

BETWEEN:

KATHLEEN CLUBB

Appellant

and

ALYCE EDWARDS

First Respondent

ATTORNEY-GENERAL FOR VICTORIA

Second Respondent

OUTLINE OF ORAL ARGUMENT — ATTORNEY-GENERAL FOR VICTORIA

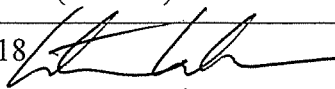
This outline is suitable for publication on the internet.

<p>1.</p>	<p>Factual background to the law</p> <p>a. The Statement of Compatibility and the Second Reading Speech.</p> <p>b. The affidavit material.</p>	<p>VicAG [12]-[27]</p>
<p>2.</p>	<p>The statutory regime: The “communication prohibition” in the <i>Public Health and Wellbeing Act 2008</i> (Vic): s 185D, read with s 185B.</p> <p>a. purpose</p> <p>b. prohibited behaviour</p> <p>- “anxiety or distress”, not “discomfort”</p> <p>c. safe access zone</p> <p>d. <i>mens rea</i></p>	<p>VicAG [10]; VicAGReply [11]- [15], [20]-[22]</p> <p><i>Cf</i> Appellant [12]-[15]</p> <p>1st Res Reply [2.10]</p>
<p>3.</p>	<p>The foundations of the implied freedom and the nature of <u>political</u> communication</p> <p>a. For communication to be political in the constitutional sense, it must have a sufficient nexus with the constitutional system of representative and responsible government.</p> <p>- <i>Lange</i> at 560-561, 566-567</p> <p>- <i>APLA</i> at 361-362 [68]</p> <p>b. The fact that a topic is controversial, or regulated, or capable of being regulated, does not make all communication about the topic “political” in the constitutional sense.</p> <p>c. Not all speech in relation to abortion is political communication in the constitutional sense.</p>	<p>VicAG [30]-[33]</p>

<p>4.</p>	<p>Effective burden</p> <p>a. Although the law does not target or burden only political communication, the law is capable of capturing and thus burdening political communication.</p> <ul style="list-style-type: none">- <i>Brown</i> at 1110 [90] <p>b. Ms Clubb’s speech: no evidence it was “political” in the relevant sense. However, the Court should reject the Commonwealth’s submission that the implied freedom analysis can be avoided.</p> <ul style="list-style-type: none">- <i>Tajjour</i> at 561 [73]-[75], 568 [102], 569 [104]- <i>Monis</i> at 210 [335]- <i>Coleman v Power</i>	<p>VicAG [28]</p> <p>VicAG [29] Cth [4], [10]-[16]</p>
<p>5.</p>	<p>The nature of the burden</p> <p>a. A limited restriction, tailored to its purpose.</p> <ul style="list-style-type: none">- <i>Levy</i> at 608-609, 614-615, 618-619, 647-648- <i>Brown</i> at 1169 [420] <p>b. The communication prohibition does not target <u>political</u> communication — the burden is incidental.</p> <p>c. The communication prohibition does not discriminate based on viewpoint.</p> <p>d. The freedom does not guarantee a captive audience.</p>	<p>VicAG [31]-[32] VicAG Reply [6]-[10]</p> <p>Cf Appellant [42]- [43], [64]</p> <p>VicAG [45]</p>
<p>6.</p>	<p>Legitimate end</p> <p>a. A legitimate end can involve the protection of the legitimate claims of individuals to live peacefully and with dignity within an ordered and democratic society.</p> <ul style="list-style-type: none">- <i>ACTV</i> at 169- <i>Levy</i> at 596-597, 608, 611, 619-620, 627, 635-636- <i>Brown</i> at 1112 [101]-[102], 1141-1142 [275] <p>b. The communication prohibition is directed to protecting the safety, wellbeing, dignity and privacy of persons accessing premises where abortions are provided. That is both legitimate and compelling.</p> <ul style="list-style-type: none">- It is responding to demonstrated harms.- It is <u>not</u> directed to “civility of discourse”.- Cf <i>Coleman v Power, Monis</i>	<p>VicAG [34]-[45]</p>
<p>7.</p>	<p>No need for stepped proportionality analysis</p> <p>a. A stepped proportionality analysis is one tool of analysis, but is not always required.</p> <ul style="list-style-type: none">- <i>McCloy</i> at 213 [68]- <i>Brown</i> at 1115 [125], 1116 [131], 1119 [158]-[159], 1143 [279]-[280], 1177-1178 [473]	<p>VicAG [48]-[51]</p>

	<p>b. A stepped proportionality analysis is not required here. The law is valid because it has a rational connection with its compelling justification.</p>	
8.	<p>Suitable for purpose</p> <p>Given the evidence about the harm caused to women accessing services, and to staff, by communications about abortion that occur as they approach the clinic, a restriction on such communications within sight or hearing of a clinic is suitable to achieve the purpose.</p> <ul style="list-style-type: none"> - <i>Tajjour</i> at 571 [112] - <i>McCloy</i> at 217 [80], 232 [132] 	<p>VicAG [53] VicAG Reply [16]-[17]</p>
9.	<p>Necessary / alternative means</p> <p>a. Any alternative must be “obvious and compelling”, and “equally effective” in achieving the legitimate end.</p> <ul style="list-style-type: none"> - <i>McCloy</i> at 211 [58], 217 [81] - <i>Brown</i> at 1117 [139], 1143-1144 [282] <p>b. Not a “lowest common denominator” requirement — room for reasonable legislative choice as to how best to achieve the purpose.</p> <ul style="list-style-type: none"> - <i>McCloy</i> at 217 [82], 292-293 [359] <p>c. Not a requirement that the State adopt the least restrictive measure possible.</p> <p>d. Bearing in mind the nature of the harms in issue and the end sought to be achieved, none of the postulated alternatives would be as effective.</p>	<p>VicAG [54]-[61] VicAG Reply [18]-[19]</p>
10.	<p>Balancing / strict proportionality</p> <p>a. For a law to be invalid at this step of the analysis, its restriction on speech must be “undue”: meaning “grossly disproportionate” or “manifestly excessive”.</p> <ul style="list-style-type: none"> - <i>McCloy</i> at 218 [86] - <i>Brown</i> at 1146 [290] <p>b. Given the compelling justification supported by evidence, the incidental effect on political communication, and the tailored time/manner/place restriction, the law does not go too far. It is not grossly disproportionate or manifestly excessive. It is not an undue restriction on political communication.</p>	<p>VicAG [62]-[63]</p>
11.	<p>The Attorney-General’s submissions are consistent with case law in other comparable jurisdictions</p> <ul style="list-style-type: none"> - <i>Connolly v DPP</i> (UK) - <i>R v Spratt</i> (Canada) 	<p>VicAG [46]</p>

Dated: 9 October 2018


Kristen Walker


Kathleen Foley


Simona Gory