The High Court, Abortion Clinic Speech Restrictions and the Assessment of Harm

*Dr Joseph Turner (B Med Sc (Hons), MBBS, Ph D, FRACGP, FARGP, FACRRM and DRANZCOG (Advanced)**
*Debbie Garratt (BN, Grad Dip Counselling, B Ed, M Ed (La Trobe), PhD candidate (UNDA)***
*Dr Simon McCaffrey (MBBS (Hons Class II), MRCOG, FRACOG and FRANZCOG)****

The High Court will consider in October the constitutionality of Victorian and Tasmanian laws prohibiting protesting, offers of assistance and other types of communication around abortion clinics. Those supporting the laws claim that they are needed considering the significant harm that may be caused by this conduct. There are, however, substantial problems with the medical evidence provided to the High Court in support of such claims. This article critiques this evidence and highlights key questions that remain unaddressed by the expert medical opinion.

Problems with the medical evidence

Lack of data on the impact of conduct outside abortion premises

A primary problem is the insufficiency of the medical evidence currently before the High Court. The primary evidence are affidavits from Dr Goldstone, a medical doctor, and Dr Allanson, a psychologist, who work for abortion clinics.[i] Dr Goldstone in his affidavit relied on two studies: the Foster Study and the Kimport Study.[ii] Dr Allanson in her affidavit relied on the Foster Study and also the Humphries Study and the Hayes and Lowe Study.[iii] Dr Allanson also relied on a psychiatric report undertaken by Dr Gregory White assessing the impact of individuals outside the Fertility Control Clinic (FCC), an abortion clinic in Melbourne, on Dr Allanson and three other individuals employed by the FCC.[iv]

Considering the importance and complexity of the issue, an attempt to assess the harm that may be caused by individuals outside abortion clinics on the basis of only two affidavits, four studies and one psychiatric report is inadequate.

Disproportionate focus on the Fertility Control Clinic

The evidence also relies excessively on data from the FCC, which is reported to be the largest provider of pregnancy termination in Victoria. The limited data concerning the situation at other abortion premises prevents an assessment of whether the situation at the FCC's premises is significantly different to that at

other premises, regarding the number of individuals outside the premises, the frequency and duration of their presence, the conduct engaged in and the nature of the harm, if any, that may be caused to patients, employees or others entering these premises.

The lack of comparative data prevents an evaluation of whether there are distinctive features of the FCC that may explain any harm alleged to occur to those entering that clinic which may not be experienced at abortion premises in Victoria, other parts of Australia or overseas. The distinctive features of the FCC may make it an unsuitable locality to assess generally the impact of conduct of individuals outside abortion premises. If so, that factor adversely affects the force of the evidence of Dr Allanson and also the study by Alexandra Humphries relied upon by Dr Allanson, both of which are primarily based on conduct at or outside the FCC's premises.

Failure to obtain data that accounts for variability in conduct

There is also a lack of studies in the evidence before the Court that take appropriate account of the variability in behaviour of individuals outside abortion premises, which can range from acts of violence, displays of offensive images, critical statements made to those entering the premises, general statements about the value of human life or respectful offers of assistance. Failing to take account of the possible differences in the impact of such various types of conduct may lead to the conclusion that the presence of all individuals outside abortion premises is equally likely to cause harm to patients or employees of the premises.

Such a conclusion is likely to be false considering that conduct such as respectful offers of assistance may not produce any harm and may even help women considering abortions to avoid harm. For example, some women may experience adverse mental health consequences from abortions that they may have avoided if they had been provided with support that would have allowed them to continue with their pregnancy.[v] More precise studies that account for the variability of conduct outside abortion clinics may indicate that broadly operating laws such as those that exist in Victoria and Tasmania may harm some persons, especially women considering abortion, and that more nuanced laws are required to ensure that at least respectful offers of assistance remain lawful.

The overseas experience may be significantly different to the Australian experience

A further problem is that, apart from the Humphries Study, all of the studies relied upon were conducted overseas. The Foster Study and Kimport Study were conducted in the United States, and the Hayes and Lowe Study was conducted in the United Kingdom. There was no consideration given by Dr Goldstone or Dr Allanson as to whether the situation concerning the nature of conduct outside abortion premises in Australia or the cultural attitudes towards, and legal

regulation of, abortion is significantly different to that in the United States or the United Kingdom.

The stressful nature of medical procedures

A further problem is that any medical procedure can be an adverse emotional experience for patients due to a range of factors such as the pain experienced from the medical condition, the health risks involved in the procedure, patient perception of vulnerability and the loss of privacy. Abortion may be a particularly emotional experience for patients or employees of clinics when compared to other procedures due to the nature of the procedure, the patient's perception of the significance of the procedure, the possibility that the patient is being coerced to undergo the abortion by third parties, and the substantial community disagreement regarding the ethics of abortion.[vi] Dr Goldstone, Dr Allanson and the studies relied upon by them do not address whether and, if so, to what extent, the adverse emotional states identified by them could be due to the stressful nature of any medical procedure nor to the possibility that participation in abortion as a patient or employee may be particularly stressful.

No use of control group in studies

The absence of the use of control groups is another significant limitation of the studies relied upon by Dr Goldstone and Dr Allanson. For example, in the Humphries Study 23 of the women who accessed the FCC had no exposure to individuals outside or in the vicinity of the FCC. These women would have been a useful control group to compare with women who were exposed to individuals outside the FCC. Instead, they were excluded from the study.[vii] The one study that did use a control group was the Foster Study that found that 'compared to women who had had no exposure to protesters, those women who reported seeing, hearing or being stopped by protesters did not have higher or lower odds of feeling any of these six emotions [regret, relief, guilt, happiness, sadness or anger]'.[viii]

Difficulty in establishing baseline emotional state

Another central limitation of the data in the studies was the inability of researchers to compare the women's emotional state with their typical emotional state. Such a comparison is essential in assessing the impact that attending such premises and encountering individuals outside the premises may have had on a woman's emotional state. There was an attempt in the Humphries Study to determine the emotional state of women before they attended the clinic. The author asked participants to assess how they 'generally feel' and to identify whether they had a history of mental health problems.[ix] However, the reliability of such data is questionable considering factors such as the stress any patient experiences due to a medical procedure, the potentially higher stress experienced from an abortion, and concerns about the confidentiality of any information disclosed in the study. The lack of such comparative data undermines the reliability of any finding that the research participants

experienced a significant adverse emotional response from encountering individuals outside abortion premises.

The Humphries Study may also be criticised for undertaking research on participants who may have been recovering from sedation. The author states that the Post-Abortion Questionnaire was ‘completed in the discharge lounge just prior to leaving the clinic’.[x] The possibility that this data may have been compromised by any sedation should have been expressly excluded by the author.

Third party influence on patient perception of individuals outside clinics

A further challenge in conducting research in this area is the influence that third parties may have on the emotional reactions of patients or employees to individuals present outside abortion clinics. The media and the comments of health professionals (especially doctors who refer patients for abortion) and staff members of abortion premises may cause patients and employees to view individuals outside abortion clinics as potentially violent or, at least, a threat to their emotional wellbeing. For example, in her affidavit, Dr Allanson stated that she knew of doctors who would not refer their patients to FCC because of their negative perception regarding the impact that those outside abortion clinics might have had on their patients.[xi]

Such emotional reactions may be reinforced in patients or employees through formal counselling at abortion premises and even through informal conversations while at abortion premises. The cause of any emotional harm to patients or employees may be due, at least in part, to how third parties describe the individuals outside abortion premises and the impact this may have on patient and employee perception of such persons. The failure to identify and discuss the significance of such potential third-party influence on any harm that patients and employees may experience is a significant limitation on the utility of the evidence.

Influence of third parties on the completion of questionnaires

Another challenge to the reliability of the studies is the influence that support persons may have had on the data collected from research participants. The value of the Hayes and Lowe Study is affected by this problem, with the authors acknowledging that ‘it was not always clear whether the comment was made by a woman seeking an abortion, or a partner, family member, or friend accompanying her’.[xii] The failure to determine if the source of the data used in the study was from the woman seeking an abortion or her support person is a fundamental failing and substantially limits its usefulness in determining claims of emotional harm caused to persons seeking an abortion by individuals outside abortion premises. The role that such support persons may have played in influencing the data provided in the other studies is less clear. However, the reliability of the studies would have been improved if any involvement of

support persons had been excluded from the process or explicitly stated in the studies.

Terminology used in studies may have skewed data

The studies relied upon by Dr Goldstone and Dr Allanson used biased terminology that may have significantly influenced the data obtained by the researchers. In the Foster Study, for example, the individuals outside abortion premises were described as 'antiabortion demonstrators' and 'protestors'.[xiii] Such language appropriately describes some individuals outside abortion premises but misrepresents others such as those making respectful offers of assistance. Although any terminology used may be criticised for containing an inherent bias, there are other descriptions that could have been used that would have been less susceptible to this criticism. The authors could have identified the impugned individuals by using terms like 'individuals outside clinics', 'advocates', 'activists' or 'communicants'.

The Foster Study also asked women: 'to what extent did the protesters upset you, if at all?' A less biased approach would be to have asked participants to describe their emotional response to those outside abortion premises and may have allowed for responses that ranged from very positive to very negative. Further, the Foster Study failed to include in it any questions that assessed whether any individuals attending the abortion premises may have been helped by those outside abortion premises. Individuals who were committed to respectfully engaging with women and offering assistance to women may have a positive impact on persons attending abortion premises, even if in just helping the woman confirm that an abortion is the appropriate choice for her.

Similarly, the Humphries Study used language that may be criticised for bias. For example, in the survey completed by the participants the author uses language such as 'confronted with anti-abortion protestors'.[xiv] Both the word 'confronted' and the expression 'anti-abortion protesters' have negative connotations that may introduce bias into the responses of the research participants.

Although the Hayes and Lowe Study did not list the exact questions asked of participants, the terminology used by the researchers can similarly be criticised on the grounds of bias. Such a criticism was conceded by the authors who note that 'the form designed to record the details uses terms such as "protest", "harass", and "intimidated", all of which could be considered leading'.[xv]

The Kimport Study did not include the questions asked of the research participants and it is not possible to assess the existence of any potential bias in the language used that may have influenced the data obtained by the researchers.

Author bias

A central problem with publications on abortion is that the authors often have a strong commitment to a particular position on the ethics of abortion. The professional experience of Dr Goldstone and Dr Allanson evidences their ethical position on abortion. Their wish is to have a workplace where individuals do not communicate about abortion to patients or employees entering abortion premises. That raises the possibility that their pre-existing beliefs may have undermined the accuracy of their views regarding the harm that could be caused by individuals outside abortion premises.

The studies relied upon by Dr Goldstone and Dr Allanson may be similarly criticised for potential author bias. For example, it is unlikely the FCC, a private commercial organisation, would have consented to the Humphries Study being undertaken at their premises unless they were confident the data obtained would be supportive of the operation of the FCC and the harmful nature of the conduct engaged in by individuals outside its premises.

Similar problems with author bias may exist with the Humphries Study. In her study, Humphries discloses that '[p]articipants were recruited from the Fertility Control Clinic where the researcher works in an administrative capacity'.[xvi] The employment of the author of the study at the FCC is a further reason why the validity of the study may be undermined on the basis of author bias.

The impact of author bias upon the interpretation of results and the way in which conclusions are drawn needs to be considered by relevant experts to assess whether this may have led to a compromise in the research process. Without such a review there remains a significant possibility that author bias may have undermined the value of the medical evidence before the High Court.

Harm caused by communications outside abortion premises

In addition to the general problems with the medical evidence before the High Court there are also specific problems with the types of harm that are claimed to be caused by communications outside abortion premises.

No evidence of recognised psychiatric disorder

There is no evidence in the materials before the High Court that any individual has suffered a recognised psychiatric disorder from other individuals being present or communicating with them about abortion outside abortion premises. Dr White confirms the medical conditions and stress symptoms reported by Dr Allanson and the other three employees of the FCC do not meet the criteria for a formal psychiatric disorder.[xvii] Similarly, there is no evidence that communications about abortion outside abortion premises can cause recognised psychiatric disorders in either Dr Goldstone or Dr Allanson affidavits.

Emotional harm

The affidavits of Dr Goldstone and Dr Allanson, and the studies relied upon by them, claim that the conduct of individuals outside abortion premises causes a range of emotional harm to patients and employees.[xviii] However, the attempt by Dr Goldstone and Dr Allanson to support their claims through reliance on personal experience and the studies referred to in their affidavits is adversely affected by the limitations of such evidence discussed above.

Further, the Foster Study found that those individuals outside abortion premises do not seem to have an effect on women's emotions about the abortion, one week later. The authors of the study note that '[w]hile being stopped by protesters does increase the odds of women being upset by protesters compared to seeing protesters only, the presence and intensity of the protester interaction had no effect on women's emotional response to their abortion (relief, regret anger, happiness, sadness or guilt) 1 week after the abortion. In other words, women may be upset by protesters, but the protesters do not affect women's subsequent feelings about their abortions'.[xix]

Although, both Dr Goldstone and Dr Allanson relied on the Foster Study, they either ignored or failed to mention that finding from this study.

The Kimport Study was relied upon by Dr Goldstone in his affidavit, where he stated that 'women attending clinics with protesters found the experience negative and, in some cases, traumatic. Some women interviewed in the study described themselves as intimidated, fearful or scared during their encounters with protestors, even if they had anticipated the presence of protestors before arriving at the clinic'.[xx]

Dr Goldstone's description of the import of the study is potentially misleading. He refers to women finding the experience 'negative and, in some cases, traumatic' but fails to mention that the study finds that only eight of the 41 women interviewed reported such emotions with another four reporting favourably that there were no protesters.[xxi]

Dr Goldstone did not critically evaluate the research methodology employed in the Kimport Study such as the use of three different methods to obtain research participants.[xxii] Of particular concern is that one of the methods involved the selection of women who had called an abortion support talk line and who could be reasonably expected to be experiencing a high level of emotional trauma from their abortion experience.

The Kimport Study also found that the participants reported a wide range of negative, in-clinic experiences that were unrelated to 'picketer' activity outside the clinic. These variables included complaints of requests for cash, of being separated from support people when entering the clinic, and of uncaring clinic staff.[xxiii] The study's findings suggest that negative experience with abortion is causally complex.

Dr Allanson relies on the Humphries Study in her affidavit stating that 'the [Humphries] study indicated that participants who were exposed to the picketers experienced considerable distress. The study also found that higher levels of pre-abortion anxiety (and increased levels of guilt, shame and hostility) were associated with having more exposure to the anti-abortion picketers.[xxiv]

That statement by Dr Allanson is not supported by or, at least, overstates the results contained within the Humphries Study. The study notes that 'more exposure to the anti-abortion picketers when entering the clinic was associated with higher levels of anxiety pre-abortion. However, this correlation was small, and was not found to be a significant predictor of pre-abortion anxiety when entered into the hierarchical regression analysis, controlling for trait anxiety'.[xxv] Ms Humphries further notes in her study that '[t]otal exposure to the picketers was not a significant unique predictor of pre-abortion anxiety and only a small significant relationship between these two variables was found'.[xxvi]

It would not be unexpected for studies to demonstrate that patients and employees are adversely affected emotionally by the conduct of individuals outside abortion premises. However, such adverse emotional impact can be expected to be experienced from any protest against or discussion of a sensitive issue and was not shown to be any greater than that which could be expected from any protests and discussion of many other controversial social issues.

Need for anaesthesia during procedure

Dr Goldstone in his affidavit claims that a 'severely negative emotional state at the time that a procedure is performed can increase a patient's discomfort during the procedure and recovery, and can increase the requirement for anaesthesia which may increase medical risk'.[xxvii] Such a claim was also made by Dr Allanson in her affidavit.[xxviii]

For the reasons discussed above, a patient may be in a 'severely negative emotional state' not due to the conduct of individuals outside abortion premises, but rather due to the stressful nature of a medical procedure and, arguably, the increased emotional significance of abortion and the possibility of coercion. Furthermore, medical abortions do not involve the use of sedation or anaesthesia and surgical abortions are usually performed under sedation or a general anaesthesia.

Considering the use of sedation or general anaesthesia it is difficult to accept Dr Goldstone's and Dr Allanson's claim that a negative emotional state can increase a patient's discomfort during the procedure. Similarly, it is difficult to understand why such an emotional state would increase a patient's discomfort during recovery beyond the discomfort that would be experienced from the adverse emotional state itself.

A delay in undergoing an abortion increases risk

Both Dr Allanson and Dr Goldstone opine that activity outside abortion premises may lead to women delaying attendance for abortion with attendant increased risk of negative outcomes.[xxix] Although it is true that the later a surgical abortion is performed the higher is the increase in certain risks of harm that a woman will face, Dr Allanson's and Dr Goldstone's assertion that women may delay undergoing an abortion due to activity outside abortion premises is based on their personal experience.

It is difficult to assess the significance of this claim by Dr Allanson and Dr Goldstone without knowing the number of women who delay undergoing an abortion due to activity outside abortion premises, the length of any delay and their definition of a negative outcome. A postponement by a few days would be unlikely to increase any clinical health risks for the woman. If a woman is in a situation where additional delay may increase her clinical health risks, the advice of her GP or other health professional as to her need to undergo the procedure as soon as possible may overcome any reluctance she has to encounter individuals outside abortion premises.

Dr Allanson and Dr Goldstone did not adequately consider whether a delay may be caused by factors other than the presence of individuals outside abortion premises. A woman may decide to delay her procedure due to a range of reasons including uncertainty about whether an abortion is the right decision in her situation.

Further, a woman who considers that she would find it emotionally difficult to encounter individuals outside abortion premises may select premises where such individuals are unlikely to be found or will be referred to such premises by their health professional. Such a situation is mentioned by Dr Allanson in her affidavit.[xxx]

In light of these considerations, there does not appear to be sufficient evidence to support the statements of Dr Allanson's and Dr Goldstone's that the occasioning of delay is an example of the harm that may be caused by individuals outside abortion premises.

Greater use of clinical time to care for patients

Dr Allanson in her affidavit states that patients 'distressed by the protesters also required greater time and skill from staff, as well as additional reassurance and evidence-based information to counter the misinformation disseminated by the protestors'.[xxxi] Dr Allanson did not provide any details of the number of patients who required this additional use of resources, attempt to exclude the possibility that such patients may be distressed due to the nature of medical procedures and abortion in particular, or exclude the possibility that information raising concerns about the abortion procedure may have been provided to the patient from family, friends, the media or personal research. Considering the failure to exclude these other factors it is difficult to accept Dr Allanson's claim

that individuals outside abortion premises are the cause, or even a cause, of the need for greater counselling by staff members.

Difficulty in attracting staff members

Dr Allanson states in her affidavit that '[h]arassment by protesters outside reproductive health care clinics also reduces the number of medical professionals willing to work in reproductive health care facilities and may therefore indirectly reduce women's access to essential health services'.[xxxii] However, Dr Allanson did not provide any examples or details of the number of staff members who she considers have resigned from working at abortion premises or decided not to pursue such a career due to the conduct of individuals outside abortion premises.

Without an understanding of the numbers of individuals who may have decided against working at abortion premises, it is difficult to assess her claim of a loss or unavailability of staff members.

Dr Allanson does not discuss the possibility that it is the nature of the work at abortion premises that may make it difficult to attract staff members. The ability of abortion premises in Australia and overseas (especially in locations where it is uncommon for there to be individuals outside abortion premises) to meet their staffing needs would likely be relatively easy data to obtain, but no such data or study is provided by Dr Allanson.

Considering the absence of comparative data, it is difficult to accept Dr Allanson's claim that individuals outside abortion premises are the cause, or even a cause, of any difficulty abortion premises may have in attracting staff members.

Benefits provided by individuals outside abortion clinics

As mentioned above, Dr Goldstone and Dr Allanson and the authors of the studies on which they rely fail to acknowledge that some individuals outside abortion premises may help women. Individuals who attend outside abortion premises may respectfully offer aid or alternatives to women who may be considering an abortion for reasons such as limited finances, insecure accommodation and lack of social support.

The provision of such support may allow some women to continue their pregnancy and potentially avoid suffering significant emotional harm from undergoing an abortion due to lack of resources. This has particularly been the experience of one of the authors of this article, Dr McCaffrey, who has had referred to him more than 20 women who encountered individuals outside abortion premises and accepted their offers of assistance.

In Dr McCaffrey's experience, these women were very grateful for the assistance provided to them by the individuals outside the abortion premises. His patients have said words to him to the following effect "But for the man we spoke with outside the clinic, we would not have our child!", "We view the people outside the clinic as having given our child life" and "We continue to keep in contact with that group, and have sent them pictures of our child to encourage them to keep doing their good work. We are so grateful to them."

The focus of Dr Goldstone, Dr Allanson and the authors of the studies on only the potential harm that might be caused by individuals outside abortion premises is clearly insufficient, leaving questions unanswered about the possibility that those individuals may improve the health and wellbeing of women considering abortion. Any comprehensive assessment of the impact of any conduct needs to take into account both the potential harm and benefit in order for an informed decision to be reached.

THE HARM CAUSED BY INDIVIDUALS COMMUNICATING OUTSIDE ABORTION CLINICS

Considering all these difficulties the medical evidence before the High Court has substantial limitations. Accordingly, it may be difficult for the Court to rely on this evidence in assessing the extent to which individuals communicating outside abortion clinics may harm, or even help, women and others accessing the premises.

The matter will be heard by the High Court commencing on 9 October 2018.

* Dr Joseph Turner (B Med Sc (Honours), MBBS, Ph D, FRACGP, FARGP, FACRRM and DRANZCOG (Advanced). General Practitioner in Armidale. Fellow of the Royal Australian College of General Practitioners and a Fellow of the Australian College of Rural and Remote Medicine.

** Debbie Garratt (BN, Grad Dip Counselling, B Ed, M Ed (La Trobe University), PhD candidate (The University of Notre Dame Australia). Registered Nurse and Executive Director of Real Choices Australia.

*** Dr Simon McCaffrey (MBBS (Honours Class II), MRCOG, FRACOG and FRANZCOG). Obstetrician and Gynaecologist at Liverpool Hospital and Sydney Southwest Private Hospital.

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[i] Affidavit of Dr Susie Allanson affirmed on 21 July 2017 ('Allanson Affidavit'); affidavit of Dr Philip Goldstone affirmed on 26 July 2017 ('Goldstone Affidavit').

[ii] Diane Foster et al, 'Effect of abortion protesters on women's emotional response to abortion' (2013) 87 *Contraception* 81, Katrina Kimport, Kate Cockrill and Tracy A Weitz, 'Analyzing the impacts of abortion clinic structures and processes: a qualitative analysis of women's negative experience of abortion clinics' (2012) 85 *Contraception* 204.

[iii] Alexandra Humphries, 'Stigma, Secrecy and Anxiety in Women Attending for an Early Abortion' (University of Melbourne, 2011, unpublished Masters' Thesis), Graeme Hayes and Pam Lowe, *"'A Hard Enough Decision to Make': Anti-Abortion Activism outside Clinics in the Eyes of Clinic Users"* (Aston University, September 2015).

[iv] Gregory White's 'Psychiatric Report' of 22 July 2014.

[v] See, eg, David M Ferguson, L John Horwood and Joseph M Boden, 'Does abortion reduce the mental health risks of unwanted or unintended pregnancy? A re-appraisal of the evidence' (2013) 47(9) Australian & New Zealand Journal of Psychiatry 819.

[vi] On the possibility that some women are coerced into undergoing abortion see, eg, the comments of Dr Carol Portman, a doctor who provides abortion services, at the Queensland Committee Hearing for the Termination of Pregnancy Bill, where Dr Portman stated: 'Sometimes even in the best of circumstances we understand that a person is to a degree being coerced but feel they still need to go ahead because it's their only choice, because otherwise this person will leave them and their four kids, for example. It's very hard to know what to do in those circumstances so you go ahead with what their choice is even though to a degree they are being coerced': Dr Carol Portman, Committee Hearing for the Termination of Pregnancy Bill, Queensland Parliament, 12 September 2018.

[vii] Humphries Study, 21.

[viii] Foster Study, 85–86.

[ix] Humphries Study, 60–67.

[x] Humphries Study, 32.

[xi] Allanson Affidavit, 10.

[xii] Hayes and Lowe Study, 3.

[xiii] Foster Study, 83.

[xiv] Humphries Study, 62.

[xv] Hayes and Lowe Study, 3.

[xvi] Humphries Study, 19.

[xvii] Gregory White's 'Psychiatric Report' of 22 July 2014, 3.

[xviii] See, for example, pages 7–15 of the affidavit of Dr Allanson providing a detailed account of the emotional harm that may be caused by individuals outside abortion premises.

[xix] Foster Study, 86.

[xx] Goldstone Affidavit, 4.

[xxi] Kimport Study, 207.

[xxii] Kimport Study, 205.

[xxiii] Kimport Study, 207–9.

[xxiv] Allanson Affidavit, 12–13.

[xxv] Humphries Study, 34-35.

[xxvi] Humphries Study, 35.

[xxvii] Goldstone Affidavit, 4.

[xxviii] Allanson Affidavit, 10.

[xxix] Allanson Affidavit, 11; Goldstone Affidavit, 4.

[xxx] Allanson Affidavit, 10–11.

[xxxi] Allanson Affidavit, 10.

[xxxii] Allanson Affidavit, 13–14.