of the existence of the premises.

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11 CAB at pp.437.30-438.10.

12 Premises" is defined inclusively in s 3(1) of the Act to include "land (whether or not vacant)" and "the whole or any part of a building, tent, stall or other structure (whether of a permanent or temporary nature".

13 At [67].

(d) The Act is vague as to whether the carve-out in sub-section (2) applies to the person making the communication or the person to whom the communication is made (or both).

45. The vagueness of the Communication Prohibition means that it has a deterrent chilling or stifling effect on political communication over and above the provision's immediate legal operation.[14]

The Communication Prohibition effectively burdens freedom of political communication

46. The Communication Prohibition purports to proscribe many communications which, on any view, would be characterised as "political".

47. Those include communications concerning:

(a) whether abortion drugs should or should not be lawful under federal law;

(b) whether the Commonwealth government should encourage or discourage abortions;

(c) whether federal laws should be changed, to the extent possible, to restrict (or facilitate) abortions.

48. Section 185D proscribes those communications in its legal operation. In its practical operation, it deters them. There is no reason to think that the burdens so inflicted are trivial or insubstantial. Those observations are sufficient for the Court to find that the provision effectively burdens the freedom.

49. It is, however, desirable to address at this point the kinds of communications in relation to abortions which are political communications protected by the freedom. In order to do so, these submissions first articulate matters of legal principle before turning to how those principles apply to s 185D.

50. The implied freedom protects the freedom to engage in political communications as an indispensable incident of the constitutionally-prescribed systems of representative and responsible government and for amending the Constitution by referendum. It is those constitutional systems which both identify the protected class of communications and delimit its boundaries.

51. This being said, the "range of matters that may be characterised as 'governmental and political matters' for the purposes of the implied freedom is broad": *Hogan v Hinch* (2011) 243 CLR 506 at [49] (French CJ) (***Hogan v Hinch***); see also *Corneloup* at [67] (French CJ) (***Corneloup***) ("The class of communications protected by the implied freedom in practical terms is wide"). The range of subjects covered may "include social and economic features of Australian society" for they "are, at the very least, matters potentially within the purview of government": *Hogan v Hinch* at [49] (French CJ). Further, the range of subjects covered may include "all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen

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[14] See *Brown* at [67]-[87].

should think about": *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 124.

52. These observations reflect a fundamental point: this Court must be cautious before forming a view that a particular class of communications is not "political" and therefore denied the protection of the freedom. There is otherwise a grave danger in the Court stifling minority or unfamiliar political speech. The matters that are apt to affect political judgments by the people of the Commonwealth are many. A communication might be irrelevant to the political judgments of most Australians, but nevertheless relevant (or highly relevant) to a small number. A communication with that character warrants constitutional protection as much as a communication with broadscale appeal and relevance. As Gageler J has said, the freedom "exists to ensure that even the smallest minority is not, without justification, denied by law an ability to be heard in the political process": *Tajjour v New South Wales* (2014) 254 CLR 508 at [145]. That minority, as the cases illustrate, might be as small as those who seek to engage in non-verbal protests in a hunting area during restricted hours in a hunting season or those who seek to express offensive political views through the post.

53. Further, that a communication is one-on-one does not deny it the character of a political communication. As the Supreme Court of the United States has said, "one-on-one communication" is "the most effective, fundamental and perhaps most economical avenue of political discourse": *McCullen v Coakley* 573 US __ (2014) (Slip Op at 21) (***McCullen***).

54. In determining whether a matter is political in the requisite sense, it is relevant to consider whether the "subject was and is a matter of political controversy": *Monis* at [229] (Hayne J). That a subject is a matter of political controversy is a good indicator that communications on that subject are relevant to federal political judgments.

55. Whether or not the implied freedom only protects "federal" political communications, all or almost all "State" political communications will also be protected because of the necessary interconnection between federal and State politics: *Unions NSW* at [20]-[27] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

56. The communications protected by the freedom included non-verbal communications as much as verbal communications: *Levy* at 594-5 (Brennan CJ), 613 (Toohey and Gummow JJ), 622-623, 625 (McHugh J), 638 (Kirby J); *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 209 CLR 199 at [195] (Kirby J). "Signs, symbols, gestures and images" are all protected: *Levy* at 622 (McHugh J).

57. Communications need not bear a single constitutional character. For example, that a communication is religious in nature does not prevent it from also being political: *Corneloup* at [67] (French CJ). Further, as indicated, ethical communications on controversial subjects are often political.

58. In addition, in determining whether a communication is political regard must be had to the practical effect of the communication, not just its content. The practical effect of a communication may be political even if, taking the words alone, the content of the communication is not. When President Kennedy said "Ich bin ein Berliner", the precise meaning of his words was irrelevant. When President Trump sends a tweet

with a spelling mistake, that tweet is apt to affect political judgments irrespective of the precise content of the tweet.

59. The potential for a communication to have a practical effect which diverges from its precise content is particularly great when the relevant communication is an on-site protest. An inevitable or characteristic effect of on-site protests is the communication of the protest – via mass media, social media or otherwise – to a broader audience than those physically present. When that occurs, images matter more than words; and the general message matters more than the precise text. A protest at the waterfront would still constitute political communication even if most (or all) of the words said at the protest concerned the weekend football results. This was the point made by Mason CJ, Toohey and Gaudron JJ in *Theophanous v Herald & Weekly Times Ltd* (1994) 183 CLR 104 at 124: "what is ordinarily private speech may develop into speech on a matter of public concern with a change in content, emphasis or context".

60. These observations reflect a matter of basic constitutional principle: whether a communication is political is to be judged, in significant part, by the way in which the communication is received by the people of the Commonwealth. To similar effect, in *Unions NSW*, Keane J observed at [112] that the severity of a law's burden on political communication is not to be assessed by reference to its burden on the particular speaker, but on the law's effect on "the flow of pertinent information" to and from the people of the Commonwealth. The error in the approach taken by the Attorney-General for Victoria at VS [31]-[32] is to assume that the political character of a communication derives solely from its content, without regard to the broader practical effect of a communication. As the Commonwealth Attorney correctly states, an important focal point is "the recipient or listener" of the communication: see CS [8]. However, what the Commonwealth Attorney leaves out is that the recipients of political communications are often not just the persons within earshot or sight of the making of the communication.

61. A communication on the topic of personal health may be political if the circumstances in which it is communicated show that, in its practical effect, it is nevertheless apt to affect political judgments.

62. That a communication is unpopular or reflects a view held only by a minority does not deny it the protection of the freedom: *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 75 (Deane and Toohey JJ); *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at [218] (Kirby J). Indeed, the need for constitutional protection for unpopular minority opinions is so much the greater: see *Monis* at [122] (Hayne J) ("[t]he very purpose of the freedom is to permit the expression of unpopular or minority points").[15] Equally, that a communication involves an appeal to emotion rather than reason does not prevent it from being political: *Levy* at 613 (Toohey and Gummow JJ), 623 (McHugh J); *Monis* at [85]-[87], [166], [208]-[209], [220] (Hayne J).

63. These matters of general principle disclose that the Communication Prohibition relevantly imposes a real, meaningful and substantial burden on political

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15 See also *Masterpiece Cakeshop Ltd v Colorado Civil Rights Commission* 584 U. S.(2018).

communication. The appellant relies on all of the matters set out in paragraphs 29 to 45 above and also emphasises the following matters:

(a) The prohibition is solely directed to communications on a topic of great and ongoing political controversy.

(b) The prohibition is solely directed to a topic of great ethical controversy in respect of which there is a direct practical connection between an individual's ethical viewpoint and the individual's political judgments.

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(c) The prohibition strikes at a place and time where communications on that topic are most likely to be effective.

(d) The prohibition is, in its practical effect, targeted at on-site protests by those who hold a particular viewpoint on the topic of abortions.

(e) The prohibition, in its practical effect, obstructs the flow of information to the people of the Commonwealth comprised of the images of on-site abortion protests. Those images are apt to influence the formation of political judgments. That is so
20 irrespective of the precise words said.

64. All in all, the burden imposed on political communication by the Communication Prohibition is intense, direct and discriminatory. Compelling and stringent justification is required.

The object of the Communication Prohibition

65. The Communication Prohibition does not pursue an end that is compatible with the constitutional systems.

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66. The relevant end is to be determined as a matter of statutory construction: *Unions NSW* at [50] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).[16]

67. The Act has an overall objects clause (s 4) and a particular objects clause for Pt 9A (s 185A). The objects in those sections are stated at a high level of generality. They diverge in material ways from the narrower scope of s 185D in its present operation. For example, s 185A refers to safety, wellbeing, privacy and dignity. Those terms are not synonymous with anxiety and distress; a fortiori, they are not synonymous with discomfort and heartache. For example, a person may feel discomforted without there
40 being any affront to the person's privacy or dignity.

68. In this context, the surest guide to the discernment of the purpose of s 185D in its present operation is to consider what the provision "does in fact": see *Leask v Commonwealth* (1996) 187 CLR 579 at 591 (Brennan J), 602-3 (Dawson J).

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16 None of the ends referred to at VS [41] can be discerned through any process of statutory construction.

69. What the Communication Prohibition does *in fact* is deter certain communications which are apt to cause discomfort. A law having that end is not compatible with the constitutionally-prescribed systems.

70. The relevant criterion is compatibility with the constitutionally-prescribed systems *not* whether the end is in the public interest. An end may be conducive to the public interest but nevertheless incompatible with the constitutionally-prescribed systems: see *Monis* at [130] (Hayne J).

71. An end is incompatible in the requisite sense if it "impede[s] the functioning" of the systems of government: *McCloy* at [31] (French CJ, Kiefel, Bell and Keane JJ).

72. The object of deterring communications which are apt to cause mere discomfort impedes the functioning of the systems of government. It is not a legitimate end.

73. Political speech is inherently apt to cause discomfort. Indeed, it might be said that causing discomfort is essential to the efficacy of political speech. In order to rouse, political speech must first excite. Sir Robert Menzies' forgotten people speech; Paul Keating's Redfern Park speech; Kevin Rudd's apology: each was apt to cause discomfort, not incidentally but deliberately. To prohibit discomforting speech is to prohibit speech when it is at its most effective.

74. This is a clearer case than *Monis*. An issue in *Monis* was whether deterring offensive communications was a legitimate end. French CJ (at [73]), Hayne J (at [97]) and Heydon J (at [236]) all held that it was not. In *Monis*, Crennan, Kiefel and Bell JJ found that s 471.12 had a legitimate end, but in circumstances where it was confined to proscribing *seriously* offensive communications (see at [348]-[349]). This is a clearer case than *Monis* because, while some political speech is offensive, it is reasonably uncommon for it to have that character. In contrast, it *is* reasonably common for political speech to be apt to cause discomfort. It is discomforting to have your views criticised. It is discomforting to be spurred to action. It is discomforting to step outside the echo chamber.

75. There is also a similarity with *Coleman*. In that case, Gummow and Hayne JJ (at [193]) and Kirby J (at [226]) held that maintaining the civility of discourse was not compatible with the constitutionally-prescribed systems of government. See also *Roach v Electoral Commissioner* (2007) 233 CLR 162 at [87] (Gummow, Kirby and Crennan JJ). The reason that is so is that much political debate is uncivil: see also *Roberts v Bass* (2002) 212 CLR 1 at [172] (Kirby J); *Coleman v Power* at [81], [105] (McHugh J). To proscribe communications merely because they are uncivil is therefore to proscribe much valuable political speech. Precisely the same can be said of discomforting speech.

76. The object pursued by s 185D in its present operation is particularly offensive to the constitutionally-prescribed system. What the law does in fact is to burden one side of the abortion debate more than the other. It discriminates; and it distorts political communication. And it does so to a viewpoint that is properly described as a minority viewpoint.

77. Further, neither the common law nor statutory criminal laws have historically proscribed conduct which causes (or is apt to cause) mere discomfort: note *Monis* at [128], [222]-[223] (Hayne J).

Proportionality – suitability

78. The Attorney-General for the State of Victoria asserts that the objects of the Communication Prohibition are those stated in s 185A: see VS at [34]. That is, on Victoria's approach, the objects of the law are to protect the safety and wellbeing of certain persons and to respect their privacy and dignity.

79. If that is so, s 185D, in its present operation, suffers from a different constitutional defect: it lacks a rational connection to those objects. There is a disconformity between the objects in s 185A and the Communication Prohibition.

80. The objects in s 185D are directed to preventing harm to safety, wellbeing, privacy and dignity. In contrast:

    (a) the Communication Prohibition applies to conduct apt to cause *discomfort.* Conduct which is apt to cause discomfort will often not be apt to harm safety, wellbeing, privacy or dignity;

    (b) the offence is committed irrespective of whether any person in fact sees or hears the communication – that is, irrespective of whether the conduct could in the circumstances in fact harm safety, wellbeing, privacy and dignity;

    (c) the offence is committed irrespective of whether there is in fact harm to safety, wellbeing, privacy and dignity.

81. If s 185D, in its present operation, is said to have as its end the objects referred to in s 185A, it is both substantially overinclusive and substantively underinclusive. It proscribes much conduct which would not in fact interfere with the safety, wellbeing, privacy or dignity of any person, let alone persons of the kind described in s 185A(a)(i) and (ii). Further, it leaves untouched the vast majority of conduct which in fact does interfere with safety, wellbeing, privacy and dignity.

Proportionality - necessity

82. In any event, the Communication Prohibition is not necessary to achieve the objects referred to in s 185A.

83. There are equally practicable, less burdensome alternatives.

84. This is not a case where one needs to look to the laws of other jurisdictions or even other laws of the same jurisdiction. The equally practicable, less burdensome, alternatives appear in ss 185B and 185D themselves. It is difficult to imagine a case where the alternative is more "obvious" in the requisite sense.

85. Paragraph (a) of the definition of "prohibited behaviour" applies to the following behaviour:

> in relation to a person accessing, attempting to access, or leaving premises at which abortions are provided, or leaving premises at which abortions are provided, besetting, harassing, intimidating, interfering with, threatening, hindering, obstructing or impeding that person by any means.

The conduct referred to in paragraph (a) encompasses all of the kinds of conduct which, characteristically, would interfere with the safety, wellbeing, dignity and privacy of persons entering or leaving the relevant premises. The Victorian Parliament must have been of the view that proscribing that conduct was appropriate and adapted to achieving the objects in s 185A or it would not have proscribed it.

86. The Minister's view that proscribing some of the conduct referred to in paragraph (a) would be insufficient to achieve the government's objective is not to the point: cf VS [57]. Parliamentary privilege prevents the Minister's statement to Parliament from being relied on as evidence of the truth of the statement. In any event, the Minister's statement does not address most of the conduct referred to in paragraph (a) of the definition of "prohibited behaviour". Also, the Minister's statement does not suggest that she turned her mind to a number of reasonable alternatives, such as (i) criminalising conduct which, though not in fact causing harassment or intimidation, was reasonably likely to have that effect or (ii) criminalising conduct which was reasonably likely to cause *serious* distress or anxiety. Further, nothing in the parliamentary materials suggests that anyone in Parliament had turned their mind to whether it was necessary to criminalise conduct which was apt to do no more than cause mere discomfort.

87. Had Parliament proscribed the conduct referred to in paragraph (a), but not that in paragraph (b), the provision would have inflicted a substantially lesser burden on political communications. Paragraph (b) is directed *solely* to communications. And it is directed to communications which are merely discomforting.

88. A practicable, but less burdensome, law could have had any one or more of the following elements (amongst others): (a) an exclusion for conduct apt to cause no more than discomfort; (b) an exclusion for communications that are consented to; (c) a requirement that the communications in fact be seen or heard; (d) a carve out for political communications; (e) a materially smaller Safe Access Zone; (f) a carve out during elections; (g) a mens rea requirement for one or more actus reus elements of the offence.

Proportionality – adequacy in balance

89. Further, the Communication Prohibition is not adequate in its balance.

90. The object it relevantly serves – preventing conduct apt to cause mere discomfort to persons entering and exiting abortion facilities – is not, on balance, an important purpose. The importance of that purpose can be contrasted with, for example, the purpose of preventing conduct that threatens, harasses or intimidates such persons. It is not to the point to observe that, prior to the introduction of s 185D, there were incidents of violent and threatening behaviour near abortion clinics: cf VS [14]. The Communication Prohibition simply is not directed to that kind of behaviour.

91. Balanced against that object, the law inflicts a grave burden on political communications. The legal and practical operation of the provision has been addressed in paragraphs 28 to 45 above. In short, the provision targets the viewpoint of the minority side of the debate on an issue of ongoing political controversy, and it does so by striking at the very kind of communication which is perceived by that side and is in fact the most efficacious kind. It also suffers from debilitating vagueness.

92. Further, the Communication Prohibition inflicts a direct burden on political communication. It targets only speech on a politically controversial topic. It does not, for example, target just *any* communication which is apt to cause discomfort.

93. The Communication Prohibition introduces incoherence into the law: it prohibits communications which would not give rise to tortious liability or in respect of which a person would otherwise have a defence to, say, a defamation suit: see *Monis* at [213], [215] (Hayne J).

94. For similar reasons, the law is not adequately calibrated or tailored: see *Brown* at [219]-[226] (Gageler J). It is over-inclusive when assessed against its asserted ends: it applies to communications apt to cause discomfort which could never interfere with the safety, wellbeing, privacy or dignity of an individual; it applies irrespective of any actual effect of an individual; on the Magistrate's construction, it does not have mens rea elements. It is also under-inclusive: it targets only communications on abortion and does not proscribe all communications apt to cause distress or anxiety.

95. It is not determinative that communications in relation to abortion can still occur elsewhere: cf VS [33]. Similarly, to suggest (contrary to the fact) that the law is "spatially precise" (see CS [46]) is to miss the point: sometimes, the spatial precision of a law may be the very thing that renders it offensive to the constitutionally-prescribed systems. A prohibition on speech on the floor of Parliament would still leave elected representatives with many avenues for expressing political communications. That does not render the law valid.

Foreign jurisprudence

96. Foreign jurisprudence is against the validity of the Communication Prohibition or is otherwise distinguishable.

97. In *McCullen*, the Supreme Court of the United States struck down an offence which proscribed knowingly standing within 35 feet of a reproductive health care facility. The Communication Prohibition is substantially more incompatible with political speech: it is directed at communication; it is content discriminatory; it is viewpoint discriminatory; it imposes a 150m buffer zone; on the Magistrate's construction, the person need not know of the abortion premises.

98. *Madsen v Women's Health Centre* 512 US 753 (1994) does not assist. The case concerned a single injunction, not a State-wide prohibition. The injunction prohibited interference with access and physical abuse of persons entering a clinic. It was not directed at communications. It was content neutral. The buffer zone was 36 feet. The Court struck the injunction down in the respects that it was similar to the

Communication Prohibition: it struck it down to the extent that it purported to proscribe "images observable to or within earshot of" patients and it struck it down to the extent that it prohibited, within 300 feet of a clinic, approaching a person seeking the clinic's services.

99. *Frisby v Shulz* 487 US 474 (1988) concerned an ordinance making it unlawful for a person to engage in picketing before or about the residence or dwelling of an individual. The ordinance bore no resemblance to the Communication Prohibition.

100. *Hill v Colorado* 530 US 603 (2000) has been superseded by the decision in *McCullen*. The law there was, in any event, content neutral: it was not targeted at abortion-related communications. The Supreme Court gave weight to the fact that the law left open the ability to hold signs.

101. *R v Spratt* (2008) 298 DLR (4th) 317 and *Van den Dungen* (1995) 80 D&R 147 both concerned exclusions zones around one particular clinic, not Statewide laws.

PART VII: APPLICABLE PROVISIONS

102. See Annexure.

PART VIII: ORDERS SOUGHT

103. The appellant seeks the orders set out in the Amended Notice of Appeal.

PART IX: ORAL ARGUMENT

104. The appellant estimates that she will need approximately 2 hours for oral argument.

Dated: 8 June 2018

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ANNEXURE – APPLICABLE PROVISIONS

Public Health and Wellbeing Act 2008 (Vic) (Version No. 30, incorporating amendments as at 2 May 2016)

Part 9A—Safe access to premises at which abortions are provided

185A Purpose

S. 185A inserted by No. 66/2015 s. 5

The purpose of this Part is—

(a) to provide for safe access zones around premises at which abortions are provided so as to protect the safety and wellbeing and respect the privacy and dignity of—

(i) people accessing the services provided at those premises; and

(ii) employees and other persons who need to access those premises in the course of their duties and responsibilities; and

(b) to prohibit publication and distribution of certain recordings.

185B Definitions

S. 185B inserted by No. 66/2015 s. 5

(1) In this Part—

abortion has the same meaning as in the **Abortion Law Reform Act 2008**;

distribute includes—

(a) communicate, exhibit, send, supply or transmit, whether to a particular person or not; and

(b) make available for access, whether by a particular person or not; and

(c) enter into an agreement or arrangement to do anything mentioned in paragraph (a) or (b); and

(d) attempt to distribute;

premises at which abortions are provided does not include a pharmacy;

prohibited behaviour means—

(a) in relation to a person accessing, attempting to access, or leaving premises at which abortions are provided, besetting, harassing, intimidating, interfering with, threatening, hindering, obstructing or impeding that person by any means; or

(b) 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; or

(c) interfering with or impeding a footpath, road or vehicle, without reasonable excuse, in relation to premises at which abortions are provided; or

(d) intentionally recording by any means, without reasonable excuse, another person accessing, attempting to access, or leaving premises at which abortions are provided, without that other person's consent; or

(e) any other prescribed behaviour;

publish has the same meaning as in the **Open Courts Act 2013**;

safe access zone means an area within a radius of 150 metres from premises at which abortions are provided.

(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.

S. 185C inserted by No. 66/2015 s. 5.

185C Principles

The following principles apply to this Part—

(a) the public is entitled to access health services, including abortions;

(b) the public, employees and other persons who need to access premises at which abortions are provided in the course of their duties and responsibilities should be able to enter and leave such premises without interference and in a manner which—

(i) protects the person's safety and wellbeing; and

(ii) respects the person's privacy and dignity.

S. 185D inserted by No. 66/2015 s. 5.

185D Prohibited behaviour

A person must not engage in prohibited behaviour within a safe access zone.

Penalty: 120 penalty units or imprisonment for a term not exceeding 12 months.

S. 185E inserted by No. 66/2015 s. 5.

185E Offence to publish or distribute recording

A person must not without consent of the other person or without reasonable excuse publish or distribute a recording of a person accessing, attempting to access, or leaving premises at which abortions are provided, if the recording contains particulars likely to lead to the identification of—

(a) that other person; and

(b) that other person as a person accessing premises at which abortions are provided.

Penalty: 120 penalty units or imprisonment for a term not exceeding 12 months.

S. 185F inserted by No. 66/2015 s. 5.

185F Search warrant

(1) A police officer of or above the rank of sergeant may apply to a magistrate for the issue of a search warrant under this section in relation to a particular place if the police officer believes on reasonable grounds that there is, or

may be within the next 72 hours, in that place evidence of the commission of an offence against—

(a) section 185D, constituted by intentionally recording by any means, without lawful excuse, another person accessing, attempting to access, or leaving premises at which abortions are provided, without that other person's consent; or

(b) section 185E.

(2) If the magistrate is satisfied by the evidence on oath or by affidavit of the applicant that there are reasonable grounds for suspecting that there is, or may be within the next 72 hours, in that place evidence of the commission of an offence referred to in subsection (1), the magistrate may issue a search warrant authorising any police officer named in the warrant—

(a) to enter the place, or the part of the place, named or described in the warrant; and

(b) to search for and seize any thing named or described in the warrant.

(3) In addition to any other requirement, a search warrant issued under this section must state—

(a) the offence suspected; and

(b) the place to be searched; and

(c) a description of the thing for which the search is to be made; and

(d) any conditions to which the warrant is subject; and

(e) whether entry is authorised to be made at any time or during stated hours; and

(f) a day, not later than 7 days after the issue of the warrant, on which the warrant ceases to have effect.

(4) A search warrant must be issued in accordance with the **Magistrates' Court Act 1989** and must be in the form set out in the regulations under that Act.

(5) The rules to be observed with respect to search warrants under the **Magistrates' Court Act 1989** extend and apply to warrants under this section.

185G Seizure of things not mentioned in the warrant

S. 185G inserted by No. 66/2015 s. 5

A search warrant authorises a police officer executing the warrant, in addition to the seizure of any thing of a kind described in the warrant, to seize any thing which is not of a kind described in the warrant if the police officer believes on reasonable grounds—

(a) that the thing is of a kind which could have been included in a warrant issued under section 185F, or will afford evidence about the commission of an offence referred to in section 185F(1); and

(b) that it is necessary to seize that thing in order to prevent its concealment, loss or destruction or its use in the commission of an offence referred to in section 185F(1).

S. 185H inserted by No. 66/2015 s. 5.

185H Announcement before entry

s. 3

(1) Before executing a search warrant, a police officer named in the warrant must—

(a) announce that the officer is authorised by the warrant to enter the place; and

(b) give any person at the place an opportunity to allow entry to the place.

(2) The police officer need not comply with subsection (1) if the officer believes on reasonable grounds that immediate entry to the place is required to ensure—

(a) the safety of any person; or

(b) that the effective execution of the search warrant is not frustrated.

Abortion Law Reform Act 2008 (Vic) (version no 5, as at 1 July 2012)

3 Definitions

In this Act—

abortion means intentionally causing the termination of a woman's pregnancy by—

(a) using an instrument; or

(b) using a drug or a combination of drugs; or

(c) any other means;