

**IN THE HIGH COURT OF AUSTRALIA  
MELBOURNE REGISTRY**

**No. M46 of 2018**

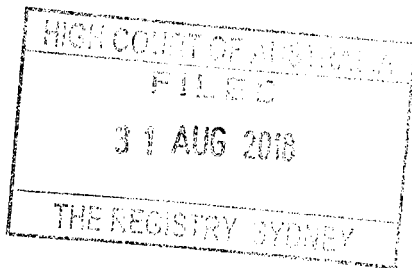
**BETWEEN:**

**KATHLEEN CLUBB**  
Appellant

and

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**ALYCE EDWARDS**  
First Respondent



**ATTORNEY-GENERAL FOR VICTORIA**  
Second Respondent

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**SUBMISSION OF THE ACCESS ZONE ACTION GROUP**

**SEEKING LEAVE TO APPEAR AS AMICUS CURIAE**

**PART I: CERTIFICATION**

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

**PART II: BASIS OF APPLICATION TO APPEAR AS AMICUS CURIAE**

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2. The Access Zone Action Group (AAG) seeks leave to appear as *amicus curiae* to make submissions against the validity of s 185D (when read with definition (b) of 'prohibited behaviour' in s 185B(1)) of the *Public Health and Wellbeing Act 2008* (Vic) (**the Act**) (**the communication prohibition**).  
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3. The AAG is a group of health professionals and lawyers who share a common concern about legislation establishing access zones around abortion premises with a particular concern about legal prohibitions against respectful offers of assistance to women considering abortion.
4. If leave is granted, the AAG seeks to limit its submissions to the third question of the test for the implied freedom of political communication (**the implied freedom**) articulated in *McCloy v State of New South Wales* (2015) 257 CLR 168 (**McCloy**) at 194–5 as modified in *Brown v Tasmania* (2017) 91 ALJR 1089 at [104].  
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5. The constitutionality of the Act was challenged in *Edwards v Clubb* (Unreported, Magistrates' Court of Victoria, Magistrate Bazzani, 6 Oct 2017, Case Number G12298656).<sup>1</sup>
6. In the constitutional challenge, the Attorney-General of Victoria in support of the Act relied on affidavits from Dr Phillip Goldstone affirmed on 26 July 2017 (**Goldstone affidavit**) and Dr Susan Allanson affirmed on 21 July 2017 (**Allanson affidavit**) and the medical studies annexed to these affidavits.<sup>2</sup>  
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7. The affidavits were relied upon by Magistrate Bazzani to uphold the validity of the Act with particular reliance placed on the Allanson affidavit to support the claim that individuals accessing abortion premises would be 'targets of intrinsically harmful behaviours on the part of anti-abortion protesters'.<sup>3</sup>
8. Dr Goldstone and Dr Allanson were not cross-examined about their evidence and no evidence from health professionals or medical studies was submitted by the defence in response to their affidavits.
9. The AAG seeks leave to make submissions on the merits of the claims made in the affidavits of Dr Goldstone and Dr Allanson and the medical studies upon which they rely considering that this evidence is relevant to the 'importance of the purpose' pursued by the legislature, which is central to answering the third question of the implied freedom test.<sup>4</sup>  
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<sup>1</sup> Core Appeal Book (AB) 282–289.

<sup>2</sup> AB 6–274.

<sup>3</sup> AB 289.

<sup>4</sup> *McCloy v New South Wales* (2015) 257 CLR 178 at 194–5 (French CJ, Kiefel, Bell, Keane JJ).

10. The AAG relies on the affidavits of Dr Joseph Turner sworn on 29 August 2018 (**Turner affidavit**), Ms Debbie Garratt sworn on 29 August 2018 (**Garratt affidavit**) and Dr Simon McCaffrey sworn on 30 August 2018 (**McCaffrey affidavit**) in support of its submissions.

### **PART III: ARGUMENT**

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11. The third question of the test for the implied freedom requires a Court that has found the purpose of a legislative provision to be legitimate to ask whether the law is ‘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?’<sup>5</sup>
12. Under the three-staged proportionality test proposed in *McCloy* for determining the answer to this question, the third stage requires that the law is ‘adequate in its balance’ which is ‘*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*’.<sup>6</sup>
13. The submission does not address the extent of the restriction that the law imposes on the freedom or the purpose that should be assigned to the communication prohibition.
14. The focus of the submission is on assisting the Court to understand the limitations of the medical studies and of the claims regarding the harm that may be caused by individuals outside abortion premises.
15. An understanding of these limitations may assist the Court more accurately assess the harm that may be prevented by the communication prohibition and determine the importance of the purpose of the prohibition.
16. Dr Turner, Ms Garratt and Dr McCaffrey in their affidavits assert that the limitations of the medical studies include:
- a) The limited amount of medical evidence provided to support claims of harm;<sup>7</sup>
  - b) The excessive reliance on one abortion premise, the Fertility Control Clinic;<sup>8</sup>
  - c) The failure of the evidence to account for the diversity of individuals outside abortion premises;<sup>9</sup>
  - d) The failure to consider that the overseas studies relied on may be not be applicable to an Australian setting;<sup>10</sup>

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<sup>5</sup> *Brown v Tasmania* (2017) 91 ALJR 1089 at [104].

<sup>6</sup> *McCloy v New South Wales* (2015) 257 CLR 178 at 195 (French CJ, Kiefel, Bell, Keane JJ).

<sup>7</sup> Turner affidavit [11]-[16].

<sup>8</sup> Turner affidavit [17]-[20].

<sup>9</sup> Turner affidavit [21]-[23]; Garratt affidavit [11]; McCaffrey affidavit [11]-[12].

<sup>10</sup> Turner affidavit [24]-[25].

- e) The failure to consider that adverse emotional reactions may be due to the stress of any medical procedure and a termination of pregnancy in particular;<sup>11</sup>
- f) The absence of control groups in most of the studies;<sup>12</sup>
- g) The difficulty in accurately comparing a patient's typical emotional state with their emotional state while at abortion premises;<sup>13</sup>
- 10 h) The possibility that third parties may influence an individual's perception of individuals outside abortion premises;<sup>14</sup>
- i) The possibility that a patient's support person may have compromised the reliability of data obtained;<sup>15</sup>
- j) The possibility that biased terminology may have compromised the reliability of data obtained;<sup>16</sup>
- k) The possibility that author bias may have compromised the reliability of data obtained;<sup>17</sup>
- 20 l) The possibility that the reliability of data in the studies may have been compromised if it was obtained while the research participant was still affected by sedation.<sup>18</sup>

17. On the harm that may be caused by individuals outside abortion premises, Dr Turner, Ms Garratt and Dr McCaffrey emphasise that there is no evidence that these individuals have ever caused someone to sustain a recognised psychiatric disorder.<sup>19</sup> Dr White in his psychiatric report found that none of the four employees of the Fertility Control Clinic (FCC) examined had suffered a formal psychiatric disorder.<sup>20</sup> This finding is particularly noteworthy considering the regular presence of the individuals outside the FCC and the lengthy employment history of the employees (Dr Allanson, for example, worked at the Fertility Control Clinic for 26 years).<sup>21</sup>

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18. On the claims regarding emotional harm, the evidence relied upon suffers from the limitations listed at paragraph [16] of this submission.<sup>22</sup> Further, the Foster Study specifically finds that individuals outside abortion premises do not seem to have an effect on women's emotions one week after the procedure.<sup>23</sup> There were additional limitations of the studies including a small sample size, inappropriate approach to locating research participants, difficulty in isolating the impact of those outside

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<sup>11</sup> Turner affidavit [26]-[29].

<sup>12</sup> Turner affidavit [30]-[33].

<sup>13</sup> Turner affidavit [34]-[37].

<sup>14</sup> Turner affidavit [38]-[42].

<sup>15</sup> Turner affidavit [43]-[45].

<sup>16</sup> Turner affidavit [46]-[53].

<sup>17</sup> Turner affidavit [54]-[57]; Garratt affidavit [14].

<sup>18</sup> Garratt affidavit [15].

<sup>19</sup> Turner affidavit [58]-[63].

<sup>20</sup> Turner affidavit [59].

<sup>21</sup> Turner affidavit [60]-[61].

<sup>22</sup> Turner affidavit [65].

<sup>23</sup> Turner affidavit [66].

abortion premises from other factors and inaccurately reporting the findings of the studies.<sup>24</sup>

19. On the claim that a ‘severely negative emotional state’ at the time of a procedure can increase a patient’s discomfort and need for anaesthesia, Dr Turner and Dr McCaffrey note that a patient may be in a negative emotional state due to factors unrelated to any individuals outside abortion premises.<sup>25</sup> They further note that medical abortions ‘do not involve the use of sedation or anaesthesia and surgical abortions are usually performed under sedation or a general anaesthesia’ so it is difficult to understand how a negative emotional state can lead to increased patient discomfort during a procedure or ‘why such an emotional state would increase a patient’s discomfort during recovery’.<sup>26</sup>
20. Dr Turner and Dr McCaffrey agree that health risks increase the later a surgical abortion is performed but consider that there is not sufficient evidence before the court to support as an expert opinion the statement 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.<sup>27</sup>
21. On the claim that patients may require more counselling due to the conduct of individuals outside abortion premises, Dr Allanson did not provide the number of individuals who may require additional counselling or exclude the possibility that such a need arose from unrelated factors. Therefore, 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.<sup>28</sup>
22. On the claim that it is difficult to attract and retain staff members due to the conduct of individuals outside abortion premises, Dr Allanson did not provide adequate data, especially comparative data from other abortion premises, to assess this claim.<sup>29</sup>
23. Dr Goldstone, Dr Allanson and the authors of the studies on which they relied failed to acknowledge that some individuals outside abortion premises may help women.<sup>30</sup> These individuals offer assistance to women who may be considering an abortion for reasons such as limited finances, insecure accommodation and lack of social support. The offers of assistance may allow some of these women to continue their pregnancy and potentially avoid significant emotional harm from undergoing an abortion due to lack of resources.<sup>31</sup>
24. Dr McCaffrey has professional experience with the assistance provided by individuals outside abortion premises. Such individuals have directed women who have accepted their offers to Dr McCaffrey who provided advice over the telephone on the progress of

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<sup>24</sup> Turner affidavit [67]–[72].

<sup>25</sup> Turner affidavit [74].

<sup>26</sup> Turner affidavit [75]–[76].

<sup>27</sup> Turner affidavit [77]–[82].

<sup>28</sup> Turner affidavit [83]–[85].

<sup>29</sup> Turner affidavit [86]–[90].

<sup>30</sup> Turner affidavit [91].

<sup>31</sup> Turner affidavit [92].

their pregnancy, any medical risks they were concerned about, and where they could receive appropriate medical care for their pregnancy.<sup>32</sup>

- 10 25. Some of these women became Dr McCaffrey's patients and their gratitude to the individuals outside abortion premises is evidenced in the statements that he has included in his affidavit. He states that his patients have said words 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.*"<sup>33</sup>
26. On the basis of the women who have been helped by individuals outside abortion premises, Dr Turner, Ms Garratt and Dr McCaffrey concluded that 'the focus of Dr Goldstone, Dr Allanson and the authors of the studies only on the potential harm that might be caused by individuals outside abortion premises undermines the value of their evidence'.<sup>34</sup>
- 20 27. In summary, there are significant problems regarding both the medical studies relied upon in this matter and the claims regarding the harm that may be caused by individuals outside abortion premises. These problems undermine the submissions made by parties regarding the importance of the purpose of the communication prohibition.

#### **PART IV: ESTIMATE OF TIME**

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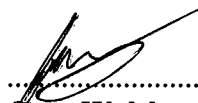
28. The AAG relies on its written submissions. It does not seek to make oral submissions unless required by the Court.

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Dated: 31 August 2018



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Solicitor



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Solicitor

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<sup>32</sup> McCaffrey affidavit [7]–[8].

<sup>33</sup> McCaffrey affidavit [9]–[10].

<sup>34</sup> Turner affidavit [93].