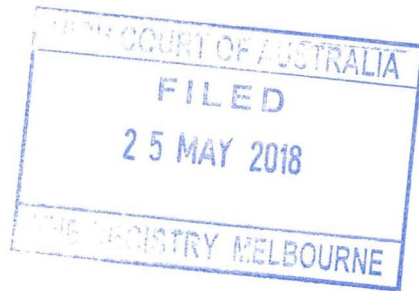


BETWEEN:

KATHLEEN CLUBB
Appellant

and

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ALYCE EDWARDS
First Respondent

ATTORNEY-GENERAL FOR VICTORIA
Second Respondent

**SUBMISSIONS OF THE CASTAN CENTRE FOR HUMAN RIGHTS LAW
SEEKING LEAVE TO APPEAR AS AMICUS CURIAE**

20 **PART I: PUBLICATION**

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

PART II: BASIS OF APPLICATION TO APPEAR AS AMICUS CURIAE

2. The Castan Centre for Human Rights Law (**Castan Centre**) seeks leave to appear as amicus curiae in this proceeding. The Castan Centre supports the submissions of the Attorney-General for the State of Victoria generally, and seeks to elaborate on the submissions of the Attorney-General for the State of Victoria pertaining to matters arising in the submissions about which the Castan Centre can offer the Court particular assistance. That is, if leave is granted, the Castan Centre seeks to assist the Court with relevant constitutional facts and address the second stage of the test for compatibility, and the third stage of the test for proportionality. Specifically, the Castan Centre cites its empirical research conducted in 2017 directly concerned with the necessary and legitimate end of Part 9A of the *Public Health and Wellbeing Act 2008* (Vic) (the **Public Health Act**).

Castan Centre for Human Rights Law (Monash University)
Party applying for amicus curiae

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3. The Castan Centre relies on the affidavit of Professor Sarah Joseph affirmed on 25 May 2018 with respect to the Castan Centre's expertise and experience in the subject matter of the law that is under challenge in this proceeding. The Castan Centre's interest is more than a mere academic or theoretical interest. The research undertaken by the Castan Centre brings an empirical perspective on the practical impact of Part 9A of the *Public Health Act* on Victorian women.

PART III: WHY THE APPLICATION TO APPEAR AS AMICUS CURIAE SHOULD BE GRANTED

- 10 4. The Castan Centre was established to advance human rights knowledge through research, policy reform, teaching, training, and public engagement. These objectives are achieved by deploying the Castan Centre's authoritative human rights expertise to influence public debate and government policy. For the reasons addressed in Professor Joseph's affidavit, the Castan Centre is internationally recognised for its research and scholarship.
- 20 5. In 2017, the Castan Centre conducted qualitative empirical research which examined the operation of the *Public Health Act*.¹ This analysis was undertaken by conducting semi-structured interviews with Victorian health professionals working in medical clinics which provide abortion services in Victoria, in order to evaluate the nature and effect of anti-abortion protests around clinics and the impact of introducing "safe access zones". The research was conducted by Dr Ronli Sifris and Dr Tania Penovic and is described in a research paper titled '*Anti -Abortion Protest and The Effectiveness of Victoria's Safe Access Zones: An Analysis*'. This research paper has received publication approval by the Monash University Law Review. The publication copy is annexure SJ-5 to Professor Joseph's affidavit.
6. The Castan Centre's submissions address matters and put arguments not directly addressed in the First Respondent or Second Respondent's submissions.

PART IV: ARGUMENT

7. These submissions address the second and third elements of the '*Lange test*', being that, if the Court finds that there is a burden on political communication:
 - 30 (a) the law is compatible with the constitutionally prescribed system of representative and responsible government in the sense that Part 9A of the *Public Health Act* does not adversely impinge upon the functioning of the system of representative and responsible government; and

¹ The research was approved by the Human Research Ethics Committee at Monash University: Human Research Ethics Committee at Monash University, *Project no 1058: Evaluating Access Zones*.

(b) the law is reasonably appropriate and adapted to achieve this objective in a manner that is compatible with the constitutionally prescribed system of representative and responsible government, in the sense that any burden on the implied freedom of political communication effected by Part 9A of the *Public Health Act* is justified.

10 8. For the avoidance of any doubt, the Castan Centre does not accept that the conduct engaged in by the Appellant and other anti-abortion protesters in contravention of Part 9A of the *Public Health Act* involves the exercise of the implied freedom of political communication. What the Castan Centre contends is that, to the extent that the restriction effected by Part 9A could be said to engage the implied freedom, the objective of the law is compatible with the constitutionally prescribed system of representative and responsible government provided by the Constitution, and the means used to achieve that objective are reasonably appropriate and adapted to achieving that objective in a manner that is itself compatible with the maintenance of the system of representative and responsible government.

Compatibility

20 9. The aim of section 185D of the *Public Health Act* is to reduce the potential for protesters to inhibit the safety, privacy and wellbeing of patients and staff. In *Levy v Victoria*,² it was held that the protection of individual or public safety was a legitimate objective.

30 10. The research conducted by Dr Sifris and Dr Penovic supports the submissions of the Attorney-General for Victoria as well as the affidavits of Dr Allanson and Dr Goldstone (referred to in the Attorney-General's submissions) with respect to the extent of the threats, intimidation and harassment experienced by clinic staff and by patients seeking access to clinical services prior to the introduction of Part 9A of the *Public Health Act*. The research demonstrates that protests outside abortion clinics have negatively impacted on women's safety and privacy, as well as their ability to access lawful medical procedures free from intimidation and harassment. Thus the stated objective of the legislation is not merely theoretical; the research shows that women's safety, privacy, health and wellbeing have in fact been impacted negatively by the protests.

11. The prohibition of certain behaviour within a safe access zone necessarily restricts behaviour that would negatively affect the safety, privacy and wellbeing of staff and patients entering a medical clinic. Rather than prohibiting such behaviour *in toto*,

² *Levy v State of Victoria* (1997) 189 CLR 579 at 608 – 609 (Dawson J), 614 (Toohey and Gummow JJ), 619 – 620 (Gaudron J), 627 (McHugh J) and 636, 642, 648 (Kirby J).

the law restricts only the manner and place of the conduct.³ The law does not restrict political communication except insofar as such communication takes the form of prohibited behaviour and occurs within a safe access zone. As such, any burden on political communication is only to the extent that it has the capacity to directly affect the privacy, safety or well-being of patients and staff at a specific location where these medical services are being provided. Such a burden does not occasion any risk to the maintenance of representative and responsible government.⁴

- 10 12. In the premises, the Castan Centre submits that the law is compatible with the system of representative and responsible government.

Proportionality

13. The third element of the ‘*Lange* test’ is to determine the extent of the burden effected by the impugned provision on the freedom. There are three stages to the test – these are the enquiries as to whether the law is justified as suitable, necessary and adequate in its balance.⁵

Suitability

- 20 14. As stated by the plurality in *McCloy v New South Wales* (2015) 257 CLR 178 (McCloy), ‘[t]his stage of the test requires that there be a rational connection between the provision in question and the statute’s legitimate purpose, such that the statute’s purpose can be furthered.’⁶
15. There is a clear link between the measure and its objective: Dr Sifris and Dr Penovic’s research has shown that section 185D of the *Public Health Act* has generally operated to protect the privacy of patients and staff and to facilitate safe access to health services by preventing protesters from targeting individuals requiring access to facilities at which abortions are provided.
16. In *Brown v State of Tasmania* some members of the Court expressed concern over the indeterminacy of the zone covered by the *Workplace (Protection from Protesters) Act 2014* (Tas), in the sense that the provision could operate in an over-

³ *Brown v State of Tasmania* [2017] HCA 43.

⁴ *Brown v State of Tasmania* [2017] HCA 43 at 22 [88] (Kiefel CJ, Bell, Keane JJ).

⁵ *McCloy v New South Wales* (2015) 257 CLR 178 at 195 (French CJ, Kiefel, Bell, Keane JJ).

⁶ *McCloy* at 217 [80] (French CJ, Kiefel, Bell and Keane JJ), citing *Unions NSW v State of New South Wales* (2013) 252 CLR 530 at 557-558 [50]-[55], 561 [64], 579 [140], 586 [168].

inclusive way: 'it will often not be possible to determine the boundaries of "business premises" or a "business access area"'.⁷

17. Section 185D of the *Public Health Act* is distinguishable from the legislation at issue in *Brown v Tasmania*. The relevant zone where certain conduct is prohibited is clearly delineated in the *Public Health Act*. Section 185D of the *Public Health Act* explicitly applies to the area within '150 metres from premises at which abortions are provided.' In turn, the boundaries or confines of premises where abortions are provided may be clearly described.

Necessity

- 10 18. As stated by the plurality in *McCloy*, the necessity stage of the proportionality inquiry considers the 'availability of other, equally effective, means of achieving the legislative object which have a less restrictive effect on the freedom and which are obvious and compelling.'⁸
19. Admittedly, the difficulty with determining whether the safe access zone provisions are 'necessary' in context of a proportionality inquiry is, firstly, that the physical location of the protest bears an important communicative function,⁹ and that the necessary size of the zone is in many respects context-specific. However, the real issue is whether safe access zones *per se* can be seen as necessary to protect the safety, wellbeing and privacy of patients and staff.
- 20 20. Dr Sifris and Dr Penovic's research demonstrates that safe access zones are necessary to protect the safety, wellbeing and privacy of patients and staff, in relation to both conduct in the nature of harassment and intimidation as well as other communications in relation to abortion that are proscribed by the *Public Health Act*. This supports the submissions of the Attorney-General for Victoria and evidence already adduced that the impact of the protests on patients can be deeply stigmatising and traumatising, and may have a long-term effect on patients' physical and mental health.
21. To the extent that it might be argued that a smaller safe access zone could have been adopted by the legislature, this would not achieve the legislative objective to the same extent. In *Tajjour v State of New South Wales*, Crennan, Kiefel and Bell JJ said the inquiry into the necessity of the measure:¹⁰
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⁷ *Brown v State of Tasmania* [2017] HCA 43 at [67] (Kiefel CJ, Bell and Keane JJ).

⁸ *McCloy* at 217 [81], citing *Unions NSW v State of New South Wales* (2013) 252 CLR 530 at 556 [44].

⁹ As to which see *Brown v State of Tasmania* [2017] HCA 43 at [117] (Kiefel CJ, Bell and Keane JJ); [191] (Gageler J); [240] (Nettle J).

¹⁰ *Tajjour v State of New South Wales* (2014) 254 CLR 508 at 572 [115] (Crennan, Kiefel and Bell JJ).

... does not proceed upon the premise that the legislature would adopt a measure which was not as effective in achieving its purpose. To approach the matter otherwise would involve the Court impermissibly substituting the legislative provision under consideration for something else.

22. A plurality of the Court in *McCloy* emphasised that '[o]nce within the domain of selections which fulfil the legislative purpose with the least harm to the freedom, the decision to select the preferred means is the legislature's.'¹¹

Adequate in its balance

- 10 23. The final stage of the 'Lange test' is to examine the extent of the effect of the freedom along with 'the importance of a legislative purpose'¹² so as to reach a conclusion as to whether a law impermissibly burdens the freedom of political communication.¹³ As the plurality said in *McCloy*, a law burdening the implied freedom must be 'adequate in its balance ... between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom'.¹⁴
24. The relevant enquiry is whether a burden on the freedom of political communication is undue, not only by reference to the extent of the effect on the freedom, but also having regard to the public importance of the purpose sought to be achieved by the law.¹⁵
- 20 25. The balance to be struck between the importance of the purpose and the extent of the restriction on the freedom necessarily involves a 'value judgment'.¹⁶ In accepting that the balance will involve a value judgement, it is contended that the balance does not involve the courts substituting their own assessment for that of the legislative decision-maker.¹⁷ Rather, the courts have a duty to determine the limit of legislative power affecting constitutionally guaranteed freedoms. The undertaking of such assessments by courts is commonplace and uncontroversial. The Court must take account of and balance the positive effect of realising the proper purpose of Part 9A of the *Public Health Act* with the negative effect of any

¹¹ *McCloy* at 217 [82] (French CJ, Kiefel, Bell and Keane JJ).

¹² *McCloy* at 215 [73] (French CJ, Kiefel, Bell and Keane JJ).

¹³ *McCloy* at 200 [21] (French CJ, Kiefel, Bell, Keane JJ).

¹⁴ *McCloy* at 179.

¹⁵ *McCloy* at 218 [86] (French CJ, Kiefel, Bell, Keane JJ).

¹⁶ *McCloy* at 219 [89] (French CJ, Kiefel, Bell, Keane JJ).

¹⁷ See Caroline Henckels, 'Proportionality and the Separation of Powers in Constitutional Review: Examining the Role of Judicial Deference' (2017) 45 *Federal Law Review* 181.

limits on constitutional rights or freedoms.¹⁸ It is appropriate for the Court to ask what benefits are gained by the policy and intent of Part 9A of the *Public Health Act*.

26. In discerning the public benefits of Part 9A of the *Public Health Act*, it is proper that the courts respect the role of the legislature to determine which policies and social benefits are to be instituted. This acceptance should not, however, operate as an absolute deference to the legislature, noting that in *McCloy* the plurality said:

10 91. Deference to legislative opinion, in the sense of unquestioning adoption of the correctness of these choices, does not arise for courts. It is neither necessary nor appropriate for the purposes of the assessment in question. The process of proportionality analysis does not assess legislative choices except as to the extent to which they affect the freedom. It follows from an acceptance that it is the constitutional duty of courts to limit legislative interference with the freedom to what is constitutionally and rationally justified, that the courts must answer questions as to the extent of those limits for themselves.¹⁹

27. In assessing whether a law is constitutionally and rationally justified, the Court may seek assistance or inform itself from sources other than the factual material adduced by the parties to proceeding.²⁰ As Brennan J said *Gerhardy v Brown*²¹:

20 When a court in ascertaining the validity or scope of a law, considers matters of fact, it is not bound to reach its decision in the same way as it does when it tries an issue of fact between the parties. The validity and scope of a law cannot be made to depend upon the course of private litigation. The legislative will is not surrendered into the hands of litigants.

...

30 The Court may, of course, invite and receive assistance from the parties to ascertain the statutory facts, but it is free also to inform itself from other sources. Perhaps those sources should be public or authoritative, and perhaps the parties should be at liberty to supplement or controvert any factual material on which the Court may propose to rely, but these matters of procedure can await consideration on another day. The Court must ascertain the statutory facts "as best it can" and it is difficult and undesirable to impose an a priori restraint on the performance of that duty.

¹⁸ *McCloy* at 219 [87] (French CJ, Kiefel, Bell, Keane JJ).

¹⁹ *McCloy* at 220 [91] (French CJ, Kiefel, Bell, Keane JJ).

²⁰ Citing *Breen v Sneddon* (1961) 106 CLR 406 at 411 (Dixon CJ). See also *North Eastern Dairy Co Ltd v Dairy Industry Authority of New South Wales* (1975) 134 CLR 559 at 622 (Jacobs J); *Levy v State of Victoria* (1997) 189 CLR 579 at 598 (Brennan J); *Thomas v Mowbray* (2007) 233 CLR 307 at 242 [639] (Heydon J).

²¹ *Gerhardy v Brown* (1985) 159 CLR 70 at 142.

28. The Castan Centre submits that it is open to the Court to receive and be assisted by the empirical legal research conducted by Dr Sifris and Dr Penovic which specifically analyses the experience of patients and clinic staff prior to the commencement of s 185D of the *Public Health Act*. The research is directly relevant to the positive effect of realising Part 9A's proper purpose and relative importance *vis à vis* any burden that the law may place on the implied freedom.
29. The research undertaken by Dr Sifris and Dr Penovic identified the benefits to women arising out of the enactment of Part 9A of the *Public Health Act* on the premise that abortion services are required by women, and are the only health service that is the subject of overt and explicit protest aimed at preventing individuals from accessing and obtaining care. The conduct that is prohibited by the *Public Health Act* is a form of targeted discrimination against women, in that it interferes with the right of women, and only women, to access a lawful medical service.
- 10
30. The public importance of the purpose of the *Public Health Act* is further demonstrated by its consistency with human rights norms enshrined in treaties ratified by Australia. The Castan Centre submits that the conduct of protests aimed at preventing individuals from accessing and obtaining abortion services without the limits of a safe access zone would impermissibly interfere with:
- 20
- (a) patients' right to privacy, in conflict with article 17 of the *International Covenant on Civil and Political Rights (ICCPR)* in that the conduct interferes with the women's decision-making in matters concerning their reproductive function, including the decision to have an abortion;
 - (b) patients' right to security of person, in conflict with article 9(1) of the ICCPR, in that the conduct involves the intentional infliction of bodily or mental injury; with article 7 of the ICCPR, in that the conduct entails cruel, inhuman or degrading treatment in article 7 of the ICCPR; and article 16 of the *Convention on the Elimination of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*;
 - 30
 - (c) patients' right to the highest attainable standard of health in conflict with article 12 of the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, and the related right to equality of access to health care services in conflict with article 12(1) of the *Convention on the Elimination of all forms of Discrimination against Women (CEDAW)*, in that the conduct hinders access to health facilities and the right to make free and responsible decisions and choices, free of violence, coercion and discrimination, over matters concerning one's body and sexual and reproductive health;
 - (d) patients' right to enjoy the benefits of scientific progress and its applications in conflict with article 15(1)(b) of the ICESCR in that the conduct impacts

on the availability of medical abortion services, which have been found by the World Health Organisation to obviate the need for surgical abortion which presents a higher medical risk to women;

(e) patients' right to equality and non-discrimination in conflict with article 1 of the CEDAW, article 3 of the ICCPR and article 3 of the ICESCR, in that the conduct has an adverse impact on women, and only women, in particular women who are vulnerable;

(f) women's equal rights to decide freely and responsibly on the number and spacing of their children in conflict with article 16(1)(e) of the CEDAW, in that it seeks to prevent women from accessing lawful abortion services in the event of an unplanned pregnancy.

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31. Further, the conduct addressed by s 185D of the *Public Health Act* may be characterised as a form of violence against women which has been recognised as a serious form of gender-based discrimination that seriously undermines women's equality.²² The Committee which supervises the implementation of CEDAW has recognised that violence against women includes acts and threats that inflict physical or psychological harm, including the abuse and mistreatment of women seeking reproductive health services.²³ The prohibition of such conduct has been considered by CEDAW to have evolved through *opinio juris*²⁴ and state practice into a principle of customary international law and falls within the obligations of state parties to CEDAW.²⁵

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32. The research of Dr Sifris and Dr Penovic identified the adverse impact of protester behaviour that is constrained by the operation of safe access zones pursuant to Part 9A of the *Public Health Act* on patients seeking to access the premises. This included but was not limited to:

²² CEDAW Committee, General Recommendation 35 on gender-based violence against women, updating General Recommendation No 19, CEDAW/C/GC/35, 14 July 2017; CEDAW Committee, General Recommendation 19: Violence against Women, 11th Session 1992 [6]; see also Declaration on the Elimination of Violence against Women, General Assembly, A/RES/48/104, 20 December 1993, [1].

²³ CEDAW Committee, General Recommendation 35 on gender-based violence against women, updating General Recommendation No 19, CEDAW/C/GC/35, 14 July 2017 at [18].

²⁴ See for example UNHCR, *The Due Diligence standard as a tool for Eliminating Violence against Women, Report of the Special Rapporteur on violence against women, its causes and consequences*, Yakin Ertürk (30 January 2006) UN Doc E/CN.4/2006/61 para 29.

²⁵ CEDAW Committee, General Recommendation 35 on gender-based violence against women, updating General Recommendation No 19, CEDAW/C/GC/35, 14 July 2017 at [2].

- (a) Protesters approaching, following or walking alongside people approaching clinic premises, distributing pamphlets, and distributing plastic models of foetuses.²⁶
 - (b) Protesters equating foetuses with babies by imploring patients not to “kill” their “baby”, and castigating patients as murderers.
 - (c) Protesters chasing, photographing, heckling, threatening, and verbally abusing patients and staff.²⁷
 - (d) Protesters preventing patients from exiting cars, impeding entry to clinics (or clinic carparks) and access along footpaths outside clinics.²⁸
 - 10 (e) Protesters displaying large and graphic posters depicting what purported to be foetuses post-abortion, foetuses in buckets, or skulls of foetuses.
 - (f) Protesters distributing visually graphic literature containing medically inaccurate and misleading information warning that abortion results in infertility, failed relationships, mental illness and cancer.²⁹
33. Furthermore, the research of Dr Sifris and Dr Penovic demonstrated that, in addition to the safety and related concerns for patients and staff, anti-abortion protesting has in some cases prevented or delayed patients’ access to medical services.
34. Delaying an abortion procedure has significant adverse consequences on women: for example, a week’s delay in accessing abortion services can affect the patient’s eligibility for medical (rather than surgical) abortion. The research also demonstrated that patients have delayed or not attended essential follow-up appointments as a consequence of protester behaviour. The conduct that protesters engaged in operated as a barrier to access to reproductive health services. Like other barriers to access to health care, the effects of the protest are most acutely felt by the most vulnerable women. Protest activity has also rendered many staff unwilling to provide abortion services, resulting in the closure of some abortion services due to an inability to recruit staff to provide lawful medical services.
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35. The research found clinic staff feared confrontations with protesters, with some expressing the fear that protesters masquerading as patients could enter the clinic

²⁶ See also *Fertility Control Clinic v Melbourne City Council* [2015] VSC 424 at 8 [15] [AB 146-147]; Magistrate's Reasons (on the charge) at 4 [AB 296].

²⁷ See also *Fertility Control Clinic v Melbourne City Council* [2015] VSC 424 at 8 [15] [AB 146-147].

²⁸ See also Affidavit of Dr Susie Allanson affirmed on 21 July 2017 [AB-10-11].

²⁹ See also Affidavit of Dr Susie Allanson affirmed on 21 July 2017 [AB-10-11].

and threaten the safety of patients and staff. The research found protests outside abortion clinics have negatively impacted on women's safety and privacy, as well as their ability to access lawful medical procedures free of intimidation and harassment.

- 10 36. In the premises, the Castan Centre submits that to the extent that the operation of the law burdens the implied freedom of political communication, the law is reasonably appropriate and adapted to achieving an objective that is compatible with the constitutionally prescribed system of representative and responsible government. There is a rational connection between the law and its objective, there is no obvious and compelling means available that would equally achieve the law's objective, and law is more than adequate in its balance.

PART V: ESTIMATE OF THE TIME

37. The Castan Centre relies on its written submissions. It does not seek to make oral submissions unless required by the Court.

Dated: 25 May 2018



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