No. M46 of 2018

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

KATHLEEN CLUBB

Appellant

-v-

ALYCE EDWARDS

First Respondent

and

ATTORNEY-GENERAL FOR VICTORIA

Second Respondent

REPLY OF FIRST RESPONDENT

PART I: CERTIFICATION

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

PART II: ARGUMENT

2.1 The Appellant's Submissions make a number of submissions as to the scope and interpretation of the relevant provisions. The First Respondent makes the general observation that the submissions seek to assert a considerably broader scope than the provisions actually have, by making assertions as to the breadth of individual parts of the offence, without regard to the provisions as a whole. By way of example, the submission as to the size of the safe access zone (**AS**, at 29(l)) is made without reference to the fact that communication in relation to abortion is only prohibited if it is able to be seen or heard by persons accessing or attempting to access the premises, and is reasonably likely to cause distress or anxiety.

2.2 These submissions respond to particular submissions as to the construction and asserted uncertainty of the "premises at which abortions are provided" and whether proof of mental elements are required.

Filed on behalf of the Office of Public Prosecutions
Adrian Castle (Principal Solicitor)
Ph 9603-7551 Fax 9603 7460

Premises at which abortions are provided

2.3 The Appellant's Submissions (**AS**, at [29(i)]) as to the large number and type of premises at which medical abortions are provided have no evidential foundation. It is accepted that the definition of abortion includes intentionally terminating a pregnancy by 'using a drug or a combination of drugs',[1] but it does not follow that there are a large number of premises at which medical abortions are provided,[2] and that this includes residential premises, universities or other places of public debate. The Act expressly excludes a pharmacy from the meaning of "premises at which abortions are provided".[3] The First Respondent does not accept that the term extends to a woman's private residence or other place at which a woman happens to take abortifacient drugs.[4] These are not "premises at which abortions are provided", both because there is no "provider" and because the use of the plural connotes the regular provision of abortions. There is no evidence that it would include universities or other place of public debate.

Construction of the offence – mens rea

2.4 The Appellant makes a number of submissions as to the uncertainty with respect to the size of the "safe access zone" (**AS**, at [29(l)], [44(c)]), and findings of the Magistrate as to *mens rea* and whether proof of knowledge is required (**AS**, at [18, 30, 44(c), 88 and 94).

2.5 These submissions ignore the factual context and the legal submissions made by the parties and involve an unfair reading of the Magistrate's reasons.

2.6 It is plain that the evidence before the Magistrate was that the Appellant knew where the safe access zone was and intended to breach it. It is apparent from the reasons that

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1 See s 185(1) of the *Public Health and Wellbeing Act 2008* and s 3 of the *Abortion Law Reform Act 2008*

2 See https://www.betterhealth.vic.gov.au/health/HealthyLiving/abortion-services-in-victoria (see Annexure C to the Second Respondent's Reply)

3 See section of the 185(1) *Public Health and Wellbeing Act 2008*

4 As to the circumstances in which medical abortions occur, see:https://www.betterhealth.vic.gov.au/health/healthyliving/abortion-procedures-medication (see Annexure A to the Second Respondent's Reply); Royal Australian College of Obstetricians and Gynaecologists, "The use of mifepristone for the termination of pregnancy" (2016) (accessed at https://www.ranzcog.edu.au/Statements-Guidelines) (see Annexure B to the Second Respondent's Reply)

the 150m boundary was displayed and explained to the protesters,[5] that there was a stated intention by 'The Helpers' to breach the safety zone to test the legislation[6] and that the Appellant was seen at the eastern boundary and asked to desist from breaking the law.[7] The Magistrate concluded that:

> *Overall, the evidence appears to this Court to be overwhelming. Mrs Clubb is videoed breaching the safe access zone. She has engaged in discussions directly and indirectly, with Inspector Cartwright about her intended breach of the legislation. She has been spoken to and cautioned at least twice, at the site and prior to the breach, by police, in an effort to warn her off the intended breach. She has progressed to her actions defiantly and deliberately, despite those warnings.*

2.7 At trial the prosecution adopted the position that the offence is one that requires proof of *mens rea*. The prosecution submitted that it was required to prove that the accused intended to engage in the "prohibited behaviour",[8] but did not further delineate the mental elements required in relation to the prohibited communication in s 185B(1)(b), save for the submission that *'the Prosecution does not need to prove ... that the accused had any particular state of mind in relation to whether the communication was 'reasonably likely to cause distress or anxiety' (i.e. this is an objective test)'*.[9]

2.8 There is nothing in the material to suggest that the Appellant raised any issue as to knowledge in submissions, which is hardly surprising given the evidence. The Appellant's submissions as to the elements of the offence were primarily in relation to the issue of distress or anxiety, and whether the couple who were approached by the Appellant were in fact distressed or anxious.[10]

2.9 Against this background, it would be unfair to read the reasons of the Magistrate as construing the offence as one where 'there is no mens rea element attaching to ... the content of the communication or the legal character of the "safe access zone"'.[11]

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5 See Reasons, CAB at 294 lines 19-28
6 See Reasons CAB, at 294 lines 25-30
7 See Reasons CAB, at 294 lines 35-36 [This is consistent with the practice of Victoria Police to give warnings in respect of "public order" summary offences]
8 See Appellant's Book of Further Materials, at pp7-9
9 See Appellant's Book of Further Materials, at p 9
10 See Reasons CAB, at 294 lines 25-30. [The Appellants have not included their written submissions in respect of questions of law in their Further Materials]
11 See AS, at [30]. See also AS, at [94]: "on the Magistrate's construction [the law] does not have any *mens rea* elements".

2.10 The First Respondent submits that the offences created by s 185D are not ones of strict liability or absolute liability, but require proof of *mens rea*. The offence may be said to comprise proof of the following:

(a) the accused communicated (by any means), and intended to communicate, in relation to abortions;

(b) the accused communicated, and intended to do so, in a manner that was able to be seen or heard by a person accessing, attempting to access or leaving premises at which abortions are provided;

(c) the communication was reasonably likely to cause distress or anxiety (an objective test);

(d) the communication occurred, and was intended to occur, within a safe access zone.

2.11 Otherwise the First Respondent adopts the submissions and reply of the Second Respondent.

Dated: 22 June 2018

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KERRI JUDD QC
Director of Public Prosecutions (Victoria)
T (03) 9603 7508
kerri.judd@opp.vic.gov.au

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BRETT SONNET
Crown Prosecutor (Victoria)
T (03) 9603 7566
brett.sonnet@opp.vic.gov.au

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JOANNA DAVIDSON
Barrister – Owen Dixon Chambers
T (03) 9225 6576
joanna.davidson@vicbar.com.au