No. M46 of 2018

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

KATHLEEN CLUBB

Appellant

-v-

ALYCE EDWARDS

First Respondent

and

ATTORNEY-GENERAL FOR VICTORIA

Second Respondent

SUBMISSIONS OF FIRST RESPONDENT

PART I: CERTIFICATION

1.1 The submissions of the first respondent are in a form suitable for publication on the internet.

PART II: STATEMENT OF ISSUE RAISED

2.1 The question raised in this proceeding is the constitutional validity of section 185D of the *Public Health and Wellbeing Act 2008* (Vic) – as this statutory provision seeks to prohibit communication relating to abortion in a "safe access zone" in a manner reasonably likely to cause distress or anxiety to a person, a question arises as to whether such a provision impermissibly burdens the implied freedom of political communication.

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PART III: SECTION 78B NOTICE

3.1 Notice was given under section 78B of the *Judiciary Act 1903* (Cth) on 4 April 2018. **[AB, 517-520]**

PART IV: JUDGMENT OF COURT BELOW

4.1 The appellant has appealed against the decision of the Magistrates' Court of Victoria in *Edwards v Clubb* (Unreported, Magistrates Court of Victoria, Magistrate Bazzani, 11 October 2017, Case No. G12298656). **[AB, 512-515]**

4.2 On 6 October 2017 Magistrate Bazzani delivered Reasons for Decision with respect to the constitutional issue that is the subject of this proceeding. **[AB, 281-289]**

4.3 On 23 December 2017 Magistrate Bazzani delivered Reasons for Decision with respect to finding the relevant charge proven. **[AB, 293-296]**

PART V: STATEMENT OF FACTS

5.1 The appellant was charged with an offence (as amended) contrary to section 185D of the *Public Health and Wellbeing Act 2008* (Vic) as follows **[AB, 276]**:

> The accused at East Melbourne on the 4/8/16 did engage in prohibited behaviour namely communicating about abortions with persons accessing premises at which abortions are provided while within a safe access zone, in a way that is reasonably likely to cause anxiety and distress.

5.2 On 3 & 4 August, 12 September, and 6, 10 & 11 October 2017 a contested hearing was conducted in the Magistrates' Court of Victoria (sitting at Melbourne) before Magistrate Bazzani. The appellant pleaded not guilty to the charge.

5.3 During the hearing, the appellant also challenged the constitutional validity of section 185D of the relevant Act on the basis that it infringed the implied freedom of political communication. After hearing legal argument (including submissions from the second

respondent who appeared as an intervener), Magistrate Bazzani ruled that section 185D was constitutionally valid.[1]

5.4 After hearing evidence from various prosecution witnesses, Magistrate Bazzani rejected a "no case" submission on behalf of the appellant. The appellant did not give evidence. Magistrate Bazzani then found the charge proven.[2]

5.5 In short compass, the uncontested facts are as follows. On 2 May 2016 the relevant Act came into operation which, inter alia, created "safe access zones" around medical clinics where abortion services are provided (buffer zones of 150 metres).[3] Members of Victoria Police met with various Christian groups during the period May - August 2016 to discuss the impact of the legislation. The appellant belonged to a group called the "Helpers of God's Precious Infants" – she was observed to be present during these meetings. However, members of the "Helpers" group advised police of their intention to breach the safe access zone in order to test the validity of the legislation. Victoria Police were later advised that on 4 August 2016 a breach of the safe access zone would occur at the East Melbourne Fertility Control Clinic.

5.6 A police operation for the planned breach was launched on that day. The appellant was seen by police near the Clinic and warned not to breach the law. Notwithstanding this warning, the appellant entered the safe access zone with two pamphlets in hand and stood some 5 metres from the Clinic's entrance. The appellant then approached a young couple – which is captured on video – speaking and handing over a pamphlet to them. The couple declined the pamphlet and moved away. The appellant was arrested by police and denied any wrongdoing stating "I don't intend to leave. I believe I have the right to offer my help to women".

5.7 At the contested hearing, the appellant made the following admissions of fact:[4]

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[1] See Reasons for Decision dated 6 October 2017 **[AB, 281-289]**

[2] See Reasons for Decision dated 23 December 2017 **[AB, 293-296]**

[3] Part 9A (including section 185D) of the *Public Health and Wellbeing Act 2008* (Vic) commenced operation on 2 May 2016

[4] See Admission of Facts signed by Kathleen Clubb on 6 October 2017 **[AB, 291]**

(i) that on 4 August 2016 she was within the "safe access zone" as defined under the relevant Act;

(ii) that she was situated outside the entrance to the East Melbourne Fertility Clinic;

(iii) that the Clinic is a premises at which abortion services are provided; and

(iv) that her actions were captured in video footage.

5.8 On 11 October 2017 the appellant was convicted of the relevant charge and was sentenced to be released on an undertaking to be of good behavior (with conviction) for a period of 2 years with a special condition of payment of $5000 to the Court Fund.

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5.9 On 8 November 2017 the appellant appealed to the Supreme Court of Victoria against the sentencing orders made by Magistrate Bazzani on a question of law (on 3 grounds) pursuant to section 272 of the *Criminal Procedure Act 2009* (Vic) – grounds 1 and 2 of the appeal relate to the constitutional validity of section 185D of the Act and ground 3 relates to an "unsafe and unsatisfactory" verdict. The appeal was listed for hearing on 27 September 2018.

5.10 However, the appellant on 8 February 2018 filed an Application for Removal of the appeal pending in the Supreme Court of Victoria to this Court. The second respondent on 2 March
20 2018 filed an Application for Removal of part of the appeal pending in the Supreme Court of Victoria to this Court.

5.11 Grounds 1 and 2 only of the appeal (relating to the constitutional validity issue) were removed into this Court by order made by Justice Gordon on 23 March 2018. **[AB, 507-510]** The appellant filed an amended notice of appeal in this proceeding on 4 April 2018. **[AB, 512-515]**

PART VI: STATEMENT OF ARGUMENT

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6.1 The first respondent submits that section 185D of the *Public Health and Wellbeing Act 2008* (Vic) is constitutionally valid.

6.2 The text of section 185D is reproduced as follows:[5]

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

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

6.3 Section 185B(1) of the Act provides for various definitions, including "prohibited behavior" and "safe access zone", as follows:

prohibited behaviour means –

(a) in relation to a person accessing, attempting to access, or leaving premises at which abortions are provided, besetting, harassing, intimidating, interfering with, threatening, hindering, obstructing or impeding that person by any means; or
(b) subject to subsection (2), communicating by any means in relation to abortions in a manner that is able to be seen or heard by a person accessing, attempting to access, or leaving premises at which abortions are provided and is reasonably likely to cause distress or anxiety; or[6]
(c) interfering with or impeding a footpath, road or vehicle, without reasonable excuse, in relation to premises at which abortions are provided; or
(d) intentionally recording by any means, without reasonable excuse, another person accessing, attempting to access, or leaving premises at which abortions are provided, without that other person's consent; or
(e) any other prescribed behaviour.

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

6.4 As Gageler J stated in *Brown v Tasmania*, the legal framework for determining whether a law contravenes the implied freedom of political communication can be stated in the following three questions:[7]

1. Does the law effectively burden freedom of political communication?
2. Is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of government?
3. Is the law reasonably appropriate and adapted to advance that purpose in a manner compatible with the maintenance of the constitutionally prescribed system of government?

If the first question is answered yes", and if either the second question or the third question is answered "no", the law is invalid.

6.5 His Honour goes on to observe:[8]

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[5] Version 30 (as at 2 May 2016)

[6] Section 185B(2) of the Act provides as follows: Paragraph (b) of the definition of ***prohibited behaviour*** does not apply to an employee or other person who provides services at premises at which abortion services are provided.

[7] *Brown v Tasmania* (2017) 91 ALJR 1089, at 1119 [156]

[8] *Brown v Tasmania* (2017) 91 ALJR 1089, at 1121 [165]

The answer to the initial question of burden within the restated analytical framework accordingly informs the intensity of the scrutiny appropriate to be brought to bear in answering the ultimate question of justification. Where a law effectively burdens freedom of political communication, and does so in pursuit of a legitimate purpose, the degree of fit between means (the manner in which the law pursues its purpose) and ends (the purpose it pursues) needed to conclude that the law is reasonably appropriate and adapted to advance its purpose in a manner that is compatible with the maintenance of the constitutionally prescribed system of government needs to be calibrated to the degree of risk which the burden imposed by the means chosen poses to the maintenance of representative and responsible government.

6.6 The first respondent submits that the relevant three questions should be answered as follows:

1. Yes – however the burden is "slight" (not "direct or substantial")[9]
2. Yes
3. Yes

and does so for the reasons advanced by the second respondent in their written submissions filed on 11 May 2018.

PART VII: ORDERS SOUGHT

7.1 The first respondent seeks the following orders:

(i) that the appellant's amended notice of appeal filed in this Court on 4 April 2018 be dismissed;

(ii) that the appellant pay the first respondent's costs in this proceeding.

PART VIII: HEARING ESTIMATE

4.1 The first respondent adopts the written submissions of the second respondent in support of its position. Likewise, the first respondent proposes to adopt the oral submissions of the second respondent advanced in this proceeding.

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[9] *Brown v Tasmania* (2017) 91 ALJR 1089, at 1121 [127]

4.2 Thus, no time is required by the first respondent other than to confirm this position at the hearing.

Dated: 18 May 2018

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Kerri Judd QC

Victorian Director of Public Prosecutions

Counsel for the First Respondent

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Brett Sonnet

Crown Prosecutor

20 **Counsel for the First Respondent**