

THE CONSTITUTIONALITY OF COMMUNICATION PROHIBITIONS AROUND ABORTION CLINICS

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ABSTRACT

Laws prohibiting a range of conduct in the vicinity of a hospital, clinic or other premise that performs abortions have been enacted in Tasmania, Victoria, the Australian Capital Territory and the Northern Territory. One of the prohibitions involves preventing certain types of communication around premises that perform abortion. It is unclear whether this prohibition is consistent with the implied freedom of political communication. A central consideration in determining whether the prohibition is compatible with the implied freedom is the extent of the burden imposed on political communication. The prohibition may be unconstitutional as it places a substantial burden on political communication.

I INTRODUCTION

Laws prohibiting a range of conduct in the vicinity of a hospital, clinic or other premise that performs abortions (an ‘abortion premise’) have been enacted in Tasmania, Victoria, the Australian Capital Territory and the Northern Territory.¹ One of the prohibitions involves criminalising communication about and against abortion in the vicinity of an abortion premise (the ‘communication prohibition’). This prohibition has raised the possibility that the provisions that limit communication may be unconstitutional for violating the implied freedom of political communication in the *Australian Constitution* (the ‘implied freedom’).

The High Court has held that there is a three stage test for determining whether a law is inconsistent with the implied freedom. The first question asks whether the law ‘effectively burdens the freedom in its terms, operation or effect?’² If it does not then the law is not invalid for breaching the implied freedom. If it does burden the freedom, then the second question asks:

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¹ *Reproductive Health (Access to Terminations) Act 2013* (Tas) s 9; *Public Health and Wellbeing Act 2008* (Vic) ss 185A-185H; *Health Act 1993* (ACT) ss 85-87; *Termination of Pregnancy Law Reform Act 2017* (NT) ss 14-16.

² *Brown v Tasmania* [2017] HCA 43 (18 October 2017) [104].

‘is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?’³ If it is not then the law is invalid for breaching the implied freedom. If it is then the third question asks: ‘is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?’⁴

Assistance in answering the third question may be provided to a court through the use of a three stage proportionality test.⁵ This test enquires whether the law is

suitable – as having a rational connection to the purpose of the provision; *necessary* – in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom; and *adequate in its balance* – a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom’.⁶

The constitutionality of the Tasmanian and Victorian provisions is due to be assessed by the High Court, which has heard appeals from two individuals who have been convicted of violating the communication prohibition.

In *Police v Preston and Stallard*⁷ (*‘Preston’*) Magistrate Rheinberger found that Mr John Preston, Mrs Penny Stallard and Mr Raymond Stallard violated the communication prohibition in the *Reproductive Health (Access to Terminations) Act 2013* (Tas) (*‘the Tasmanian Act’*), which prohibits within a 150m zone of an abortion premise (an *‘access zone’*) conduct that constitutes *‘a protest in relation to terminations that is able to be seen or heard by a person accessing, or attempting to access, premises at which terminations are provided’*.⁸ The convictions arose out of three separate incidents. On 5 September 2014, Mr John Preston was

³ Ibid.

⁴ Ibid.

⁵ The use of the proportionality test to assist in answering the third question does not have the unanimous support of the High Court – see, eg, *Brown v Tasmania* [2017] HCA 43 (18 October 2017) [157]-[166] (Gageler J); [415]-[438] (Gordon J).

⁶ *McCloy v New South Wales* (2015) 257 CLR 178, 193-195 [2].

⁷ *Police v Preston and Stallard* [2016] (27 July 2016) TASMC.

⁸ *Reproductive Health (Access to Terminations) Act 2013* (Tas) s 9(1), (2).

standing about 4-5 metres from the entry door to an abortion premise based in Hobart.⁹ He was seen by Ms Sarah Heald as she was walking past the premise.¹⁰ On 8 September 2014, Ms Heald again saw Mr Preston outside the premise distributing leaflets and displaying a banner with a picture of an unborn child.¹¹ On this occasion Ms Heald approached Mr Preston and advised him that his conduct was illegal under the new legislation. On the 14 April, 2015, Mr Preston was again outside the premise and was accompanied this time by Mrs Penny Stallard and Mr Raymond Stallard. All three were holding signs critical of abortion. A police officer approached them and gave a direction requiring them to leave the area for 8 hours. When they refused they were taken to the police station and charged for failing to comply with the directions of a police officer and for committing an offence under s 9(2) of the Tasmanian Act. Magistrate Rheinberger held that the provisions did not breach the implied freedom and convicted the defendants for failing to comply with the directions of a police officer and for committing an offence under s 9(2) of the Tasmanian Act.¹² Preston was the only defendant who appealed against his conviction and \$3,000.00 fine.

In *Edwards v Clubb*¹³ ('Clubb') Magistrate Bazzani found that Mrs Kathleen Clubb violated the communication prohibition in the *Public Health and Wellbeing Act 2008* (Vic) that prohibited within a 150m zone of an abortion premise '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'.¹⁴ Mrs Clubb was a member of a group who had advised the Victorian Police that they were intending to test the validity of the legislation by engaging in conduct within an access zone that was potentially prohibited by the Act. At about 10.30am on 4 August 2016, Mrs Clubb was filmed by police about five metres from the entrance to the East Melbourne Fertility Control Clinic carrying two pamphlets with only one mentioning abortion. Mrs Clubb attempted to communicate with a couple who were entering the Clinic and offered them a pamphlet (the

⁹ *Police v Preston and Stallard* [2016] TASMC (27 July 2016) [6].

¹⁰ *Ibid* [3].

¹¹ *Ibid* [5].

¹² *Ibid* [54]-[55], [87]-[88].

¹³ The criminal liability of Mrs Clubb was decided in *Edwards v Clubb* (Unreported, Magistrates' Court of Victoria, Magistrate Bazzani, 23 December 2017, Case Number G12298656) while the constitutional validity of the provisions was decided in a separate hearing: *Edwards v Clubb* (Unreported, Magistrates' Court of Victoria, Magistrate Bazzani, 6 Oct 2017, Case Number G12298656).

¹⁴ *Public Health and Wellbeing Act 2008* (Vic) ss 185B, 185D.

Magistrate did not make a finding regarding which pamphlet was offered). The footage showed the male of the couple spoke to Mrs Clubb, declined the pamphlet and the couple then moved away from Mrs Clubb. The magistrate held that the engagement appeared polite and there was no evidence of duress or violence.¹⁵ Magistrate Bazzani found that the provisions did not breach the implied freedom and convicted Mrs Clubb for violating the communication prohibition and imposed a \$5,000.00 fine and a two year good behaviour bond.

A central consideration in determining whether the Tasmanian and Victorian Acts will be found to be constitutional is the extent of the burden that the laws place on the freedom of political communication. As the plurality stated in *Brown v Tasmania*: '[g]enerally speaking, the sufficiency of the justification required for such a burden should be thought to require some correspondence with the extent of that burden'.¹⁶ Similarly, in *McCloy v New South Wales* the majority held that 'the greater the restriction on the freedom, the more important the public interest purpose of the legislation must be for the law to be proportionate'.¹⁷

Considering the centrality of this issue to a consideration of the constitutionality of the Acts this article considers the extent to which the provisions burden political communication. Part II examines the broad range of communications prohibited outside abortion premises. Part III considers the extent to which communications not directed at abortion premises may be prohibited under the Acts. Part IV assesses the area that may be covered by access zones and considers any difficulties that may be involved in identifying access zones. Part V evaluates the gravity of the penalties for violating the provisions.

II THE BROAD RANGE OF COMMUNICATION PROHIBITED

OUTSIDE ABORTION PREMISES

A Conduct critical of abortion will be prohibited

The prohibitions in the Tasmanian Act against 'protesting' and in the Victorian Act against 'communications reasonably likely to cause distress or anxiety' have the potential to prohibit an

¹⁵ *Edwards v Clubb* (Unreported, Magistrates' Court of Victoria, Magistrate Bazzani, 23 December 2017, Case Number G12298656) 3.

¹⁶ *Brown v Tasmania* [2017] HCA 43 (18 October 2017) [118] (Kiefel CJ, Bell and Keane JJ) citing *Tajjour v New South Wales* (2014) 254 CLR 508, 580 [151] (Gageler J).

¹⁷ *McCloy v New South Wales* (2015) 257 CLR 178, 219 [87] (French CJ, Kiefel, Bell and Keane JJ).

extensive range of non-violent conduct outside abortion premises. As indicated in *Preston and Clubb*, they can be expected to forbid any kind of communication that claims that terminations are unethical or that they may cause a woman to suffer physical or mental harm. The provisions will also likely prohibit individuals from advising women entering the premises that there are alternative options available with people who are willing to care for both women and their children. Perhaps most relevant to the High Court challenge, the provisions will also prohibit communications about legal and political matters relevant to the provisions. Under the provisions, for example, it would likely be illegal in the vicinity of abortion premises to criticise the provisions or the politicians who introduced the laws, recommend voting for a particular political party with a pro-life platform or ask those entering the premises to help campaign to reform the law.

Silent vigils outside abortion premises where the individual says and distributes nothing could also be prohibited if there is something that the person wears or does that could be understood as communicating disapproval of abortion. For example, praying in an obvious manner or wearing a symbol that is associated with anti-abortion views could be in violation of the provisions. That the provisions were designed to have this effect was made clear in the second reading speech for the Tasmanian Act in which the Minister, Michelle O'Byrne, stated that

it will stop the silent protests outside termination clinics that purport to be a vigil of sorts or a peaceful protest but which, by their very location, are undoubtedly an expression of disapproval. As one submitter to the consultation framed it, there is nothing peaceful about shaming complete strangers about private decisions made about their bodies. I respect that each of us are entitled to our views. What I do not respect is the manner in which some people choose to express them, and standing on the street outside a medical facility with the express purpose of dissuading or delaying a woman from accessing a legitimate reproductive health service is, to my mind, quite unacceptable.¹⁸

If individuals engage in their silent activity in a way that cannot reasonably be understood to communicate a message of disapproval then there may not be a violation of the provisions. Such a result was found in *Bluett v Mellor*¹⁹ ('*Bluett*') where three defendants were prosecuted under

¹⁸ Tasmania, *Parliamentary Debates*, House of Assembly, 16 April 2013 (Michelle O'Byrne).

¹⁹ *Bluett v Mellor, Bluett v Popplewell and Bluett v Clancy* ACT Magistrates Court CC2017/2722).

the communication prohibition around ACT abortion premises.²⁰ Magistrate Theakston acquitted the three defendants on the basis that a protest requires some form of communication from a protester and that silent prayer and the mere display of rosary beads could not be considered to be a type of communication.²¹ However, any type of non-verbal conduct that could be considered to communicate disapproval will likely violate the provisions. Even the act of walking through an access zone wearing symbols that may be associated with disapproval of abortion (e.g. a cross, rosary beads, religious clothing, clothing with pro-life slogans, etc) could result in criminal prosecution.

An additional feature of the provisions that substantially increases the extent of their operation is that they apply even if the person entering the premise consents to the communication or initiates the conversation with another person in the vicinity of the premises. Further, as all that is required under the provisions is that there is a ‘protest’ or communication that is ‘reasonably likely to cause distress or anxiety’ a person can be convicted if the person entering the premises did not want the matter to be prosecuted and did not suffer any distress or anxiety. The provisions even raise the possibility that those entering the premises may use the provisions maliciously by engaging in conversations in access zones with individuals who are anti-abortion and then making a complaint when a comment is made that may violate the provisions.

A conviction is also possible for communications that are not actually seen or heard by anyone entering the premise as the provisions prohibit conduct that is ‘able to be seen or heard by a person accessing’ the abortion premise. The intention for the provision to operate in this manner was made clear in the second reading speech in the Victorian Parliament which stated ‘[t]his offence does not require that an individual who is accessing or leaving such premises must actually see or hear the activity’.²² Such an interpretation substantially increases the operation of the provision if there is no requirement that anyone needs to even be attempting to access the premise in order for an offence to be found.

²⁰ *Health Act 1993* (ACT) ss 85-87.

²¹ *Bluett v Popplewell* [2018] ACTMC 2 [84]-[87].

²² Victoria, *Parliamentary Debates*, Legislative Assembly, 22 October 2015, 3976 (Jill Hennessy).

B *Conduct supportive of access to abortion may be prohibited*

Although these substantial restrictions are an expected result of the provisions, the ambiguous nature of the prohibitions will mean that the ambit of their operation will likely be much larger than this. The prohibitions could apply, at least under the Victorian legislation, to a person who is supportive of abortion rights but is concerned that some women are not making fully informed choices and who simply wants to talk to women entering abortion premises to make sure that they are making an informed choice. They could also prohibit someone who merely wants to obtain more information about what happens inside abortion premises and attempts to communicate with those entering or leaving the premises.

The provisions could also prevent members of the community from discussing important matters with those entering abortion premises. For example, there may be legitimate concerns about the safety of particular abortion premises but journalists or other individuals who want to discuss these concerns with employees may be unwilling to approach employees entering the premises due to concerns that this may violate the provisions. Similarly, if health professionals at the abortion premises are being investigated for malpractice or for performing illegal abortions the provisions might discourage individuals from advising women entering the premises about the allegations on the understanding that it could violate the provisions.²³ Although such conduct might be permitted on the basis that it is not a ‘protest’ or ‘reasonably likely to cause distress or anxiety’, the belief that there might be a conviction under the provisions may have the effect of prohibiting a wide range of communications that the parliamentarians supporting the provisions did not intend.

A particular problem with the Victorian provisions is that it may also operate to criminalise the conduct of patients, police officers or support persons. Section 185B(2) of the Act makes it clear that ‘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’. However, there is no such protection provided to the pregnant woman, police officers or a family member or friend who is accompanying the pregnant woman as a support person to the premise. They could be prosecuted

²³ For a recent example of a case that held that the doctor had performed an illegal abortion see *R v Sood* [2006] NSWSC 1141.

if they say or do something that someone who is accessing the premises can see or hear and which is ‘reasonably likely to cause distress or anxiety’.

The scope of the prohibition can be interpreted to not just cover statements to the woman by the support persons but also statements by the pregnant woman or the support persons to anyone in the environment. Such an outcome is possible as the provision simply prohibits conduct that is ‘reasonably likely to cause distress or anxiety’. It does not restrict the operation of the provision to only prohibit conduct that is reasonably likely to cause distress or anxiety to a person entering the premises. For example, if individuals who do and say nothing except stand near the premises are not considered to be in violation of the Act and the woman or a support person says something offensive to them then this statement could be in violation of the Act. Support for such an interpretation can be found in the defence provided in s 185B(2) that only protects an employee or other person who provides services at the premises. It is arguable that if Parliament had wanted this defence to apply to others entering the premises then it could easily have expanded the defence.

A court could hold that a defence exists under s 185B(2) for the support person and police officer by interpreting the phrase ‘other person who provides services’ to include them, but it would be hard to argue that the phrase could extend to the pregnant woman who is the recipient of the services. Alternatively, a court might find that the phrase ‘reasonably likely to cause distress or anxiety’ is ambiguous and interpret it to apply only to a person accessing the premises. Under the legislation the purpose of the provision is stated as ‘(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’.²⁴ Considering these purposes a narrow interpretation of the provisions may be adopted, which would remove the possibility of patients, support persons and police officers violating the provisions except in the rare situation that their conduct was ‘reasonably likely to cause distress or anxiety’ to persons entering the premises.

²⁴ *Public Health and Wellbeing Act 2008* (Vic) s 185A.

C The importance of on-site protests

The provisions will clearly have the effect of preventing individuals from engaging in protests and other forms of communication in the vicinity of the sites where the activity of concern takes place. Prohibitions against on-site protests and other activities are particularly limiting on political communication as it is at the sites where the controversial activity is occurring that individuals will often be able to most effectively promote their message to the people operating on that site and to the community. The importance of on-site action is widely recognised as demonstrated by the conduct of activists in other areas such as forestry operations, mining, churches, abattoirs and Greyhound racing. The importance of location to a protest in the context of forestry operation was emphasised in *Brown v Tasmania* by the plurality who noted that ‘even though protests about forest operations may be communicated in other ways ... other methods of communication are less likely to be as effective as the communication of images of protesters pointing to what they claim to be damage to the natural environment.’²⁵ A point affirmed by Gageler J in the same case:

The communicative power of on-site protests, the special case emphasises and common experience confirms, lies in the generation of images capable of attracting the attention of the public and of politicians to the particular area of the environment which is claimed to be threatened and sought to be protected ... The nature of the burden imposed on political communication by the impugned provisions is that the burden can be expected to fall in practice almost exclusively on on-site political protests of that description. Not only are the provisions targeted by the definition of protester to political communication, but they are targeted by the same definition to political communication occurring at particular geographical locations. Given those geographical locations, and given the history of on-site protests in Tasmania, it would be fanciful to think that the impugned provisions are not likely to impact on the chosen method of political communication of those whose advocacy is directed to bringing about legislative or regulatory change on environmental issues and would have little or no impact on political communication by those whose advocacy is directed to other political ends.²⁶

Similarly, Nettle J noted that

²⁵ *Brown v Tasmania* [2017] HCA 43 (18 October 2017) [117].

²⁶ *Ibid* [191], [193].

there is a long history of environmental protests in Australia, especially in Tasmania, aimed at influencing public and governmental attitudes towards logging and the protection of forests. In the experience of the first plaintiff, on-site protests against forest operations and the broadcasting of images of parts of the forest environment at risk of destruction are the primary means of bringing such issues to the attention of the public and parliamentarians. Media coverage, including social media coverage, of on-site protests enables images of the threatened environment to be broadcast and disseminated widely, and the public is more likely to take an interest in an environmental issue when it can see the environment sought to be protected. On site protests have thus contributed to governments in Tasmania and throughout Australia granting legislative or regulatory environmental protection to areas not previously protected.²⁷

III THE EXPANSIVE OPERATION OF THE PROVISIONS

A Conduct not aimed at abortion premises will be prohibited

As the Acts do not make it a requirement that the person's conduct is directed at abortion premises they would likely prohibit a wide range of behaviour within the 150m zones that could be seen or heard by those attempting to access the premises but which is not aimed at these individuals. This conduct could include an anti-abortion protest not aimed at abortion premises, individuals wearing anti-abortion clothing or symbols and a vehicle driving within a zone with an anti-abortion sign.

The provisions could even impact individuals in private residences or commercial premises whose conduct communicates an anti-abortion message that can be seen or heard by a person on their way to an abortion premise. A person discussing abortion or watching a documentary on abortion in their home, for example, could violate the provisions if a person walking to the abortion premises on the footpath could hear the statements made. Similarly, a bookstore will likely be prohibited under the provisions from displaying an abortion related book, poster or other object in its display window or some other internal or external location that may be observable by a person attempting to access an abortion premise. That the provisions could have this kind of impact was made clear by Ms Mikakos, Victorian Minister for Families and Children, who stated that an 'outward-facing sign about abortion in a window of a property that

²⁷ Ibid [240].

is in the safe access zone may be prohibited under the legislation if it is displayed in a manner that means it is able to be seen by a person accessing or leaving a premises [sic] that provides abortions and is reasonably likely to cause distress and anxiety'.²⁸

B Universities and other educational institutions

A further problem with the provisions is that they may limit or prevent discussions at universities and other educational institutions. A premise at which abortions are performed that is close to an educational institutions will make it likely that at least part of the access zone will include the institution and so will make it a criminal offence to discuss abortion in a way that may violate the provisions. The Royal Women's Hospital in Melbourne, for example, performs abortions and is near The University of Melbourne. Depending upon how the perimeter of the Royal Women's Hospital is determined, the 150m access zone may result in a substantial area of the University being covered by an access zone. One of the campuses of The Australian Catholic University is similarly covered by an access zone as Dr Rachel Carling-Jenkins explains:

One of the many Dr Marie Stopes abortion clinics is at 182–184 Victoria Parade, East Melbourne. The 150-metre radius — or the no-go zone — encompasses the Greek Orthodox church next door and all the grounds of the Australian Catholic University. Pro-life discussion, which may cause distress under this bill, will be prevented outside this church, on the grounds of the Australian Catholic University, on the grounds of the Catholic Education Office and on part of St Patrick's Cathedral property.²⁹

The potential for the access zones to limit communications at universities and other educational institutions indicates the highly restrictive nature of the legislation as such institutions are, at least in theory, supposed to be places where open discussions of ethical and political issues is permitted and ideally encouraged for the benefit of society.

C Houses of worship

The provisions will also limit communication on the grounds of churches and other houses of worship. As indicated in the previous section, a single access zone in Melbourne will prohibit

²⁸ Victoria, *Parliamentary Debates*, Legislative Council, 24 November 2015, 4784 (Jenny Mikakos).

²⁹ *Ibid* 4755-6 (Rachel Carling-Jenkins).

communication about and against abortion on the entire grounds of a Greek Orthodox Church (the Holy Church of the Annunciation of Our Lady) and part of the grounds of a Catholic Cathedral (St Patrick's Cathedral). On the adverse impact that the prohibitions will have on the Greek Orthodox Church, Dr Rachel Carling-Jenkins advised the Victorian Parliament that the Very Reverend Father Kosmas Damianides from the affected Church 'has expressed grave concerns about this bill and what its implications may be for his parishioners, who may well discuss their pro-life views outside the church, which practically shares a wall with an abortion clinic'.³⁰

The operation of the access zones in this respect provides a further example of how the provision may adversely affect political communication but its impact in relation to communications with a religious dimension may be considered to be particularly significant. The importance of freedom of communication to religious liberty is clearly recognised under international law. The *International Covenant on Civil and Political Rights*, for example, holds that '[e]veryone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in *public or private*, to manifest his religion or belief in worship, observance, practice and *teaching*'.³¹

The High Court, however, may hold that the impact of the provisions on religious freedom is not a relevant additional consideration as the essence of the inquiry is on the burden on political communication and whether the provision has a particular adverse impact on political communication with a religious dimension is not relevant to this inquiry.

D *Politicians and political parties*

Political parties and individual politicians may also be adversely affected by the communication prohibitions. A standard practice, especially during election periods, is to affix political material in prominent areas and for supporters to distribute pamphlets in public places promoting the positions of the party or the politician. Those parties and politicians widely known to be critical

³⁰ Ibid 4756 (Rachel Carling-Jenkins).

³¹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) Art 18(1) (emphasis added).

of abortion may violate the provisions if they promote these policies in an access zone. Even if there is no specific mention of abortion in the material used, the mere mention of the name of such a political party or politician in an access zone may be sufficient to meet the requirements of a communication that is reasonably likely to cause distress or anxiety. Considering the commitment of some anti-abortion activists they could even establish a political party with an explicitly anti-abortion name (e.g. the Australian Pro-Life Party) that would make it even more likely that the mere use of the party's name within an access zone would be a criminal offence. A political party or politician could even have an office within an access zone and under the provisions any display of material outlining their position on abortion or even merely identifying themselves could breach the provisions.

The possible impact of the provisions on the campaigns of politicians was considered by Ms Jenny Mikakos, Victorian Minister for Families and Children, who claimed that

a billboard that would be advocating a vote for a certain political party due to its stance on abortion ... would likely be a permissible act because such a billboard would not be targeting women accessing abortions and would therefore not be likely to be perceived as distressing. So if a member or political party were to be distributing material that related to their electioneering, as long as it was not perceived as distressing in terms of the definitions under the act, that would not be problematic. It is a different matter when people are handing out material that has very graphic photographs of fetuses or material of that nature, because that type of material may fall within the provisions of the act that relate to communicating in such a way that is likely to cause distress or anxiety to a person accessing an abortion clinic.³²

The statement by Mikakos concedes that it would be possible for politicians and political parties to be prosecuted if they were distributing material that satisfied the requirement of being reasonably likely to cause distress or anxiety. Considering the adverse impact that the provisions will have on this central aspect of political communication the provisions should be recognised as placing a heavy burden on the implied freedom.

³² Victoria, *Parliamentary Debates*, Legislative Council, 24 November 2015, 4790 (Jenny Mikakos).

E *A limited interpretation of ‘attempting to access’*

The view that the phrase ‘attempting to access’ means that conduct occurring anywhere in the 150m zone might violate the provisions appears to have been rejected by Magistrate Rheinberger in *Preston* who instead preferred a narrower interpretation meaning that the person ‘attempting to access’ must be in close proximity to the premises.³³ The merit of this interpretation is questionable. A broad interpretation of the meaning of ‘attempting to access’ would provide better protection to women seeking terminations and would seem to be more in line with the purposes of the provisions aimed at protecting women from physical and emotional harm. Support for such an interpretation may be provided by Jill Hennessy, Minister for Health, who in relation to the prohibitions in Victoria made it clear in the Statement of Compatibility that a

safe access zone of 150 metres has been determined to be appropriate because it provides a reasonable area to enable women and their support people to access premises at which abortions are provided without being subjected to such communication. As I have explained, the conduct has included following women and their support persons to and from their private vehicles and public transport. There have also been many instances of staff being followed to local shops and services, and subjected to verbal abuse. Such conduct has often occurred well beyond 150 metres. However, I consider that 150 metres is a reasonable area that is necessary to enable women and their support persons to access premises, safely and in a manner that respects their privacy and dignity. While such conduct has occurred beyond 150 metres of some abortion services, having a clear safe access zone of 150metres will enable abortion services to advise women of how they can best access the premises without the risk of such conduct, such as where they can park their vehicles or use public transport.³⁴

Further support for a broad interpretation can be found in the terminology used to describe the protected area. The Tasmanian Act uses the phrase ‘access zone’ which supports the view that once a woman seeking a termination enters the 150m zone she is to be understood as having started the process of ‘attempting to access’ the premises. If this broader interpretation is preferred the High Court then the burden on the implied freedom by the Acts will be substantially increased in a range of ways such as those discussed above.

³³ *Police v Preston and Stallard* [2016] (27 July 2016) TASMC 14 [27].

³⁴ Victoria, *Parliamentary Debates*, Legislative Assembly, 22 October 2015, 3973-4 (Jill Hennessy).

IV THE SUBSTANTIAL AREA RESTRICTED BY ACCESS ZONES

A The large number of access zones created

A further criticism of the provisions is that they will create many access zones throughout Tasmania and Victoria making a substantial part of both States areas within which communications about and against abortions will be prohibited. In Tasmania, there would be access zones around the public hospitals (Royal Hobart Hospital, Launceston General Hospital, North West Regional Hospital and Mersey Community Hospital) at which abortions are performed. There may also be access zones around the five private hospitals in Tasmania (Hobart Private Hospital, St Helen's Private Hospital, North West Private Hospital, The Hobart Clinic and Steele Street Clinic Private Hospital) and the four Catholic hospitals (Lenah Valley Campus, St John's Campus, St Luke's Campus and St Vincent's Campus) if they offer surgical abortions and/or medical abortions such as RU486 or Plan B (or similar). In Victoria, according to the Australian Institute of Health and Welfare, there are 132 public and private hospitals in Melbourne with a similar number throughout rural Victoria.³⁵ Although some of these hospitals would not provide any reproductive health services, access zones would be established around those hospitals that provide surgical or medical abortions.

Catholic and other religiously affiliated hospitals may not offer surgical abortion or RU486 but they may offer (or may decide to offer in the near future) oral contraceptives and Plan B (or similar) for victims of sexual assault or for other patients who may benefit from the medication.³⁶ This type of medication can operate as a contraceptive but may also operate as an abortifacient by preventing implantation and on this basis if these hospitals do offer this medication then they could be considered to be abortion premises under the provisions.³⁷ Such an outcome is possible

³⁵ Australian Institute of Health and Welfare, 'My Hospitals' (2018) <<https://www.myhospitals.gov.au/browse-hospitals/vic/melbourne/melbourne>>.

³⁶ See, eg, Christa Pongratz-Lippitt 'German bishops give leeway on contraception in rape cases' (22 February 2013) <<https://www.ncronline.org/news/world/german-bishops-give-leeway-contraception-rape-cases>>.

³⁷ The dispute regarding whether Plan B and similar medication can have the effect of preventing implantation after fertilisation and whether such a result should be considered to constitute an abortion is an ongoing scientific and philosophical controversy. See, eg, Nicanor Pier Giorgio Austriaco, 'Is Plan B an Abortifacient? A Critical Look at the Scientific Evidence' (2007) 7(4) *The National Catholic Bioethics Quarterly* 703; Chris Kahlenborn, Rebecca Peck and Walter B Severs, 'Mechanism of action of levonorgestrel emergency contraception' (2015) 82 *The Linacre Quarterly* 18; R Alta Charo, 'Alternative Science and Human Reproduction' (2017) 377 *The New England Journal of Medicine* 309; Peter J Cataldo, 'Moral Certitude in the Use of Levonorgestrel for the Treatment of Sexual Assault Survivors' in Jason T Eberl (ed) *Contemporary Controversies in Catholic Bioethics* (Springer, 2017) 197.

as the Tasmanian provisions apply to premises at which ‘terminations’ are provided and the provisions define ‘terminate’ as meaning ‘to discontinue a pregnancy so that it does not progress to birth by – (a) using an instrument or a combination of instruments; or (b) using a drug or a combination of drugs; or (c) any other means’.³⁸ Similarly, the Victorian provisions apply to premises at which ‘abortions’ are provided with the definition of ‘abortion’ taken from the *Abortion Law Reform Act 2008* (Vic) which defines ‘abortion’ as ‘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’.³⁹ A court could hold that a pregnancy only begins at implantation and so exclude medications like Plan B from the scope of the provisions.⁴⁰ However, if a broader interpretation of the provisions is adopted and the potential of medication like Plan B to ‘discontinue’ or ‘terminate’ a pregnancy is accepted then a court could hold that premises that provide this medication are abortion premises for the purpose of the Acts.

In addition to the premises that specifically provide abortions, doctor’s clinics and medical centres that provide RU486 would also likely qualify as ‘premises at which terminations are provided’. It is difficult to know the number of doctors who have been trained to administer RU486 as the government does not make this information easily accessible to the public due to its sensitive nature.⁴¹ However, Ms Mikakos, the Minister for Families and Children in Victoria, estimated that in 2015 there were about 100 GPs trained in the administration of RU486 in Victoria.⁴² An access zone could exist around any clinic in Victoria or Tasmania where a doctor administers RU486 and considering that these doctors may work at multiple clinics a significant number of access zones would be created by these doctors. Any clinic that administers Plan B (or similar) could also be covered by an access zone on the understanding that this medication has the potential to end a pregnancy. On the expansive scope of the provisions in Victoria, Dr Rachel Carling-Jenkins noted that there are ‘40,000 GPs in Victoria and an estimated 10,000 GP clinics.

³⁸ *Reproductive Health (Access to Terminations) Act 2013* (Tas) s 3.

³⁹ *Abortion Law Reform Act 2008* (Vic) s 3.

⁴⁰ R Alta Charo, ‘Alternative Science and Human Reproduction’ (2017) 377 *The New England Journal of Medicine* 309.

⁴¹ Victoria, *Parliamentary Debates*, Legislative Council, 24 November 2015, 4786 (Jenny Mikakos).

⁴² *Ibid* 4785 (Jenny Mikakos).

There are many with such clinics in the CBD. Should this extreme law pass, with a 150-metre radius around each clinic, almost the entire CBD will be a no-go zone for pro-life activism'.⁴³

It is also possible that pharmacies in Tasmania will also be considered to be abortion premises for the purpose of the Act. Under the Victorian provisions it is explicitly stated that 'premises at which abortions are provided does not include a pharmacy'.⁴⁴ Similarly, the comparable provisions in the Northern Territory make it clear that 'premises for performing terminations ... does not include a pharmacy'.⁴⁵ However, as there is no such exclusion of pharmacies in the Tasmanian provisions it is arguable that where RU486 and Plan B (or similar medications) are sold then these pharmacies may fall within the description of 'premises at which terminations are provided'. Although such a result is possible, the High Court may interpret the phrase 'premises at which terminations are provided' to only refer to premises that typically do more than simply provide a person with medication and general advice and so exclude pharmacies from the operation of the Tasmanian legislation on this basis. A similar approach could also be taken in relation to RU486 in which case the scope of the provisions would be further narrowed.

The area in which abortion related communications are currently prohibited may increase in the future if additional hospitals, doctor's clinics and medical centres decide to start providing surgical or medical terminations. The general nature of the provisions even creates the possibility of malicious abuse as an abortion provider could begin operating in a location where they know that public discussions regarding abortion are likely.

The reverse could also apply where particular premises stop providing surgical or medical terminations but decide against publicly announcing their decision. This would create the undesirable situation that community members would incorrectly believe that abortion related communications are illegal in certain public areas that are no longer covered by an access zone. It could also lead to police officers arresting individuals on the false belief that the person is in an access zone. This would be a very similar situation to *Brown v Tasmania* where the expansive

⁴³ Ibid 4755 (Rachel Carling-Jenkins).

⁴⁴ *Public Health and Wellbeing Act 2008* (Vic) s 185B(1).

⁴⁵ *Termination of Pregnancy Law Reform Act 2017* (NT) s 4.

nature of the provisions caused individuals opposed to the forestry operations to be arrested and charged under the legislation when they were not in a prohibited area.⁴⁶

Considering the large number of hospitals, abortion premises, medical centres and general practice clinics the Tasmanian and Victorian provisions may have created hundreds, if not thousands, of access zones in which communications about and against abortions are prohibited. This represents a major limitation on the ability of individuals to discuss abortion in an extraordinarily large area of both States. On this basis the provisions should be regarded as imposing a major restriction on the implied freedom.

B The difficulty in determining the area of access zones

In addition to the extensive area covered by the provisions, a further problem, especially for activists and police officers, is working out the locations and boundaries of access zones. For some locations, such as abortion premises and public hospitals, it will be widely known that abortions are performed at the location and that access zones have now been established at those locations. However, for many other sites it will not be widely known that abortions are performed at the site often because the managers intentionally restrict this information due to the sensitive nature of abortion. Nevertheless, access zones will still be established around these sites as knowledge that abortions are performed on the premises is not required for an access site to be established.

A related problem is determining the precise boundaries of the 150m zones around abortion premises. It is unclear whether the zone should be from the particular locations where abortions are performed or from the entire perimeter of the premises. If it is held to be from the perimeter then for locations such as major hospitals a very large access zone will be created from which protesters are excluded compared to the access zones that will apply to smaller premises. Even for smaller premises the access zones will still be very large establishing zones that are at least 70,650 m² (150m radius x 150m radius x 3.14) in which abortion related communications may constitute a criminal offence.

⁴⁶ *Brown v Tasmania* [2017] HCA 43 (18 October 2017) [150] (Kiefel CJ, Bell and Keane JJ).

This inability to reliably identify premises at which terminations are provided and the boundaries of access zones may result in individuals breaching the provisions even though they did not know that they were within an access zone. Such a possibility was recognised in *Bluett* where the magistrate held that a conviction could be secured without the person knowing they were in an access zone if they were reckless on the grounds that they were aware that there was a substantial risk that they were entering an access zone and they had no valid justification for entering the area.⁴⁷ This ambiguity surrounding the operation of the provisions is also likely to deter individuals from communicating about abortion in many areas throughout Tasmania and Victoria on the basis that an area might be protected by an access zone.

In *Brown v Tasmania*, the plurality in holding that the impugned provision was unconstitutional placed significant weight on how the design of the Act limited political communication it was not intended to limit. On the unintended operation of the provisions their Honours held

[t]hat the Protesters Act may operate effectively to stifle political communication which it is not the purpose of the Act to stifle is not merely a function of the vagaries of the application of the concepts employed by the legislation to “facts on the ground”; it is a consequence of the design of the Act in its deployment of a possibly mistaken, albeit reasonable, belief of a police officer as the mechanism by which it operates. Protests may be effectively terminated in circumstances where it is not necessary that the protester has, in truth, contravened [the provisions], where it is not necessary to establish that any offence has been committed by the protester, and where judicial review of the mechanism whereby such a result is brought about is not practically possible before the protest is terminated.⁴⁸

⁴⁷ *Criminal Code 2002* (ACT) s 20(2).

⁴⁸ *Brown v Tasmania* [2017] HCA 43 (18 October 2017) [79] (Kiefel CJ, Bell and Keane JJ).

V THE GRAVITY OF THE PROHIBITION

A Significant penalties apply for violating the prohibitions

Under the Tasmanian Act a person who engages in prohibited behaviour within an access zone faces a penalty of a fine not exceeding 75 penalty units (75 x \$159 = \$11,925) or imprisonment for a term not exceeding 12 months, or both.⁴⁹ Under the Victorian Act a person who engages in prohibited behaviour within a safe access zone faces a penalty of 120 penalty units (120 x \$158.57 = \$19,028.40) or imprisonment for a term not exceeding 12 months.⁵⁰ These are significant penalties that permit a court to impose a substantial punishment including a lengthy prison sentence even for first time offenders. There are also no defences in the provisions that a defendant can rely upon to avoid conviction such as a ‘reasonable excuse’ defence that exists in the Victorian Act in relation to other types of ‘prohibited behaviour’ or that the person entering the clinic consented to or initiated the conversation.⁵¹

In *Brown v Tasmania*, the plurality considered the substantial penalties that applied to violating the prohibitions on protesting to be a further factor in finding that a significant burden was placed on the implied freedom. Their Honours held that

[t]he possibility that a protester might be liable to a substantial penalty should not be overlooked, but it may not loom so largely as a deterrent. This may be because no charge under the Protesters Act has been successfully prosecuted. There has been no successful prosecution for the reason that mistakes have been made about whether the Protesters Act applied. However, from the point of view of protesters, there is nothing to suggest that mistakes will not continue to be made. That circumstance will operate as a significant deterrent. That will occur as a practical matter whether or not a prosecution for an offence is pursued to a successful conclusion and without any occasion for the determination by a court of whether or not the operation of provisions infringes the implied freedom in the circumstances of the case.⁵²

⁴⁹ Acting Minister for Justice (Tasmania), ‘Penalty Units and Other Penalties’ in Tasmania, *Tasmanian Government Gazette*, No 21, 24 May 2017, 429, 431 <http://www.gazette.tas.gov.au/editions/2017/may_2017/21703_-_Gazette_24_May_2017.pdf>.

⁵⁰ Treasurer, ‘Notice Under Section 6, Fixing The Value Of A Fee Unit And A Penalty Unit’ in Victoria, *Victoria Government Gazette*, No G 13, 30 March 2017, 485, 541 <<http://www.gazette.vic.gov.au/gazette/Gazettes2017/GG2017G013.pdf#page=13>>.

⁵¹ *Public Health and Wellbeing Act 2008* (Vic) s 185B(1) def of ‘prohibited behaviour’ paras (c) and (d).

⁵² *Brown v Tasmania* [2017] HCA 43 (18 October 2017) [87] (Kiefel CJ, Bell and Keane JJ).

Unlike the legislation in *Brown v Tasmania*, there is no uncertainty regarding whether convictions will be secured against those who violate the Tasmanian and Victorian Acts considering that convictions have already been secured against those who were found to have violated the prohibitions. The substantial penalties and the likelihood of conviction is a significant restriction on the freedom as many individuals would be unwilling to engage in a protest if they considered that it could result in them being arrested and convicted of a crime requiring them to pay a substantial fine, serve a sentence of imprisonment up to 12 months and have a permanent criminal record.

B The prohibitions are permanent

The Tasmanian and Victorian Parliaments intend these laws to permanently ban communication about and against abortion in the vicinity of abortion premises. A permanent ban on political communication in an area is far more serious than the temporary bans for events such as the 2007 Asia-Pacific Economic Cooperation meeting held in Sydney. In *Brown v Tasmania*, the plurality considered the possible long duration of bans under the impugned Act was a significant burden on political communication as the Act could

bring the protest of an entire group of persons to a halt and its effect will extend over time. Protesters will be deterred from returning to areas around forest operations for days and even months. During this time the operations about which they seek to protest will continue but their voices will not be heard.⁵³

Unlike the temporary bans in the legislation in *Brown v Tasmania* the bans under the Tasmanian and Victorian provisions are permanent. The greater severity of the prohibitions contained in the provisions provides further support for a finding by the High Court that the provisions place a substantial burden on the implied freedom.

VI CONCLUSION

The burden that the provisions place on the implied freedom should be regarded as substantial considering that the prohibitions on ‘protests’ and communications that are ‘reasonably likely to cause distress or anxiety’ will likely prohibit a range of different types of communication around

⁵³ Ibid [86].

abortion premises. Further, the uncertainty regarding the location of access zones, the precise boundaries of the zones protected and the conduct that is prohibited in these locations may cause many individuals to decide not to protest, offer help or communicate about political matters anywhere near abortion premises through fear that they may violate the provisions even though they may not be within an access zone or otherwise breaching the provisions.

As discussed in the introduction, the assessment of whether a provision is unconstitutional for breaching the implied freedom involves the application of a detailed three part test. Although it is beyond the scope of this article to conduct a detailed assessment of the likely outcome of the appeal, it would not be unexpected for the provisions to be found to be compatible with the implied freedom especially if the High Court holds that the purposes of the provisions are to protect pregnant women from emotional harm and unsolicited offers of assistance and that these purposes are of such substantial importance that a significant burden on political communication can be justified.

Such an outcome, however, is not certain. An issue that will likely be central to the appeal is the requirement of ‘necessity’ explicitly identified in the proportionality test as requiring that there be ‘no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom’. The High Court could find that there are alternative approaches to regulating the area that indicate that the Tasmanian and Victorian laws are not necessary. Some possible alternative approaches could be laws that permit offering assistance to pregnant women while retaining prohibitions against statements critical of abortion, provide greater clarity regarding the location and boundaries of access zones,⁵⁴ suspend the operation of the provisions during election periods,⁵⁵ exempt sensitive areas within access zones such as houses of worship and universities, permit consensual conversations and/or impose less substantial penalties. The possibility that some of these approaches could be regarded as valid alternative means for achieving the purposes of the provisions may be an influential factor in convincing at least a majority of the High Court that the burden cannot be justified and the provisions are unconstitutional for breaching the implied freedom.

⁵⁴ For example, the approach adopted in the ACT involved creating a map of the access zone that clearly identified the location of the zone and its boundaries: *Health Act 1993* (ACT) ss 85-87; *Health (Protected Area) Declaration 2016 (No 2)* (ACT).

⁵⁵ Such an approach has been proposed in New South Wales: *Public Health Amendment (Safe Access to Reproductive Health Clinics) Bill 2018* (NSW).