IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY **NO M46 OF 2018**

BETWEEN: **KATHLEEN CLUBB**

Appellant

AND: **ALYCE EDWARDS**

First Respondent

ATTORNEY-GENERAL FOR VICTORIA

Second Respondent

SUBMISSIONS OF THE HUMAN RIGHTS LAW CENTRE

SEEKING LEAVE TO APPEAR AS AMICUS CURIAE

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Human Rights Law Centre
Party applying for amicus curiae

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PART I PUBLICATION

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

PART II BASIS FOR APPLICATION

2. The Human Rights Law Centre (**the Centre**) seeks leave to appear as *amicus curiae* to make submissions in support of 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**), and in particular to address:

   (a) the extent and characterisation of the burden which the communication prohibition places upon the implied freedom of political communication (**implied freedom**);

   (b) the role of necessity and balancing as tools of analysis, including in the present case:

      (i) the inadequacy of laws to protect the rights of patients and staff accessing clinics providing abortions prior to the enactment of Part 9A of the Act; and

      (ii) the nature and significance of the legitimate end pursued by the communication prohibition in the context of determining whether the law is adequate in its balance.

3. The Centre respectfully submits the Court should grant its application to appear as *amicus curiae* for the following reasons.

4. First, the Centre has assisted applicants in a number of cases involving the implied freedom on a pro bono basis. Since January 2006, the Centre has been involved in a number of matters raising constitutional questions.[1] Most recently the Centre provided written submissions in *Brown v Tasmania* (2017) 91 ALJR 1089.

[1] *Roach v Electoral Commissioner* (2007) 233 CLR 162, *Momcilovic v The Queen & Ors* (2011) 245 CLR 1, *Wotton v Queensland* (2012) 246 CLR 1, *Attorney General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441,

5. Second, the Centre has experience and expertise in issues concerning freedom of speech, abortion-related laws and human rights in Australia. The protection and promotion of freedom of expression and women's reproductive rights are two of the Centre's current focus areas. This experience and expertise means it is well-placed to assist the Court in this case, including in bringing international and comparative legal materials to the Court's attention where appropriate.

6. The Centre has been actively engaged in recent times in scrutinising and commenting on laws impacting the implied freedom. In 2016, the Centre published a major report entitled *Safeguarding Democracy*[2] and in 2017, a report titled *Defending Democracy*,[3] both of which address Australian laws limiting freedom of expression and the implied freedom.

7. The Centre has also been actively engaged in advancing the legal protection of women's reproductive rights, particularly in abortion-related laws. In 2015, the Centre co-ordinated the legal team for the plaintiff in *Fertility Control Clinic v Melbourne City Council* (2015) 47 VR 368. The plaintiff sought to compel the Melbourne City Council to take action to stop anti-abortion activities outside the East Melbourne Fertility Control Clinic. The Centre made numerous public statements about the inadequacy of existing laws in Victoria and supported the passing of the *Public Health and Wellbeing Amendment (Safe Access Zones) Act 2015* (Vic).[4]

8. Outside of Victoria, the Centre has made submissions to parliamentary, departmental and law reform commission inquiries about abortion-related laws and women's human

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CPCF v Minister for Immigration and Border Protection (2015) 255 CLR 514, *North Australian Aboriginal Justice Agency Limited v Northern Territory* (2015) 256 CLR 569, *Plaintiff M68/2015 v Minister, for Immigration and Border Protection* (2016) 257 CLR 42 and *Wilkie v The Commonwealth* (2017) 349 ALJR 1.

2 Human Rights Law Centre, *Safeguarding Democracy* (Report, February 2016).

3 Human Rights Law Centre, *Defending Democracy: Safeguarding Independent Community Voices* (Report, June 2017).

4 Human Rights Law Centre, 'Victorian Government to support creation of safe access zones for abortion clinics' (Media Release, 1 September 2015) <https://www.hrlc.org.au/news/victorian-government-to-support-creation-of-safe-access-zones-for-abortions?rq=safe%20access%20zones>.

rights, including most recently in the Northern Territory in 2017[5] and in Queensland in 2016 and 2018.[6]

9. Third, the issues raised as to the analytical framework and principles for determining whether an impugned law impermissibly burdens the implied freedom is of general importance throughout Australia and of particular significance to the activities, objectives and purposes of the Centre. The Centre's objects, as set out in Rule 2(a) of its Constitution, include:

   (a) to promote, protect and contribute to the fulfilment of human rights in Australia, particularly the human rights of people that are disadvantaged or living in poverty; and

   (b) to contribute to the harmonisation of law, policy and practice in Australia with regards to human rights.

10. Rule 3 of the Centre's Constitution provides that the Centre may, for the purpose of carrying out its objects, provide legal services and act as *amicus curiae*. The Centre's policy is only to seek leave to do so selectively and in respect of cases falling within the Centre's focus areas and where the issues presented are of special public importance and interest. The issues raised in the present case could have far-reaching implications, not only in other jurisdictions where comparable safe access zone laws exist,[7] but in relation to other laws that may burden the implied freedom for protective purposes.

11. Finally, the Centre's submissions address matters and put arguments not directly addressed in the submissions of the second respondent. While the Centre supports the validity of the communication prohibition, it does so from a different perspective. These submissions may assist the Court in reaching a correct determination and which

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5 Human Rights Law Centre, 'Respecting Women's Autonomy and Health', Submission to Department of Health, *Termination of Pregnancy Law Reform: Discussion Paper*, 18 January 2017.

6 Human Rights Law Centre, 'Reforming Queensland's Outdated Abortion Laws', Submission to Queensland Law Reform Commission, *Review of Pregnancy Termination Laws*, 20 March 2018; Human Rights Law Centre, 'Ensuring Human Rights to Reproductive Health', Submission to Health, Communities, Disability and Domestic and Family Violence Prevention Committee, Queensland Parliament, *Abortion Law Reform (Women's Right to Choose) Amendment Bill 2016 and Inquiry into laws governing termination of pregnancy in Queensland*, 30 June 2016.

7 See *Health (Patient Privacy) Amendment Act 2015* (ACT); *Termination of Pregnancy Law Reform Act* 2017 (NT). See also *Public Health Amendment (Safe Access to Reproductive Health Clinics) Bill* 2018 (NSW).

is likely to be different, at least in emphasis, from the argument presented by other parties and interveners.[8]

PART III ARGUMENT

12. The Centre supports the conclusion reached by the second respondent that the communication prohibition is valid. These submissions address the following matters:

    (a) the extent and characterisation of the burden that the communication prohibition places on the implied freedom;

    (b) the need to go beyond an assessment of whether the impugned law is rationally related to the achievement of a legitimate end, and to consider matters of
10 necessity and adequacy of balance in assessing whether the law is reasonably appropriate and adapted to a legitimate end;

    (c) the inadequacy of laws to protect the rights of patients and staff accessing clinics providing abortions prior to the enactment of Part 9A of the Act as it relates to the analysis of necessity; and

    (d) the significance of the legitimate end that the communication prohibition seeks to achieve, as part of the assessment of whether it is adequate in balance.

(a) Extent and characterisation of the burden

13. The Centre supports the submissions of the second respondent that the communication prohibition burdens the implied freedom and submits that the Court should conclude
20 that the burden is insubstantial for the following reasons.

14. First, the communication prohibition has a confined and defined geographical operation. Except within eyesight or earshot of a safe access zone, a person can express his or her views about abortion to those who care to listen.

15. Second, there is no reason for the Court to find that communication about abortion policies (such policies being a matter of government and politics) will be materially

[8] *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 312; *Roadshow Films v iiNet Ltd* (2011) 284 ALR 222 at [61].

impeded if a person is prohibited from conveying his or her views about the subject in safe access zones in a manner reasonably likely to cause distress and anxiety to other persons seeking to access or leave such zones. There are no facts to suggest such an impediment. By the nature of the subject matter, communications about abortion policies are equally well conveyed by expressing those views in other places.

16. In its practical operation, the communication prohibition materially reduces the opportunity for a person who opposes women seeking information about, or access to, reproductive health (including abortions) to dissuade a prospective patient from seeking health services or having an abortion, or to interfere with a patient seeking health services or having an abortion. That opportunity is reduced because, without access to the safe access zone, the person: (a) may not know who is planning to have an abortion so as to speak with them; and (b) cannot attempt to influence them at the critical moment when they access the specialist health services. However, the reduced opportunity should not be treated as co-extensive with any reduced opportunity to engage in political debate.

17. With respect to the consequences of characterising the burden as insubstantial, the Centre submits that it does not follow that the scrutiny or justification should be overlooked or diminished. In this respect, the Centre's submission differs from the second respondent for the following reasons.

18. First, the second respondent submits that the burden in this case is slight or insubstantial because not all communication about abortion captured by the communication prohibition will be political in nature [**Vic at [29], [31]**]. The Centre submits that in so far as the law burdens the implied freedom, it is that burden which requires scrutiny and justification. The impact of the law on other forms of communication is not relevant to the inquiry as to what constitutes political communication, that is, at the first step of *Lange*.

19. The second respondent's contention that communication in safe access zones to deter women from having an abortion is not political because it is "directed at influencing a personal and private medical opinion alone" [**Vic at [31]**] should be approached with caution. To the extent that the second respondent's submissions invite the Court to narrow its traditionally broad conception of what counts as communication on subjects

of politics and government, it should not be accepted. As French CJ said in *Hogan v Hinch*:

> The range of matters that may be characterised as "governmental and political matters" for the purpose of the implied freedom is broad. They are not limited to matters concerning the current functioning of government. They arguably include social and economic features of Australian society. For these are, at the very least, matters potentially within the purview of government.[9]

20. A broad approach to what counts as communication on matters of government and politics is appropriate and befits current circumstances in society, where all kinds of subject matters can properly form the part of political debate.

21. Second, the second respondent submitted that s 185D is a confined "time, manner and place" restriction [**Vic at [33]**] because those affected by it can express their views in the ways they want elsewhere. The Centre submits that restrictions on the time, manner and place of political communications still require careful assessment, particularly against the context in which the impugned laws were introduced. Much will turn upon the facts. Describing a law as effecting a "time, place or manner" restriction may inform consideration of its justification, but it does not warrant some more truncated form of analysis of that justification.

22. For example, *Brown v Tasmania* illustrates that the place of a protest can affect the impact of a political communication to such a degree that to restrict the places of such protests can be to substantially burden the freedom.[10] *McCloy*, by contrast, illustrates that the availability of alternative means of communicating political views may, in an appropriate case, justify the conclusion that a burden is insubstantial.[11]

23. The present case can be distinguished from *Brown v Tasmania* because there is nothing to support a finding that communication at particular locations, namely clinics providing a range of reproductive health services to women, is important to disseminating political messages about abortion. By contrast, there were facts in *Brown*

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9 (2011) 243 CLR 506 at 544 [49].

10 (2017) 91 ALJR 1089 at 1114 [117] – [118] (Kiefel CJ, Bell and Keane JJ).

11 See *McCloy v New South Wales* (2015) 257 CLR 178 at 220-221 [93] (Gageler J).

v Tasmania that supported a finding about the particular significance of onsite protests to debate about environmental issues.[12]

24. *Brown v Tasmania* is distinguishable on other bases also. The legislation in *Brown* applied in potentially vast areas of land, the boundaries of which were difficult to determine and depended on vague and wide definitions.[13] That uncertainty contributed to the severity of the burden on the freedom by creating the risk that the law would be given a broader operation than its terms required.[14] By contrast, in this case, the geographical bounds of the impugned provision of the Act are defined and certain and stable.

10 **(b) The analysis required for insubstantial burdens**

25. The second respondent's submission [**Vic at [47]-[51]**] that a small, "minimal", "slight" or "insubstantial" burden is permissible provided only that the impugned law is (a) aimed at the achievement of a legitimate end, and (b) rationally connected to, or suitable for, the achievement of that end, should not be accepted.

26. The extent of the justification required to support the validity of a law that burdens the implied freedom will depend upon, and be related to, the extent and nature of the burden.[15] It does not follow, however, that the small magnitude of a burden should avoid or disengage the need to scrutinise whether the impugned law is reasonably appropriate and adapted (or proportionate) to the legitimate end. Rather, the small
20 extent of the burden informs the Court's full consideration of whether the impugned law is reasonably appropriate and adapted. As Kiefel CJ, Bell and Keane JJ stated in *Brown v Tasmania*, in response to a submission that necessity testing and strict proportionality (or balancing) were not always required, "*Lange*, correctly understood, requires that *any* effective burden on the freedom must be justified".[16] The Centre

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[12] See (2017) 91 ALJR 1089 at 1102-1103 [32]-[34] (Kiefel CJ, Bell and Keane JJ), 1126 [191]-[192] (Gageler J), 1133 [240], 1140 [270] (Nettle J).

[13] (2017) 91 ALJR 1089 at 1107 [67]-[68], 1108-1108 [73], [77] (Kiefel CJ, Bell and Keane JJ).

[14] (2017) 91 ALJR 1089 at 1108 [77], 1109 [85], 1110 [91] (Kiefel CJ, Bell and Keane JJ).

[15] See, eg, *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 143; *Hogan v Hinch* (2011) 243 CLR 506 at 555-556 [95]-[96]; *Wotton v Queensland* (2012) 246 CLR 1 at 16 [30]; *Brown v Tasmania* (2017) 91 ALJR 1089 at 1114 [118], 1115 [128] (Kiefel CJ, Bell and Keane JJ).

[16] (2017) 91 ALJR 1089 at 1115 [126]-[127] (Kiefel CJ, Bell and Keane JJ).

notes the approach taken by other members of this Court who rejected the contention that small burdens do not require any justification at all.[17]

27. The authorities have regarded the extent of the burden as informing the degree of scrutiny brought to bear upon a measure, not in truncating the analysis entirely by putting certain lines of inquiry to one side and looking only for a rational connection between means and end.[18] A law that causes a small or insubstantial burden should not escape close scrutiny because of that fact.

28. An approach that addresses only the question of "rational connection" would lead to a very thin conception of the Court's function in enforcing the constitutional limit on legislative and executive power that is embodied in the implied freedom; such a conception would not befit the importance of the implied freedom within the framework of the Commonwealth Constitution. Rationality review is little more than another way to check that the purpose of the impugned law is as a party says it is.[19] A provision that is not rationally connected to a claimed end is unlikely to have that end as its true purpose, properly conceived applying standard principles of construction.

(c) The inadequacy of laws to protect the rights of patients and staff accessing clinics providing abortions prior to the enactment of Part 9A of the Act

29. The Centre agrees with the second respondent's submissions in relation to the necessity of the communication prohibition: **[Vic [54]-[61]]**. Specifically, the Centre submits that the laws that existed in Victoria prior to the enactment of Part 9A of the Act were not sufficient to protect the rights of women seeking to access reproductive health clinics, nor the rights of staff working at those clinics. [20]

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[17] *Monis v The Queen* (2013) 249 CLR 92 at 145 – 146 [120] – [121](Hayne J).

[18] See *Brown v Tasmania* (2017) 91 ALJR 1089 at 1110 [90], 1114 [118] (Kiefel CJ, Bell and Keane JJ), 1120 [164] (Gageler J), 1146 [291] (Nettle J); *Monis v The Queen* (2013) 249 CLR 92 at 145 – 146 [120] – [121] (Hayne J). Cf *Tajjour v New South Wales* (2014) 254 CLR 508 at 581 [151] (Gageler J).

[19] Cf *Unions NSW v New South Wales* (2013) 252 CLR 530 at 559-560 [59], 561 [64]-[65] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

[20] Victoria, Parliamentary Debates (*Statement of Compatibility)*, Legislative Assembly, 22 October 2015 3972 (Minister Hennessy, Minister for Health).

30. One clear illustration is the findings of the Supreme Court in *Fertility Control Clinic v the Melbourne City Council*.[21] At [15], McDonald J cited the unchallenged evidence that activities of the anti-abortion protesters included the following:

- standing outside the Clinic every day for more than 20 years from Monday to Saturday inclusive in numbers from three to 12 persons with 50 to 100 persons once per month;
- approaching women apparently coming to the Clinic, imposing their presence even when clearly unwelcome;
- harassing women entering or leaving the Clinic, engaging in arguments with the women and passers-by;
- attempting to block women's entry to the Clinic;
- blocking the footpath outside the Clinic;
- entering the laneway that runs along the side of the Clinic to follow patients or stand and pray, sing and shout outside the Clinic's consulting rooms;
- jostling and striking people passing the area and entering the Clinic;
- making offensive, frightening and misleading statements to patients and staff;
- engaging in loud singing, praying and shouting, clearly audible in the Clinic;
- intimidating and harassing patients of the Clinic, with the effect of deterring patients from attending the Clinic; and
- causing significant injury to the personal comfort of staff members, patients and others.

31. The Court addressed the evidence of attempts to engage the Victorian Police. His Honour found the Council's advice to settle the matter privately by referral to Victoria Police was misconceived (at [39]). However, the Court declined to make orders

[21] *Fertility Control Clinic v Melbourne City Council* (2015) 47 VR 368.

compelling the Melbourne City Council to take action under nuisance laws to address the conduct described in the evidence.[22]

(d) The significance of the legitimate end in balancing s 185D of the Act against that end

32. The Centre supports the submissions of the second respondent [**Vic [36]-[46]**] as to the legitimacy of the ends pursued by the communication prohibition, which is a task necessarily undertaken prior to assessing suitability and necessity, as the second respondent has done. The purpose of the law is plainly to protect the safety, wellbeing, privacy and dignity of persons, particularly women, accessing reproductive health clinics in Victoria, and staff working at such clinics.

33. In identifying the legitimate ends sought to be pursued by the communication prohibition, the second respondent's submissions detail the significant or compelling nature of those ends. The Centre submits that those matters are important not only to identifying the legitimate end but to the significance of that legitimate end as part of the balancing analysis.

34. The legitimate ends that Victoria is pursuing are multifaceted. The law advances public and individual safety, which have been regarded as legitimate ends by the Court.[23] Significantly, the communication prohibition is also designed to protect the rights of individuals, principally women's rights to privacy, dignity and equal access to healthcare, as well as ensuring safe and healthy working conditions for staff at clinics that provide abortions.[24]

35. The Centre seeks to supplement the second respondent's submissions in the following respects.

36. First, the importance of Victoria taking proactive measures to advance women's rights to privacy and non-discrimination should be understood within its historical context, in

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[22] *Fertility Control Clinic v Melbourne City Council* (2015) 47 VR 368.

[23] *Levy v Victoria* (1997) 189 CLR 579, 597 (Brennan J), 609 (Dawson J), 614 (Toohey and Gummow J), 620 (Gaudron J), 627 (McHugh J), 642, 647 (Kirby J); *Wotton v Queensland* (2012) 246 CLR 1, 16 [31] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

[24] Victoria, *Parliamentary Debates (Second Reading)*, Legislative Assembly, 22 October 2015, 3974 (Minister Hennessy, Minister for Health).

particular the criminalisation of abortion until 2008.[25] Efforts aimed at combatting the stigma that criminalisation of abortion caused have particular importance in vindicating women's privacy and dignity when accessing reproductive healthcare.

37. Second, women seeking abortions and staff working at the clinics experience harm as a result of being targeted by individuals engaged in anti-abortion activities, including attempting to discourage women from seeking advice, medical care or an abortion. The affidavits of Dr Allanson[26] and Dr Goldstone[27] record the negative impacts of such anti-abortion activities outside clinics in Victoria, based on their experiences working at clinics providing services that include abortion. These impacts include psychological distress, anger and fear and delays in accessing an abortion or post-abortion care, which can increase the risk of complications. One study from the United Kingdom has noted that mere presence of anti-abortion activities outside a clinic is a gateway factor in terms of creating distress for patients.[28]

38. Third, women and those accompanying them to the clinics at which abortions are provided are properly to be characterised as a "captive audience". Women accessing such clinics do so because they need to access reproductive health services. They may not be able to access this specialist healthcare elsewhere, particularly in regional and rural parts of Victoria. In this context it is relevant that women may attend such clinics for health services other than abortion but are similarly targeted by anti-abortion activities.[29] In practical terms, persons entering or leaving such clinics cannot escape the communications directed at them.[30]

39. Victoria has a legitimate interest in protecting the safety and privacy of individuals when they seek health information and treatment at the very moment when their privacy interests are most vulnerable. In the United States, the Supreme Court has recognised a legitimate interest in regulating speech where "the degree of captivity

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[25] The law of abortion was removed from the *Crimes Act 1958* (Vic) by the *Abortion Law Reform Act 2008* (Vic).

[26] **AB 6-21, 160-169, 172-209, 239-42.**

[27] **AB 243-248, 259-274.**

[28] Affidavit for Dr Susie Allanson [**AB 172-201**].

[29] **AB 28-44.**

[30] The same may be said of staff working at the clinics.

makes it impractical for the unwilling viewer or auditor to avoid exposure"[31] resulting in a substantial privacy interest being violated. In *Madsen v Women's Health Centre Incorporated*, in accepting medical privacy as a significant privacy interest supporting the restriction of the right to free speech, the Supreme Court stated that the "targeted picketing of a hospital or clinic threatens not only the psychological, but also the physical, well-being of the patient held "captive" by medical circumstance".[32]

40. Similarly, in Canada it has been accepted that patients of a clinic where abortion services were available were not in a position to avoid exposure to anti-abortion communications outside the clinic and should not be forced to endure such exposure where they cannot decline to receive it.[33]

41. Fourth, the protection of human rights is plainly a compelling interest. The interests of women seeking health care are recognised by the rights guaranteed by the *International Covenant on Civil and Political Rights*[34] and the *International Covenant of Economic, Social and Cultural Rights.*[35] International law has recognised that criminalisation of abortion is deleterious for women's health[36] and discriminatory.[37]

42. The Human Rights Committee has stated that obstacles to receiving information about medical options from known and trusted medical providers, and the failure to ensure

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[31] *Hill v Colorado* (2000) 530 US 703, 718 (quoting *Erznoznik v City of Jacksonville* (1975) 422 U.S. 205, 209).

[32] *Madsen v Women's Health Centre Incorporated* (1994) 512 US 753, 768.

[33] *R v Spratt* (2008) BCCA 340, [80]-[89].

[34] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS. 171 (entered into force 23 March 1976) arts 3, 7, 17.

[35] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) arts 3, 7, 12.

[36] Committee on Economic, Social and Cultural Rights, *General Comment No 22: Sexual and Reproductive Health,* UN Doc E/C.12/GC/22 (2016) [40]; Juan Mendez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment,* UN Doc A/HRC/31/57 (5 January 2016) [44]. See also World Health Organisation, *Safe Abortion: Technical and Policy Guidance for Health Systems* (2nd ed, 2012) 87.

[37] Committee on the Elimination of Discrimination against Women, *General Recommendation 24: Article 12 of the Convention (Women and Health)*, UN Doc A/54/38/Rev 1 (1999) [11]; United Nations Human Rights Committee, *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication no. 2324/2013*, UN Doc CCPR/C/116/D/2324/2013 (9 June 2016) [7.9]-[7.11].

access to an abortion where authorised by law, are factors relevant to determining that the denial of a timely abortion constitutes cruel, inhuman and degrading treatment.[38]

43. The protection of women's privacy, safety and dignity when accessing reproductive healthcare is consistent with Australia's obligations under the *Convention on the Elimination of all forms of Discrimination against Women* (**CEDAW**).[39] CEDAW requires Australia to ensure equality between men and women in access to healthcare, including reproductive healthcare and information,[40] and respect the right of women to decide the number and spacing of their children and to access the information, education and means to exercise these rights.[41]

10 44. The CEDAW Committee has recognised that 'abuse and mistreatment of women and girls seeking sexual and reproductive health information, goods and services, are forms of gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment'.[42]

45. Finally, human rights are also recognised by the *Charter of Human Rights and Responsibilities 2006* (Vic), specifically non-interference with privacy and equality under the law.[43] Statutory provisions in Victoria are to be subject to a statement of compatibility with human rights before being passed in Parliament, they must be interpreted compatibly with human rights so far as is possible and public authorities are

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[38] Human Rights Committee, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2324/2013*, UN Doc CCPR/C/116/D/2324/2013 (17 November 2016) [7.5]; Human Rights Committee, *Views: Communication No. 1608/2007*, UN Doc CCPR/C/101/D/1608/2007 (28 April 2011) [9.2]. See also the jurisprudence of the European Court of Human Right in the context of privacy rights: *Tysiąc v. Poland* (ECtHR, Fourth Section, Application No 5410/03, 20 March 2007) [110]; *A, B and C v Ireland* (ECtHR, Grand Chamber, Application No 25579/05, 16 December 2010) [245]; In *R R v Poland* (ECtHR, Fourth Section, Application No 27617/04, 26 May 2011) [197] the Court noted that the State's positive obligations to ensure that where abortion is permitted in law, practical barriers to accessing abortion services are addressed through specific measures.

[39] *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

[40] UN Committee on Economic, Social and Cultural Rights, *General Comment 14: The Right to the Highest Attainable Standard of Health,* UN Doc E/C.12/2000/4 (11 August 2000) [12(b)]; Committee on the Elimination of Discrimination against Women, *General Recommendation 24: Article 12 of the Convention (Women and Health),* UN Doc A/54/38/Rev.1, chap. I (1999).

[41] *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) art 16(e).

[42] CEDAW Committee, *General Recommendation 35 on gender-based violence against women, updating General Recommendation No 19,* UN Doc (CEDAW/C/GC/35, 14 July 2017) [18].

[43] *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 8, 10, 13.

required to act compatibly with human rights.[44] This broader statutory context should inform consideration of the compelling nature of the ends sought to be achieved.

46. These are matters that support the compelling nature of the legitimate ends of the law.

47. In summary, given the compelling nature of the legitimate end of the law, the necessity of the law to achieve that end, and the small extent of the burden on the implied freedom, the Centre submits that the communication prohibition is adequate in its balance and valid.

PART IV ESTIMATE OF TIME

48. If the Court grants the Centre leave to appear and considers it would be assisted by oral submissions, the Centre seeks leave to present oral argument for no longer than 10 minutes.

Dated: 25 May 2018

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[44] *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 28, 32(1), 38