

Campbell, Kevin

From: Dixon, Megan
Sent: Monday, 22 June 2015 4:50 PM
To: Beddoe, Julie
Cc: Jorgensen, Alex; Parker, Vicki; Field, Julie
Subject: `FW: Health (Patient Privacy) Amendment Bill 2015
Attachments: 20150622171046478.pdf

Importance: High

Urgent brief request for Wed please?

M

Megan Dixon | Acting Director, Civil Law; Human Rights Adviser Phone 02 6207 0595 | Fax 02 6205 0937 Legislation, Policy and Programs | Justice and Community Safety Directorate | ACT Government Level 2, 12 Moore Street Canberra ACT 2601 | GPO Box 158 Canberra ACT 2601 | www.act.gov.au

-----Original Message-----

From: Hosking, Kim
Sent: Monday, 22 June 2015 4:42 PM
To: Dixon, Megan
Subject: FW: Health (Patient Privacy) Amendment Bill 2015
Importance: High

-----Original Message-----

From: Hosking, Kim
Sent: Monday, 22 June 2015 4:20 PM
To: Field, Julie
Cc: Parker, Vicki; Benson, Andrew
Subject: Health (Patient Privacy) Amendment Bill 2015
Importance: High

Hey Julie

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Cheers,
Kim.

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From: Hosking, Kim
Sent: Monday, 22 June 2015 4:18 PM
To: Conroy, Kathryn
Subject: Health (Patient Privacy) Amendment Bill 2015

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Campbell, Kevin

From: Field, Julie
Sent: Monday, 22 June 2015 5:11 PM
To: Costello, Sean; Watchirs, Helen; Jorgensen, Alex
Cc: Beddoe, Julie; Dixon, Megan
Subject: FW: Health (Patient Privacy) Amendment Bill 2015
Attachments: 20150622171046478.pdf

Importance: High

Hi

Would you have capacity to look at this? Minister has asked for advice by CO Wednesday. Perhaps if we did something together?

Julie

Julie Field Executive Director
 (02) 6207 0522 Fax: (02) 6205 0937
 mailto: julie.field@act.gov.au
 Legislation, Policy and Programs | Justice and Community Safety Directorate | ACT
 Government Level 2, 12 Moore Street Canberra ACT 2601 | GPO Box 158 Canberra ACT 2601
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Campbell, Kevin

From: Field, Julie
Sent: Monday, 22 June 2015 6:47 PM
To: Parker, Vicki
Cc: Dixon, Megan; Jorgensen, Alex; Beddoe, Julie
Subject: Re: Health (Patient Privacy) Amendment Bill 2015

I flicked it to HRC on Kim's instructions.

Julie Field
 Executive Director
 Legislation, Policy & Programs
 Justice and Community Safety Directorate

Sent from my iPad

> On 22 Jun 2015, at 6:27 pm, "Parker, Vicki" <Vicki.Parker@act.gov.au> wrote:

>
 > I am not sure either. Julie?
 >
 > V
 >
 > Vicki Parker |Deputy Director-General Justice Justice and Community
 > Safety Directorate
 > Ph: +61 2 62053504
 > M:

> -----Original Message-----

> From: Dixon, Megan
 > Sent: Monday, 22 June 2015 4:53 PM
 > To: Parker, Vicki; Field, Julie
 > Cc: Jorgensen, Alex; Beddoe, Julie
 > Subject: FW: Health (Patient Privacy) Amendment Bill 2015
 > Importance: High

> Hi Vicki and Julie,

> You ok for me to flick on the HR Commission for their thoughts? Not sure of ACT approval protocol for flicking Min requests on to Stat Officers. Thought I'd best get your approval first.

> Megan

> Megan Dixon | Acting Director, Civil Law; Human Rights Adviser Phone
 > 02 6207 0595 | Fax 02 6205 0937 Legislation, Policy and Programs |
 > Justice and Community Safety Directorate | ACT Government Level 2, 12
 > Moore Street Canberra ACT 2601 | GPO Box 158 Canberra ACT 2601 |
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Campbell, Kevin

From: Field, Julie
Sent: Tuesday, 23 June 2015 10:03 AM
To: Costello, Sean
Cc: Watchirs, Helen; Jorgensen, Alex; Beddoe, Julie; Dixon, Megan; Thilagaratnam, Renuka; Durkin, Mary
Subject: Re: Health (Patient Privacy) Amendment Bill 2015

Sounds good.

Julie Field
 Executive Director
 Legislation, Policy & Programs
 Justice and Community Safety Directorate

Sent from my iPad

> On 23 Jun 2015, at 10:02 am, "Costello, Sean" <Sean.Costello@act.gov.au> wrote:
 >
 > Thanks Julie
 >
 > Just to maintain our independence, we might aim to have something to you by mid-afternoon tomorrow, which you can consider before finalising your view, and passing on to the Minister? Say by 2?
 >
 > Give me a call if you want to discuss further.
 >
 > Cheers
 >
 > Sean
 > x
 >
 > -----Original Message-----
 > From: Field, Julie
 > Sent: Monday, 22 June 2015 5:11 PM
 > To: Costello, Sean; Watchirs, Helen; Jorgensen, Alex
 > Cc: Beddoe, Julie; Dixon, Megan
 > Subject: FW: Health (Patient Privacy) Amendment Bill 2015
 > Importance: High
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 > Hi
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 > Would you have capacity to look at this? Minister has asked for advice by CO Wednesday. Perhaps if we did something together?
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 > Julie
 >
 > Julie Field Executive Director
 > (02) 6207 0522 Fax: (02) 6205 0937
 > <mailto:julie.field@act.gov.au>
 > Legislation, Policy and Programs | Justice and Community Safety Directorate | ACT
 > Government Level 2, 12 Moore Street Canberra ACT 2601 | GPO Box 158 Canberra ACT 2601 | www.act.gov.au
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Campbell, Kevin

From: Jorgensen, Alex
Sent: Tuesday, 23 June 2015 5:42 PM
To: Dixon, Megan
Cc: Beddoe, Julie; Field, Julie
Subject: First cut of the Abortion exclusion zone brief in case im not in tomorrow.
Attachments: AG Brief HPPA Bill huma rights implications.docx

Please see draft.

Will move some of this analysis into attachments to bring down the length..

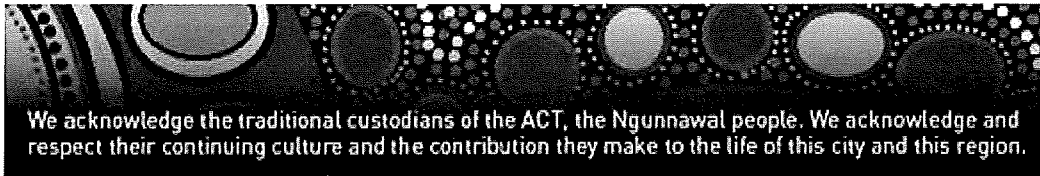
Cheers
Alex

Alexander Jorgensen-Hull | Senior Policy Officer (Civil Law)

Phone 02 6207 0534 | Fax 02 6205 0937

Legislation, Policy and Programs | Justice and Community Safety Directorate | ACT Government

Level 2, 12 Moore Street Canberra ACT 2601 | GPO Box 158 Canberra ACT 2601 | www.act.gov.au



Human Rights

Campbell, Kevin

From: Jorgensen, Alex
Sent: Wednesday, 24 June 2015 9:35 AM
To: Dixon, Megan
Subject: FW: Health (Patient Privacy) Amendment Bill 2015
Attachments: 20150622171046478.pdf

Importance: High

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From: Field, Julie
Sent: Monday, 22 June 2015 5:11 PM
To: Costello, Sean; Watchirs, Helen; Jorgensen, Alex
Cc: Beddoe, Julie; Dixon, Megan
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Importance: High

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 (02) 6207 0522 Fax: (02) 6205 0937
 mailto: julie.field@act.gov.au
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Campbell, Kevin

From: Jorgensen, Alex
Sent: Wednesday, 24 June 2015 9:43 AM
To: Dixon, Megan
Subject: Emailing: Attachment D Jones SYD Law Review Article abortion clinic exclusion zone constitutional analysis
Attachments: Attachment D Jones SYD Law Review Article abortion clinic exclusion zone constitutional analysis.pdf

Your message is ready to be sent with the following file or link attachments:

Attachment D Jones SYD Law Review Article abortion clinic exclusion zone constitutional analysis

Note: To protect against computer viruses, e-mail programs may prevent sending or receiving certain types of file attachments. Check your e-mail security settings to determine how attachments are handled.

Comment:

Implementing Protest-free Zones around Abortion Clinics in Australia

Eleanor Jones*

Abstract

This article considers the ‘Access Zones’ provisions of the *Reproductive Health (Access to Terminations) Act 2013* (Tas) that implement protest-free zones around abortion clinics. It will be argued that reform designed to insulate the public space around abortion clinics from political debate is well intentioned, but constitutionally dubious. Such provisions squarely confront the current division of the High Court on the issue of whether offensive political communication that is not likely to provoke a violent or actual breach of the peace can be legitimately burdened in the name of upholding ‘public order’ and ‘contemporary standards’ alone. Although it is not entirely clear how such a challenge would be received, it is evident that the questionable constitutionality of protest-free zones around abortion clinics provides a likely vehicle for High Court consideration of these issues.

I Introduction

I respect that each of us are entitled to our views. What I do not respect is the manner in which some people choose to express them.¹

An understandable sense of discomfort and affliction is aroused when women seeking an abortion are forced to endure a public critique of their lawful choice in the form of a picket line. The same is true of political protests that target the families of deceased soldiers.² Having disavowed ‘political correctness’ throughout the 1990s,³ Australia is now witnessing divergence between its commitment to robust, occasionally acrimonious, political debate and its commitment to tolerant and civil public discourse. The existence of a constitutionally implied right to freedom of political communication is accepted.⁴ However, the High Court is divided on whether this necessitates acceptance and tolerance of offensive or

* Eleanor Jones (BA Hons) is a final year LLB student at Sydney Law School. The author thanks Associate Professor David Rolph for his willingness to provide guidance and direction.

¹ Tasmania, *Parliamentary Debates*, House of Assembly, 16 April 2013, 24–87 (Michelle O’Byrne, Minister for Health).

² See generally *Monis v The Queen* (2013) 87 ALJR 340, 388 [238] (Heydon J) (‘*Monis*’).

³ Davinder Pal Ahluwalia and Greg McCarthy, “‘Political Correctness’: Pauline Hanson and the Construction of Australian Identity” (1998) 57 *Australian Journal of Public Administration* 79, 82–4.

⁴ See generally Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 521–7, 531–43.

hurtful political communication.⁵ In 2013, Heydon J concluded that the current Court's allowance of 'sadistic, wantonly cruel and deeply wounding blows'⁶ in the name of free political communication is evidence that the implied freedom was a 'noble and idealistic enterprise, which has failed, is failing and will go on failing'.⁷

Protests outside abortion clinics are poised to become the next example of political communication that is objectionable to a majority of Australians, but nonetheless protected from regulation by the freedom of political communication.⁸ There is a 'longstanding public consensus and legislative settlement on abortion in Australia'.⁹ Opinion polls consistently reveal that a sizeable majority of Australians believe that abortion services should be legally and easily accessible.¹⁰ Countries of a similar disposition have implemented protest-free zones around abortion clinics to protect patients from intimidation and humiliation at the hands of anti-abortion protesters.¹¹ The *Reproductive Health (Access to Terminations) Act 2013* (Tas) ('RHATA') provides a model for the creation of protest-free zones in Australian jurisdictions. This Act prohibits the 'besetting, harassing, intimidating, interfering with, threatening, hindering, obstructing or impeding' of any person and the making of any protest 'in relation to terminations' within 150 metres of an abortion clinic.¹² This article examines the necessity, validity and constitutionality of these provisions.

Part II canvasses the background and context of the RHATA. In pt III, the expected constitutional challenge to the 'Access Zones' clause will be discussed in light of freedom of political communication. This discussion draws on First Amendment jurisprudence from the United States. Although many have warned that American authorities are of little assistance,¹³ the United States Supreme Court has heard eight constitutional challenges to variously sized buffer zones precluding protests outside abortion clinics. Such decisions provide a 'useful illumination' of the principles involved.¹⁴ The United States Supreme Court has accepted prohibitions on approaching within 2.5 metres of a clinic patient¹⁵ and has upheld

⁵ In *Monis* (2013) 87 ALJR 340, the High Court divided 3:3 on the constitutionality of the *Criminal Code* (Cth) s 471.12, which prohibits use of the postal services in a way that reasonable persons would regard as offensive. French CJ, Hayne and Heydon JJ upheld the appeal: at 362 [73], 384 [214], 391 [251]. Crennan, Kiefel and Bell JJ dismissed the appeal: at 391 [352].

⁶ *Monis* (2013) 87 ALJR 340, 388 [241] (Heydon J).

⁷ *Ibid* 391 [251] (Heydon J).

⁸ *Ibid* 367 [104] (Hayne J).

⁹ Kate Gleeson, 'Tony Abbott and Abortion: Miscalculating the Strength of the Religious Right' (2011) 46 *Australian Journal of Political Science* 473, 485.

¹⁰ Katharine Betts, 'Attitudes to Abortion in Australia: 1972 to 2003' (2004) 12 *People and Place* 22, 23. See generally Barbara Baird, 'Abortion Politics during the Howard Years: Beyond Liberalisation' (2013) 44 *Australian Historical Studies* 245, 248.

¹¹ See, eg, *Access to Abortion Services Act*, RSBC 1996, c 1, s 2; *Freedom of Access to Clinic Entrances Act*, 18 USC § 248 (1994).

¹² RHATA s 9.

¹³ *Levy v Victoria* (1997) 189 CLR 579, 594, 598 (Brennan CJ) ('Levy'); *Monis* (2013) 87 ALJR 340, 404 [326]. See generally William Buss, 'Constitutional Words about Words: Protected Speech and Fighting Words under the Australian and American Constitutions' (2006) 15 *Transnational Law & Contemporary Problems* 489, 494.

¹⁴ *APLA Ltd v Legal Services Commissioner NSW* (2005) 224 CLR 322, 358; *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 240–1.

¹⁵ *Hill v Colorado*, 530 US 703, 729 (2000).

modest buffer zones (4.5 metres) around abortion clinic entrances.¹⁶ Accepting the common thesis that America's freedom of speech is more expansive than Australia's implied freedom of political communication,¹⁷ it appears unlikely that the Australian High Court would strike down the *RHATA* in its entirety to allow an unfettered right to protest outside abortion clinics. This article discusses what restrictions on these protests the High Court might accept and how such restrictions could be reconciled with the freedom of political communication.

II Background to the Reform

Accessing abortion services in Tasmania has been comparatively more difficult than in other Australian states.¹⁸ Prior to 2013, abortion was criminalised,¹⁹ unless the woman had obtained written certifications from two medical practitioners and had met a standard of 'informed consent', which required the patient to have been counselled on her options, including carrying the pregnancy to term.²⁰ Notably, between 1985 and 2000, more than a third of Tasmanians who underwent abortion procedures under the Medicare Benefits Schedule did so outside of Tasmania.²¹ This fact has concerned the Tasmanian Parliament.²² The *RHATA* is thus appropriately understood as a reform to liberalise access to abortion services.²³ This includes the erection of 'Access Zones' around clinics to prevent women feeling ashamed or stigmatised.²⁴ Relevantly, three types of behaviour are prohibited in these 150-metre zones: (a) besetting, harassing, intimidating, threatening and obstructing a person, (b) any 'protest' relating to abortions, and (c) graphically recording a patient attempting to access the clinic.²⁵

Although anecdotal evidence of intimidation and harassment was heard by the inquiry into the *RHATA*,²⁶ abortion clinic protests are not an endemic feature of the Tasmanian, or Australian, political landscape. A small number of isolated illegal protests have been documented in Australia, the most infamous of which

¹⁶ *Schenck v Pro-Choice Network of Western New York*, 519 US 357, 380 (1997) ('*Schenck*').

¹⁷ *Levy* (1997) 189 CLR 579, 641 (Kirby J).

¹⁸ See generally, Baird, above n 10, 254–5; Mark Rankin, 'Recent Developments in Australian Abortion Law: Tasmania and the Australian Capital Territory' (2003) 29 *Monash University Law Review* 316, 320.

¹⁹ *Criminal Code Act 1924* (Tas) s 134. This provision was repealed by the *RHATA* s 14(f).

²⁰ *Criminal Code Act 1924* (Tas) s 164. This provision was repealed by the *RHATA* s 14(g). The *RHATA* requires that medical practitioners performing terminations after 16 weeks of pregnancy obtain the 'woman's consent' and 'consult with another medical practitioner': s 5(1).

²¹ Carolyn Nickson, Julia Shelly and Anthony Smith, 'Use of Interstate Services for the Termination of Pregnancy in Australia' (2002) 26 *Australian and New Zealand Journal of Public Health* 421, 423.

²² Tasmania, *Parliamentary Debates*, Legislative Council, 20 December 2001, 1–3 (Lin Thorp); Tasmania, *Parliamentary Debates*, House of Assembly, 16 April 2013, 24–87 (Jeremy Rockliff).

²³ See, eg, *RHATA* s 8. The *RHATA* also broadens the considerations relevant to a medical practitioner's certification of the abortion: s 5(2). The *RHATA* imposes an obligation on doctors, counsellors and nurses to provide details of where information about terminations can be accessed and, where applicable, to perform emergency terminations, irrespective of any conscientious objection to the procedure: ss 7(2), 6(3).

²⁴ Tasmania, *Parliamentary Debates*, House of Assembly, 16 April 2013, 24–87 (Michelle O'Bryne).

²⁵ *RHATA* s 9(1) (definition of 'Prohibited Behaviour' (a)–(d)).

²⁶ Evidence to Government Administration Committee, Legislative Council of Tasmania, Hobart, 29 July 2013, 7 (Caroline de Costa).

involved the murder of a security guard at Melbourne's Fertility Control Clinic in July 2001.²⁷ By comparison, more than 70 000 anti-abortion protesters were reportedly arrested at American abortion clinics between 1987 and 1993.²⁸ The intensity of these protests overwhelmed traditional police resources, thereby justifying protest-free zones as a means of prevention.²⁹ Such an impetus does not exist in Australia and, arguably, current protests could be responded to by using existing causes of action.

There is an argument open to abortion clinics that these protests represent a public nuisance.³⁰ 'Unreasonable or excessive obstruction' of roadways,³¹ and protests that beset those who wish to pass, may constitute acts of public nuisance.³² 'Besetting' here means to 'set about or surround with hostile intent', causing the passer-by to 'hesitate through fear to proceed or, if they do proceed, to do so only with fear for their safety'.³³ Animal-rights activists protesting a circus were found to create a public nuisance by 'lining up so as to compel would-be patrons to "walk the gauntlet" of shouting picketers'.³⁴ However, such behaviour must be distinguished from that of protesters merely attempting to communicate their point of view to a passing person.³⁵ Importantly, besetting conduct is assessed relative to the sensibilities of its targets.³⁶ Besetting a woman outside an abortion clinic, when it might reasonably be assumed that she is vulnerable or could be easily distressed, would make a finding of public nuisance more likely.

Injunctive relief can offer a remedy of a similar scope to the 'Access Zones' provisions. Following instances of trespass, in 1986 Murray J in the Victorian Supreme Court granted an injunction to restrain Right to Life Victoria from standing within three metres of the footpaths surrounding the Royal Women's

²⁷ *R v Knight* [2002] VSC 498 (19 November 2002). See generally Rebecca Dean and Susie Allanson, 'Abortion in Australia: Access versus Protest' (2004) 11 *Journal of Law and Medicine* 510, 511; Jo Morgan, 'US Hate Crime Legislation: A Legal Model to Avoid in Australia' (2002) 38 *Journal of Sociology* 25, 35.

²⁸ Tara Kelly, 'Silencing the Lambs: Restricting the First Amendment Rights of Abortion Clinic Protestors in *Madsen v Women's Health Centre*' (1995) 68 *Southern California Law Review* 427, 429–30. See generally *National Organisation for Women Inc v Scheidler*, 510 US 249 (1994).

²⁹ *Schenck*, 519 US 357, 363–4 (1997).

³⁰ See generally *Australian Builders' Labourers' Federated Union of Workers (WA) v J-Corp Pty Ltd* (1993) 42 FCR 452, 456–8. The Attorney-General has standing to commence a civil proceeding for public nuisance on behalf of the public: *Attorney-General v PYA Quarries Ltd* [1957] 2 QB 169, 190–1. If a private plaintiff has suffered 'particular injury to himself beyond that which is suffered by the rest of the public' (as is arguably true of the relevant abortion clinics) that private plaintiff will also have standing in respect of that public nuisance: *Benjamin v Storr* (1874) LR 9 CP 400, 406; *Transurban City Link v Allan* (1999) 57 ALD 581, 591; *Walsh v Ervin* [1952] VLR 361, 371. See also *Criminal Code Act 1924* (Tas) ss 140–1.

³¹ *McFadzean v Construction, Forestry, Mining and Energy Union* (2007) 20 VR 250, 282.

³² *Ibid* 282–3.

³³ *Dollar Sweets Pty Ltd v Federated Confectioners Association of Australia* [1986] VR 383, 388 (Murphy J).

³⁴ *Animal Liberation (Vic) Inc v Gasser* [1991] 1 VR 51, 59. See also *Barloworld Coatings (Aust) Pty Ltd v Australian Liquor, Hospitality & Miscellaneous Workers Union* (2001) 108 IR 107, 112 [16] ('*Barloworld*').

³⁵ *Barloworld* (2001) 108 IR 107, 112 [16].

³⁶ *Animal Liberation (Vic) Inc v Gasser* [1991] 1 VR 51, 59.

Hospital.³⁷ The practicalities of this restriction do not appear to have been of particular concern: ‘It seems to me that anyone who wants to stand either with shoe-box coffins or handing out leaflets 3 metres out from the gutter would do so at his own risk.’³⁸ Although of little assistance in preventing the protests themselves, individual women might also seek to protect their identity or the revelation of their patient status by means of a claim of breach of privacy³⁹ or confidence.⁴⁰ The status of such a claim in Australia is uncertain but it has been accepted that information relating to a woman’s abortion is information of a ‘purely personal nature’.⁴¹ A statutory offence for breaching privacy is applicable in Tasmania, if accessing an abortion clinic is characterised as a ‘private act’.⁴² Other criminal offences, such as public annoyance,⁴³ or organising a public demonstration without a permit,⁴⁴ also allow some opportunity for police intervention and therefore control over these protests, albeit not to the same degree as the strict prohibition in the *RHATA*.

The sufficiency of the existing means of regulating protests formed the basis of some arguments against the *RHATA*.⁴⁵ The prospect of a constitutional challenge to the protest-free zones was also clearly of concern to the Government Administration Committee.⁴⁶

III Protest-free Zones and the Implied Freedom of Political Communication

Freedom to communicate in relation to political and governmental matters is a necessary incident of the constitutionally prescribed system of representative and responsible government in Australia.⁴⁷ The requirement of democratic elections

³⁷ *Royal Women’s Hospital v Right to Life Victoria* [1986] VSC 246 (5 June 1986) 4 (Murray J). See also *Healy v Right to Life Victoria* [1987] VSC 29 (12 February 1987).

³⁸ *Royal Women’s Hospital v Right to Life Victoria* [1986] VSC 246 (5 June 1986) 3 (Murray J). Cf *Schenck*, 519 US 357, 378 (1997).

³⁹ The possibility of a tort for the invasion of privacy has been recognised: *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 328, 278. However, it is unlikely to be upheld where alternative causes of action exist, as is the case here: *Doe v Australian Broadcasting Corporation* [2007] VCC 281 (3 April 2007) [148], [150].

⁴⁰ *Campbell v MGN Ltd* [2004] 2 AC 457 indicates that photographs taken, even in a public street, that convey information of an ‘essentially private nature’ may form the basis of a breach of confidence: at 468. An obligation of confidence can arise where the recipient of information ‘ought to know’ the information is confidential or private: at 465. Such an obligation may arise where obviously confidential information is inadvertently revealed in a public place: *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 281. Whether there is an expectation of privacy attached to conduct observable from a public place, such that the information of that conduct would be confidential, is unclear under Australian law.

⁴¹ *Royal Women’s Hospital v Medical Practitioners Board of Victoria* (2006) 15 VR 22, 35, 36.

⁴² *Police Offences Act 1935* (Tas) s 13A.

⁴³ *Ibid* s 13.

⁴⁴ *Ibid* s 49AB.

⁴⁵ Evidence to Government Administration Committee, Legislative Council of Tasmania, Hobart, 29 July 2013, 13 (Michael Stokes).

⁴⁶ Evidence to Government Administration Committee, Legislative Council of Tasmania, Hobart, 19 August 2013, 74–6. Cf Evidence to Government Administration Committee, Legislative Council of Tasmania, Hobart, 30 July 2013, 5 (Terese Henning).

⁴⁷ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560 (‘*Lange*’).

provides little guidance as to what those elections and the attendant political debate should look like.⁴⁸ Given the vast array of issues that could possibly impact the exercise of one's vote at an election, the parameters of the political communication impliedly protected by the *Constitution* remains open to argument. The High Court's focus on the textual implication of the freedom has often obscured explicit enunciation of these limits.⁴⁹ However, two different judicial conceptions of political debate have emerged from recent cases:⁵⁰ one that accepts 'unreasonable, strident, hurtful and highly offensive communications' as part of 'robust' political debate,⁵¹ and the other that strives for a civil, accessible and rational discourse.⁵² Importantly, neither conception is 'obviously required or excluded' by the *Constitution*.⁵³ Given the difficulty in substantiating the content of the implied freedom and the High Court's near even split on the question of whether offensive communication falls within it, this article concedes that the prospective constitutionality of the *RHATA* is uncertain. However, it is clear that any challenge to the implementation of protest-free zones around abortion clinics would allow the High Court an important opportunity to mediate these conflicting positions and to shed further light upon the type of debate that the implied freedom of political communication serves to protect.

The test of whether the freedom of political communication has been impermissibly infringed involves three stages of enquiry.⁵⁴ First, it is necessary to characterise the burden upon political communication, whether direct or indirect.⁵⁵ Second, the purpose or object of the law must be ascertained to determine whether that purpose is legitimate in the sense of being 'compatible with the maintenance of the constitutionally prescribed system of representative and responsible government'.⁵⁶ Finally, it must be established that the provisions are 'reasonably appropriate and adapted to achieving that legitimate object or end'.⁵⁷ Where political communication has been burdened directly, this enquiry may take the

⁴⁸ See Adrienne Stone, 'The Limits of Constitutional Text and Structure Revisited' (2005) 28 *University of New South Wales Law Journal* 842, 846–9.

⁴⁹ See, eg, *McGinty v Western Australia* (1996) 186 CLR 140, 168 (Brennan CJ), 182–3 (Dawson J), 231–3 (McHugh J); *Lange* (1997) 189 CLR 520, 557. See generally Zines, above n 4, 551; Adrienne Stone, 'Australia's Constitutional Rights and the Problem of Interpretive Disagreement' (2005) 27 *Sydney Law Review* 29, 43.

⁵⁰ Adrienne Stone, 'Insult and Emotion, Calumny and Inveective: Twenty Years of Freedom of Political Communication' (2011) 30 *University of Queensland Law Journal* 79, 90.

⁵¹ *Monis* (2013) 87 ALJR 340, 361 [67] (French CJ).

⁵² *Coleman v Power* (2004) 220 CLR 1, 6 (Gleeson CJ), 90 (Callinan J), 100 (Heydon J) ('*Coleman*').

⁵³ Stone, above n 50, 90.

⁵⁴ *Monis* (2013) 87 ALJR 340, 359 [61] (French CJ).

⁵⁵ *Ibid* 367 [108] (Hayne J). The distinction between direct and indirect burdens upon political communication has re-emerged in recent jurisprudence: *Hogan v Hinch* (2011) 243 CLR 506, 555–6; *A-G (SA) v Corporation of the City of Adelaide* (2013) 87 ALJR 289, [217] (Crennan and Kiefel JJ) ('*A-G (SA) v Adelaide*'); *Monis* (2013) 87 ALJR 340, 409 [352] (Crennan, Kiefel and Bell JJ). This distinction is said to be most relevant to the stringency of the 'appropriate and adapted' test. Here, the distinction will also be discussed in the course of characterising the burden that protest-free zones would place upon political communication.

⁵⁶ *Lange* (1997) 189 CLR 520, 562.

⁵⁷ *Ibid*.

stricter form of whether the provision is ‘necessary for the attainment of some overriding public purpose’.⁵⁸

A Would Protest-free Zones Burden Political Communication?

In order to burden political communication, the *RHATA* would need to infringe activities that are both communicative and political. This infringement may be merely incidental, depending on whether the provision ‘specifically target[s] communication’ as its ‘direct purpose’.⁵⁹ The Access Zones implement a content-based prohibition on communication that relates to the issue of terminations but only within a specified area.⁶⁰ This poses the question: is it the communication itself or the location of the communication that is the specific target of the prohibition?

Because the implied freedom protects ‘communication’ generally, the communicative value of speech and conduct has not been thoroughly distinguished.⁶¹ Nonetheless, it has been thought that regulations relating to the time, location and manner of political communication do not specifically target or directly burden political communication, but rather constrict the conduct associated with it.⁶² The High Court has accepted that restrictions on movement, for example, may rob an individual of the opportunity to make their protest ‘in a manner which would have achieved maximum’ effect.⁶³ It has also been acknowledged that the form of communication may be ‘neither incidental nor accidental’ to its meaning: ‘the greater the insult, the more effective the attack may be’.⁶⁴ Regulating the delivery of the communication, such as whether it takes the form of an insult, is therefore difficult to divorce from regulation of the communication itself. And yet restrictions as to location and form of communication in these cases were construed as mere incidental or indirect burdens.⁶⁵

The proposition that regulating conduct only indirectly burdens communication is difficult to maintain where the regulated conduct achieves, or at least influences, an overall communicative purpose. Emerson has argued that, where the predominant purpose of conduct is communicative, regulation of that conduct should be seen as a direct burden upon communication:

⁵⁸ *Levy* (1997) 189 CLR 579, 619 (Gaudron J). See also *Cunliffe v Commonwealth* (1994) 182 CLR 272, 299–300, 337–9; *Coleman* (2004) 220 CLR 1, 102 (Heydon J); *A-G (SA) v Adelaide* (2013) 87 ALJR 289, 337 [217] (Crennan and Kiefel JJ).

⁵⁹ *Levy* (1997) 189 CLR 579, 619 (Gaudron J), 645 (Kirby J).

⁶⁰ *RHATA* (Tas) s 9(1) (definition of ‘Prohibited Behaviour’ (b)).

⁶¹ *Levy* (1997) 189 CLR 579, 594–5 (Brennan CJ).

⁶² See, eg, *A-G (SA) v Adelaide* (2013) 87 ALJR 289, 306 [46] (French CJ), 338 [219] (Crennan and Kiefel JJ); *Monis* (2013) 87 ALJR 340, 409 [352] (Crennan, Kiefel and Bell JJ).

⁶³ *Levy* (1997) 189 CLR 579, 609 (Dawson), 613–14 (Toohey and Gummow JJ), 623–5 (McHugh J), 636 (Kirby J).

⁶⁴ *Monis* (2013) 87 ALJR 340, 364 [85] (Hayne J).

⁶⁵ See, eg, *O’Flaherty v City of Sydney Council* (2013) 210 FCR 484, 497–8 (‘O’Flaherty’); *Coleman* (2004) 220 CLR 1, 10, 101–2; *A-G (SA) v Adelaide* (2013) 87 ALJR 289, 338 [219] (Crennan and Kiefel JJ); *Monis* (2013) 87 ALJR 340, 409 [352] (Crennan, Kiefel and Bell JJ).

The burning of a draft card is, of course, conduct that involves both communication and physical acts. Yet it seems quite clear that the predominant element in such conduct is expression (opposition to the draft) rather than action (destruction of a piece of cardboard).⁶⁶

However, Hart Ely suggests that this approach constructs an ontological dilemma as the burning of a draft card:

involves no conduct that is not at the same time communication and no communication that does not result from conduct. Attempts to determine which element 'predominates' ... [are] question-begging judgments about whether the activity should be protected.⁶⁷

If the predominant purpose of a protest is to persuade through communication, then regulation of a protest's location incidentally burdens the communication. If the location of the protest is itself communicative, then its regulation directly burdens that communication. The parliamentary consideration of the Access Zones provisions acknowledged that the latter is true of abortion clinic protests because even silent vigils, absent communication, are transformed into 'expression[s] of disapproval' by virtue of their location outside clinics.⁶⁸

The High Court has acknowledged that individuals' conduct by means of their movement and association is facilitative of their freedom of communication.⁶⁹ 'Freedom of political communication depends on human contact and entails at least a significant measure of freedom to associate with others ... [This] necessarily entails freedom of movement.'⁷⁰ Political communication will be burdened when citizens are 'held in enclaves, no matter how large the enclave or congenial its composition'⁷¹ and no matter how readily they can communicate within that particular enclave.⁷² Given this acknowledgment, the current assumption that the regulation of the location of protests indirectly burdens communication is unsatisfactory.⁷³ In determining whether communication is *effectively* burdened, one must look to the 'practical effect' of the law.⁷⁴ The creation of protest-free zones prohibits certain communication, defined by its content, being voiced in a forum that produces a particular message communicated specifically to women accessing abortions. That this communication could be replicated elsewhere, albeit less effectively, does not necessarily suggest that the

⁶⁶ Thomas Emerson, *The System of Freedom of Expression* (Random House, 1970) 84.

⁶⁷ John Hart Ely, 'Flag Desecration: A Case Study in the Role of Categorization and Balancing in First Amendment Analysis' (1975) 88 *Harvard Law Review* 1482, 1495–6. For a study of the variability of these judgments, see generally Rachel Entman, 'Picket Fences: Analyzing the Court's Treatment or Restrictions on Polling, Abortion and Labor Picketers' (2001) 90 *Georgetown Law Journal* 2581.

⁶⁸ Tasmania, *Parliamentary Debates*, House of Assembly, 16 April 2013, 24–87 (Michelle O'Bryne).

⁶⁹ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 212 (Gaudron J); Zines, above n 4, 532; *Kruger v Commonwealth* (1997) 190 CLR 1, 91–2 (Toohey J), 115 (Gaudron J), 142 (McHugh J) ('*Kruger*'), cf 70 (Dawson J).

⁷⁰ *Kruger* (1997) 190 CLR 1, 115 (Gaudron J).

⁷¹ *Ibid.*

⁷² *Ibid* 116, 125.

⁷³ *O'Flaherty* (2013) 210 FCR 484, 497–8; *Levy* (1997) 189 CLR 579, 608–9 (Dawson J), 613–14 (Toohey and Gummow JJ), 623–5 (McHugh J), 636 (Kirby J).

⁷⁴ *Monis* (2013) 87 ALJR 340, 367 [108] (Hayne J).

burden upon this communication is indirect. If we are to construe protest-free zones around abortion clinics realistically, it is clear that their ‘purpose and design ... as its own defenders urge in attempted justification — [is] to restrict speakers on one side of the debate’.⁷⁵ Although the decision in similar circumstances in *Levy* concluded otherwise, such a law is aptly described as directly burdening free communication, notwithstanding its ostensible focus on the mere location of that communication.⁷⁶

It is also necessary to consider whether the content of the communication should rightly be considered political. The regulation of abortion services and clinics is a matter for state governments. Nonetheless, it is now accepted that such issues influence national politics, especially because the Commonwealth allocates funding for state services.⁷⁷ It has been directly accepted that ‘abortion is a sensitive political matter’,⁷⁸ and that religious or moralising speech ought to be considered political communication.⁷⁹ Thus, it is relatively settled that discussion of the issue of abortion constitutes communication relating to political and government matters.

Although abortion clinic protests would tend to engage political issues in their content, there may be circumstances in which the context of speech robs it of political character. In *Coleman*, the Court entertained, but ultimately rejected, an argument that a ‘personal campaign’ against a private figure may fall outside the realm of political and governmental matters.⁸⁰ Crennan, Kiefel and Bell JJ accepted in *Monis* that a law may validly burden political communication that intrudes into the ‘personal domain’ but their Honours did not address whether the personalised form of that communication removed the political character of its content.⁸¹ This proposition must surely be true in some circumstances. For example, the United States Supreme Court upheld a by-law precluding anti-abortion protesters from picketing the residential house of an abortion provider because the protest did not seek to ‘disseminate a message to the general public’ and therefore was not protected speech.⁸² Conversely, the personalised insults displayed by the Westboro Baptist Church at Matthew Snyder’s funeral (‘You’re Going to Hell’, ‘God Hates You’) were protected because ‘the overall thrust and dominant theme of Westboro’s demonstration spoke to broad public issues’.⁸³ The distinction is a fine one and is again influenced by whether the content or the context of the speech is deemed most important.

Some have argued that personalised attacks do not require constitutional protection because they will not impact and are not necessary to political debate.⁸⁴

⁷⁵ *Hill v Colorado*, 530 US 703, 768 (Kennedy J) (2000).

⁷⁶ *Levy* (1997) 189 CLR 579, 618, 620 (Gaudron J).

⁷⁷ *Hogan v Hinch* (2011) 243 CLR 506, 543, 544 (French CJ).

⁷⁸ *Re Sublime Pty Ltd and Australian Communications and Media Authority* (2010) 115 ALD 239, 242.

⁷⁹ *A-G (SA) v Adelaide* (2013) 87 ALJR 289, 312 [67] (French CJ).

⁸⁰ *Coleman* (2004) 220 CLR 1, 1–2, 11, 25–6. See also *Monis* (2013) 87 ALJR 340, 389 [242] (Heydon J).

⁸¹ *Monis* (2013) 87 ALJR 340, 403 [320], 404 [324] (Crennan, Kiefel and Bell JJ).

⁸² *Frisby v Schultz*, 487 US 474, 486 (1988).

⁸³ *Snyder v Phelps*, 131 S Ct 1207, 1217 (Roberts CJ) (2011) (‘*Westboro Baptist Church Case*’).

⁸⁴ See, eg, *Westboro Baptist Church Case*, 131 S Ct 1207, 1228–9 (Alito J) (2011).

This proposition has some appeal: if the freedom of political communication is an incident of the constitutional system of government, its application should arguably be instrumental to that end and need only protect communication likely to shed light on political matters in the mind of an elector.⁸⁵ The state appellate courts have variously considered this argument in relation to anti-vilification laws. Adopting the opposite conclusion to New South Wales,⁸⁶ the Victorian⁸⁷ and Queensland Courts of Appeal have voiced support for the argument that anti-vilification laws do not burden the implied freedom because political communication can be ‘sufficiently free’ without victimising minority groups.⁸⁸ The same may be said of abortion clinic protests: political debate about abortion can operate freely without personally addressing women accessing abortions. There is obvious truth in the statement that some political communication is not ‘an essential part of any exposition of ideas’, is of ‘slight social value’ and is ‘so unreasonable, so irrational ... not [to] assist the electors to an informed or true choice’.⁸⁹ Ultimately, the question of whether Australian governance would continue to operate satisfactorily in the absence of the proscribed speech is ‘too large and diffuse an inquiry’ to be accepted as the test for defining the parameters of protected communication.⁹⁰

To illustrate this point, when considering whether the sending of graphic pictures of aborted fetuses to chemist shops that stocked the ‘morning-after pill’ was a defensible form of political protest, a United Kingdom court commented:

The most that [the defendant] could have hoped to achieve was to persuade those responsible in the pharmacies ... to stop selling the ‘morning after pill’ ... It is difficult to see what contribution this would make to any public debate.⁹¹

Yet anti-abortion protesters would consider a marginal reduction in the availability of the morning-after pill to be a victory consistent with their political aim of reducing the use of that drug. Thus, a test that defines communication as political only where it is useful, effective or influential for public debate will exclude a great deal of communication on the basis of a generalised judgment as to how persuasive the communication is. This will generate disproportionate protections for the ‘mainstream of political discourse’ because, by definition, minority opinions are less likely to have an impact of political debate.⁹² Consequently, the *RHATA* and protest-free zones around abortion clinics generally are likely to burden political communication. There is reason to believe that this burden would operate as a direct restriction on communication. The Access Zones target speech because of its content and regulate conduct that is facilitative of that message. At the least, the freedom of political communication is burdened

⁸⁵ *Coleman* (2004) 220 CLR 1, 104 (Heydon J).

⁸⁶ *Sunol v Collier* (2012) 289 ALR 128, 138.

⁸⁷ *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* (2006) 206 FLR 56, 68 [34], 118 [210].

⁸⁸ The Court ultimately followed New South Wales authority in concluding that political communication was burdened: *Owen v Menzies* (2012) 265 FLR 392, 395 (de Jersey CJ), 415–16 (McMurdo P).

⁸⁹ *Chaplinsky v New Hampshire*, 315 US 568, 572 (1942); *Coleman* (2004) 220 CLR 1, 92 (Callinan J), 104, 105 (Heydon J).

⁹⁰ *Monis* (2013) 87 ALJR 340, 369 [119] (Hayne J).

⁹¹ *Connolly v DPP* [2008] 1 WLR 276, 286 [32].

⁹² *Monis* (2013) 87 ALJR 340, 369 [122], 377 [173] (Hayne J).

indirectly by the prohibition on protesting within the specified areas. The character of the communication ought to be considered political, regardless of its personalised content and its likely incapacity to impact the wider political debate.

Accepting that the freedom of political communication is so burdened, the possibility that this burden is enacted pursuant to, and justified by, a legitimate legislative purpose will now be considered.

B Does a Legitimate Purpose Justify the Implementation of Protest-free Zones?

Upon examining the text, historical background and ‘social object’ of the legislation, a number of possible motives can be attributed to the *RHATA*.⁹³ To the extent that the Access Zones provisions seek to prevent traffic disruption, they pursue a legitimate purpose. Preventing physical obstructions, hindrances or impediments to vehicles or pedestrians trying to enter a clinic,⁹⁴ they are analogous to those regulations upheld in *A-G (SA) v Adelaide* as ensuring the ‘comfort, convenience and safety of other road users’.⁹⁵ The prohibition on ‘besetting, harassing, intimidating, interfering with [or] threatening’ persons appears to be directed towards preventing breaches of the peace.⁹⁶ However, given protests that do not beset, harass or intimidate are also prohibited,⁹⁷ a wider purpose may be attributed to the provisions in attempting to cultivate a sense of safety and comfort for women accessing abortion clinics. The legitimacy of this purpose depends upon the judicial construction of what the content of free political debate should be and, in particular, the degree of offence that must be tolerated as an unavoidable by-product.

‘Keeping public places free from violence’ falls squarely within the category of purposes that allow legislation to legitimately burden political communication.⁹⁸ Any communication that is ‘intended ... [or likely] to provoke unlawful, physical retaliation’ can be restricted, even where this communication relates to political matters.⁹⁹ Judicial analysis of whether it is legitimate to prohibit communication that does not ‘rise to the level of provoking or arousing physical retaliation or the risk of such’, but which is nonetheless offensive or harassing, is far more equivocal.¹⁰⁰ Four members of the Court in *Coleman* concluded that a carefully tailored regulation directed at ‘preventing the intimidation of participants in debates on political and governmental matters’ could be legitimate, even where a violent breach of the peace was unlikely.¹⁰¹ Three members of the Court in

⁹³ Ibid 370 [125] (Hayne J), 403 [317] (Crennan, Kiefel and Bell JJ). For the governmental purposes said to justify similar legislation in the United States see: *Hill v Colorado*, 530 US 703, 726 (2000); *Schenck*, 519 US 357, 376 (1997).

⁹⁴ *RHATA* s 9(1).

⁹⁵ *A-G (SA) v Adelaide* (2013) 87 ALJR 289, 335 [204] (Crennan and Kiefel JJ).

⁹⁶ *RHATA* s 9(1) (definition of ‘Prohibited Behaviour’ (a)).

⁹⁷ Ibid s (9)(1) (definition of ‘Prohibited Behaviour’ (b)).

⁹⁸ *Coleman* (2004) 220 CLR 1, 58 (Gummow and Hayne JJ); Stone, above n 50, 88.

⁹⁹ *Coleman* (2004) 220 CLR 1, 58 (Gummow and Hayne JJ), 77–8 (Kirby J).

¹⁰⁰ Ibid 77 (Kirby J).

¹⁰¹ Ibid 4 (Gleeson CJ), 34 (McHugh J), 90 (Callinan J), 100 (Heydon J), cf 56 (Gummow and Hayne JJ), 77 (Kirby J).

*Monis*¹⁰² held that it may be legitimate to burden political communication where the language ‘use[d] in the place where it is spoken and in the context to whom it is spoken is contrary to contemporary standards of good public order and goes beyond what by those standards is simply an exercise of freedom to express opinions’.¹⁰³ In both cases, strong criticisms were voiced of these attempts to produce ‘civility of discourse’.¹⁰⁴ Australia’s ‘luxuriant tradition’ of acrimonious political debate coexists with legislative restrictions on the use of insult, vilification and intimidation.¹⁰⁵ The difficulty lies in identifying the degree of tolerance that should be expected: must we tolerate all insults that fall short of provoking a physical reaction or is there another line to be drawn?

An acknowledgment from the High Court that the peace of society can be breached without the risk or actuality of violence would be a welcome development in the jurisprudence on the freedom of political communication. It is archaic to assume that harmful political debate can only occur ‘between two persons of relatively equal power ... acculturated to respond to face-to-face insults with violence’.¹⁰⁶ The simple fact that the recipient of an insult is unlikely to respond violently should not dictate the level of offence they are expected to tolerate. The resilience of police officers in withstanding public insult may provide some justification for allowing the insult in *Coleman* to go unpunished.¹⁰⁷ It would be unjust, however, to expect an individual to withstand insult because she was unlikely to resort to violence, where that improbability was a result of her vulnerability and fear, rather than her strength and stoicism.¹⁰⁸ A pregnant woman, who is already conflicted or ashamed about accessing an abortion, might only rarely resort to violence. However, it is not clear why the democratic society envisaged by the *Constitution* would necessarily view a physical dispute between two parties disposed to physical retaliation as a more severe breach of the peace than the emotional trauma that may be inflicted upon a vulnerable party by virtue of malicious contributions to the political debate.¹⁰⁹ It can even be argued that political communication is left more free when such communication is prohibited because ‘stimulating anger or embarrassment or fear’ in political debate creates ‘obstacles to the exchange of useful communication’.¹¹⁰

¹⁰² *Monis* (2013) 87 ALJR 340, 404 [324], 408 [349] (Crennan, Kiefel and Bell JJ). French CJ appeared to base his decision on the breadth of the offence, rather than an illegitimacy of purpose: at 362 [73].

¹⁰³ *Ibid* 399 [298], 400 [300] (Crennan, Kiefel and Bell JJ). See also *Coleman* (2004) 220 CLR 1, 6 (Gleeson CJ).

¹⁰⁴ *Monis* (2013) 87 ALJR 340, 382 [199], 385 [220]–[221]; *Coleman* (2004) 220 CLR 1, 58 (Gummow and Hayne JJ), 77–8 (Kirby J).

¹⁰⁵ Roger Douglas, ‘The Constitutional Freedom to Insult: The Insignificance of *Coleman v Power*’ (2005) 16 *Public Law Review* 23, 27. See also *Coleman* (2004) 220 CLR 1, 58 (Gummow and Hayne JJ), 70 (Kirby J).

¹⁰⁶ Charles Lawrence, ‘If He Hollers Let Him Go: Regulating Racist Speech on Campus’ [1990] *Duke Law Journal* 431, 454. See generally Rosalie Berger Levinson, ‘Targeted Hate Speech and the First Amendment: How the Supreme Court Should Have Decided *Snyder*’ (2013) 46 *Suffolk University Law Review* 45, 55–6.

¹⁰⁷ *Coleman* (2004) 220 CLR 1, 78 (Kirby J).

¹⁰⁸ *Ibid* 4 (Gleeson CJ).

¹⁰⁹ *Ibid* 90, 92 (Callinan J), 100 (Heydon J); *Monis* (2013) 87 ALJR 340, 389 [242] (Heydon J).

¹¹⁰ *Coleman* (2004) 220 CLR 1, 32 (McHugh J), 103 (Heydon J).

According to this approach, it would be legitimate to burden political communication where that communication involved the ‘deliberate inflicting of serious public offence or humiliation’, ‘[i]ntimidation and bullying’¹¹¹ and ‘wounding ... [by] publicly insulting’ or the ‘intrusion of offensive material into ... personal domain[s]’.¹¹² There are two characteristics of abortion clinic protests that assist the argument that such protests are ‘contrary to contemporary standards’ and beyond a simple expression of opinion.¹¹³ First, the concept of the ‘unwilling listener’ or ‘captive audience’ has been narrowly recognised in America as justifying a prohibition on speech where an individual has ‘no ready means of avoiding the unwanted speech’.¹¹⁴ Although this has not specifically been adopted in Australia, French CJ alluded to it in *A-G (SA) v Adelaide*. In that case, a by-law prohibiting preaching, canvassing and haranguing in public was held to be valid because it protected ‘members of the public from gratuitous interference with their freedom to choose whether and, if so, when and where they would be subject to proselytising communications’.¹¹⁵ Scholars have argued that medical circumstance may ‘hold pregnant women captive to abortion protesters outside of health clinics’.¹¹⁶ This is particularly true in Tasmania, where the number of clinics providing termination services is limited. According to Children by Choice, there are only two private abortion clinics in Tasmania.¹¹⁷ Second, the nature of abortion, as an intensely private decision, may allow scope to argue that attempting to communicate personally on this topic goes beyond the mere expression of a political opinion.¹¹⁸ In *Monis*, intrusions into the ‘personal domain’ were considered proscribable by three of members of the Court.¹¹⁹ Whether this ‘personal domain’ could extend from receiving mail at a private residence to walking down the street for the purpose of achieving a private course of action, such as seeking an abortion, remains to be seen.

Thus, the High Court would be asked to affirm either the broad or narrow interpretation of what is a legitimate regulation of offensive and hurtful communication. By either path, we return to the question of what political debate ought to be. Whether communication is contrary to contemporary standards is as difficult an assessment as whether communication is ‘sufficiently insulting and provocative to make reactive physical retaliation likely’.¹²⁰ Nonetheless, even if it remains the case that only communication likely or intending to result in violence can be regulated, some of the provisions of the *RHATA* could be read down so as to

¹¹¹ *Ibid* 6 (Gleeson CJ), 100 (Heydon J).

¹¹² *Monis* (2013) 87 ALJR 340, 404 [324] (Callinan, Kiefel and Bell JJ).

¹¹³ *Ibid* 399 [298], 400 [300] (Crennan, Kiefel and Bell JJ).

¹¹⁴ *Frisby v Schultz*, 487 US 474, 487 (1988).

¹¹⁵ *A-G (SA) v Adelaide* (2013) 87 ALJR 289, 308 [54] (French CJ).

¹¹⁶ Leslie Gielow Jacobs, ‘Nonviolent Abortion Clinic Protests: Reevaluating Some Current Assumptions about the Proper Scope of Government Regulation’ (1996) 70 *Tulane Law Review* 1359, 1440.

¹¹⁷ Children by Choice, *Fact Sheet: Australian Abortion Law and Practice* (19 September 2013) <<http://www.childrenbychoice.org.au/info-a-resources/facts-and-figures/australian-abortion-law-and-practice#TAS>>.

¹¹⁸ *Monis* (2013) 87 ALJR 340, 399 [298], 400 [300] (Crennan, Kiefel and Bell JJ).

¹¹⁹ *Ibid* 403–4 [317]–[326] (Crennan, Kiefel Bell JJ). Cf at 383 [206] (Hayne J).

¹²⁰ Buss, above n 13, 496.

be constitutional.¹²¹ This would preserve a prohibition on verbal harassment or intimidation likely to result in physical retaliation: a significant narrowing of the application of the Access Zones.

C Is the Creation of a Protest-free Zone Reasonably Appropriate and Adapted to a Legitimate Purpose?

The *RHATA* must be appropriate and adapted to achieving the legislative purpose previously identified if the burden on political communication is to be compatible with the constitutionally prescribed system of representative and responsible government.¹²² Whether the Access Zones, as formulated, are appropriate and adapted therefore depends on the legitimate legislative purpose accepted by the court, the uncertainty of which is canvassed above. For example, although the prevention of traffic disruptions is a legitimate purpose, not all of the provisions could be considered appropriate and adapted to that purpose. An individual respectfully handing out pamphlets on a footpath can hardly be considered a traffic disruption and yet, their actions are caught by the prohibition.¹²³ Similarly, if the legitimate purpose of the *RHATA* is the prevention of violence, the general prohibition on protests, which is not qualified by a requirement of intimidation, harassment or threats, is unlikely to be accepted as appropriate and adapted. A protest-free zone of 150 metres is excessive if its purpose is simply to prevent violence because it places a distance larger than a soccer pitch between the two individuals.¹²⁴ Some degree of preventative caution may be accepted if it is believed that no measure, other than complete exclusion, 'could reasonably be taken to prevent angry and probably violent confrontations' because of the 'highly emotional' nature of the interaction.¹²⁵ However recent cases suggest that provisions directed towards maintaining public order will only be upheld where they are qualified. For example, while McHugh J was willing to accept the prevention of intimidation as a legitimate purpose, his Honour commented that such provisions ought to be qualified, at least, by an intention on the part of the speaker to intimidate.¹²⁶ Equally, while the High Court was willing to accept a burden upon political communication to ensure 'comfort, convenience and safety of other road users', the provisions in that case enacted a permit system that allowed only the possibility that protests would be prohibited, where specifically considered inconvenient.¹²⁷

It is therefore unlikely that the provisions of the *RHATA* would survive in their entirety. The blanket prohibition of 'protest[s] in relation to terminations' that are 'able to be seen or heard' by patients is unlikely to be viewed as sufficiently precise to withstand the controversy of its implementation.¹²⁸ This provision is

¹²¹ *Coleman* (2004) 220 CLR 1, 53–4, 56 (Gummow and Hayne JJ).

¹²² *Ibid* 30 (McHugh J).

¹²³ *RHATA* s 9(1) (definition of 'Prohibited Behaviour' (b)).

¹²⁴ *Ibid* s 9(1) (definition of 'Access Zone').

¹²⁵ *Levy* (1997) 189 CLR 579, 627.

¹²⁶ *Coleman* (2004) 220 CLR 1, 34 (McHugh J).

¹²⁷ *A-G (SA) v Adelaide* (2013) 87 ALJR 289, 323 [138], 324 [141] (French CJ), 335 [204] (Crennan and Kiefel JJ).

¹²⁸ *RHATA* s 9(1) (definition of 'Prohibited Behaviour' (b)).

enlivened by the less certain legislative purpose of preventing political communication that is contrary to contemporary standards. The legitimacy of crafting legislation to provide individuals seeking abortions with ‘absolute impunity’ from unsolicited communication¹²⁹ relies upon careful qualification and a ‘close relationship between its construction and its purpose’ of maintaining public order.¹³⁰ Because the provision regulates speech on the basis of its content, it may be interpreted as a direct burden upon political communication and therefore judged according to whether it is ‘necessary for the attainment of some overriding public purpose’.¹³¹ As has been discussed, there is little evidence to suggest that these protests are so frequent and unruly that access to abortion clinics is currently being disrupted to the extent that so wide an exclusion zone is necessary.

Finally, the punishments imposed by the *RHATA* are severe: fines of up to 75 penalty units (\$9750) or imprisonment for a term not exceeding 12 months or both.¹³² The severity of punishment attached to a prohibition on political communication will tend to justify a ‘restrictive reading’ of the provision and will attract additional scrutiny as to whether the legitimate purpose of the law is proportionate to the seriousness of the criminal punishment.¹³³ This is a further indication that the absolute protest-free zone may not withstand constitutional scrutiny. Nonetheless, this would leave the prohibition on besetting, harassing and intimidating conduct, and the prohibition on graphically recording patients in force, with the possibility that these would be read down to apply only to conduct resulting or likely to result in a physical disruption of the peace.

IV Conclusion

It is difficult to reach a predictive conclusion as to how the High Court will interpret the legitimacy of the *RHATA*. Both the communicative purpose and the emotional offence of the protests derive from the location and context of the speech. Determining whether it is better to allow a formal infringement of political communication or better to accept a functional hindrance to the comfortable access of abortion clinics will involve a question of ‘weight or balance’, despite judicial protestations otherwise.¹³⁴ Incidents of violence and intimidation have significantly decreased in America following the implementation of protest-free zones around

¹²⁹ Government Administration Committee, Legislative Council of Tasmania, Hobart, 20 November 2013, 82–138 (Mr Hall).

¹³⁰ *Monis* (2013) 87 ALJR 340, 357 [50] (French CJ).

¹³¹ *Levy* (1997) 189 CLR 579, 619 (Gaudron J). See also *Cunliffe v Commonwealth* (1994) 182 CLR 272, 299–300, 337–9, 338; *Coleman* (2004) 220 CLR 1, 102 (Heydon J); *A-G (SA) v Adelaide* (2013) 87 ALJR 289, 337 [217] (Crennan and Kiefel JJ).

¹³² *RHATA* s 9(2). Significant amendments in the penalties were made in Committee when the Bill was before the Legislative Council in November 2013. The financial penalty was reduced from 500 penalty units to 75 penalty units. An amendment of the maximum imprisonment term from 12 months to three months was negatived. See Government Administration Committee, Legislative Council of Tasmania, Hobart, 20 November 2013, 82–138.

¹³³ *Coleman* (2004) 220 CLR 1, 53–4, 56 (Gummow and Hayne JJ), 66 (Kirby J); *Levy* (1997) 189 CLR 579, 614 (Toohey and Gummow JJ); *Monis* (2013) 87 ALJR 340, 402 [311] (Crennan, Kiefel and Bell JJ).

¹³⁴ *Coleman* (2004) 220 CLR 1, 29 (McHugh J); Kelly, above n 28, 456.

abortion clinics: such a reduction is a noble legislative goal.¹³⁵ Whether it is legitimate to burden political communication in order to achieve that goal depends on one's concept of what is desirable, or at least tolerable, political debate. We may be hopeful that law reform implementing protest-free zones around abortion clinics in Australia will provide an occasion for the High Court to undertake this imaginative exercise.

¹³⁵ William Alex Pridemore and Joshua Freilich, 'The Impact of State Laws Protecting Abortion Clinics and Reproductive Rights on Crimes Against Abortion Providers: Deterrence, Backlash or Neither?' (2007) 31 *Law and Human Behavior* 611, 624; Joshua Wilson, *Street Politics of Abortion: Speech, Violence and America's Culture Wars* (Stanford University Press, 2013) 180–3.

Campbell, Kevin

From: Dixon, Megan
Sent: Wednesday, 24 June 2015 1:21 PM
To: Field, Julie
Cc: Jorgensen, Alex
Subject: Green Bill Brief
Attachments: Health (Patient Privacy) Amendment Bill 2015 Abortion exclsuion zones advice.tr5

Hi Julie,

I have cleared this brief through to you...Explained to Alex my reshuffling. Do you agree with the recs? I played with these a bit Alex?

M

-----< HP Records Manager Record Information >-----

Record Number : MIN:2015/004268
Title : Health (Patient Privacy) Amendment Bill 2015 Abortion exclsuion zones advice

Campbell, Kevin

From: Costello, Sean
Sent: Wednesday, 24 June 2015 2:15 PM
To: Dixon, Megan; Field, Julie; Jorgensen, Alex; Beddoe, Julie
Cc: Watchirs, Helen; Durkin, Mary; Thilagaratnam, Renuka; Hingston, Matt
Subject: Health Patient Privacy Amendment Bill_exclusion zones_comments
Attachments: Health Patient Privacy Amendment Bill_exclusion zones_comments.docx

Hello All

Here is our close to final **draft** response to the Attorney regarding the Health Patient Privacy Amendment Bill, for your information. We'll forward final version to yourselves and Attorney later this afternoon.

Cheers

Sean



**ACT HUMAN RIGHTS
COMMISSION**

Australian Capital Territory

24 June 2015

Ms Julie Field
Executive Director
Legislation, Policy and Programs, JACS
Via email

Dear Ms Field,

Health (Patient Privacy) Amendment Bill 2015

We understand that the Attorney-General has asked for urgent preliminary advice on the human rights implications of this draft bill. Given the short timeframes, we have kept our comments brief. We will also provide this advice to the Attorney directly.

Overview of the bill

The bill proposes to introduce criteria for creating a 'protected area' around an 'approved medical facility', that is, a facility which has been approved in accordance with section 83 of the *Health Act 1993* for carrying out abortions. The specific details regarding the dimensions of a particular 'protected area' will be set out in a disallowable instrument (item 5, new section 86).

The bill proposes to prohibit the following types of behaviour in a 'protected area' during a declared 'prohibited period' (8am-6pm on the days the facility is open, or as otherwise declared by the Minister via a disallowable instrument, see item 5, new section 85(2)):

- Harassing, hindering, intimidating, interfering with, threatening or obstructing a person with the intention of stopping the person from entering the facility, or having or providing the abortion;
- Acts that are able to be seen or heard by a person accessing the facility that are intended to stop the person from entering the facility, or having or providing the abortion; and
- Protests in relation to the provision of abortions.

A person in a 'protected area' will also be prohibited from 'intentionally capturing the visual data' of a person accessing or leaving the facility without their consent, however this does not appear to be subject to any time restrictions. In the time available, we have not been able to consider how this Bill might interact with other surveillance legislation, including the *Workplace Privacy Act 2011*.

It will be an offence to engage in 'prohibited behaviour' in a 'protected area' (25 penalty units). It will also be an offence (subject to limited exception) to publish a visual record of a person entering or leaving a facility without their consent (50 penalty units and/or 6 months imprisonment).

Human rights implications

The bill places restrictions on the right to freedom of expression, which is protected in section 16 of the *Human Rights Act 2004*. Freedom of expression is not an absolute right and may be subject to reasonable limits in

accordance with section 28 of the HR Act. Essentially, a limitation on the right to freedom of expression will be justifiable if it is aimed at a legitimate objective, and is rationally and proportionately connected to that objective. It may also appear to restrict the right to freedom of religion; however, in our view, the bill is drafted in a way that is neutral about the type of protest that it is to be regulated, in so far that protest activity both for and against abortion will be captured.

Currently Tasmania is the only Australian jurisdiction to have enacted legislation to provide for an exclusion zone around abortion clinics. Exclusion zone legislation, however, has been enacted in comparable human rights jurisdictions overseas, such as Canada. Similar legislation is also found in the US. Other human rights jurisdictions such as the UK appear to rely on the use of injunctions as the primary means for controlling protest behaviour in the vicinity of abortion clinics. In our view, exclusion zone legislation would afford a more comprehensive approach than injunctive relief, as it would provide greater consistency, transparency and certainty for people to regulate their behaviour accordingly.

Regardless of the specific mechanism employed, the experience of these comparable jurisdictions suggests that measures of this nature are likely to be compatible with the right to freedom of expression if they:

- are designed to ensure the safety, security and privacy of patients and workers;
- apply only to a limited area; and
- operate only during a specific and limited time.

In our view, the bill's evident purpose – to ensure that women's access to an approved medical facility providing abortion services is not impaired – is a legitimate objective. The measures are not directed at prohibiting expression of specific ideas, opinions and beliefs, but rather to protect people from the potentially harmful consequences of such expression occurring in a particular place, time and manner. The bill does not prohibit people from expressing their views anywhere else. Human rights law has generally viewed time, place and manner restrictions to be less offensive to the values of freedom of expression than an outright ban on a particular kind of speech.

Measures restricting expression have also been found to be compatible where they are designed to protect a 'vulnerable group', (see, for example, the Canadian Supreme Court's decision in *R v Keegstra* (1990), 61 C.C.C. (3d) 1 (SCC)). The case for compatibility is greater where the protected interest relates to a recognised human right, such as, in this case, the right to privacy or the right to security of the person. To the extent that the bill helps protect these rights by restricting activities that impair access to a legal medical procedure, it is likely to be compatible with human rights. It is also likely to advance other HR Act values, including the right to equality and non-discrimination, by removing potential barriers to women's access to equitable health care and reproductive choice.

We note that the measures proposed in the bill are likely to alleviate current restrictions on women's rights to privacy and security of the person, and improve their ability to access medical services in safety and privacy. While no one has lodged a formal complaint to date, concerns about this issue are nevertheless regularly raised with Health Services Commissioner.

Areas of concern

On the whole, the bill appears appropriately circumscribed to meet its objectives; in particular the time, place and manner restrictions are welcome, and the use of disallowable instruments will enable the measures to be specifically tailored to a particular location without sacrificing parliamentary oversight. However, the following aspects may give rise to some concerns:

'Reasonably necessary'

- The bill provides that the Minister may declare an area around an approved medical facility to be a 'protected area' if satisfied that it is 'reasonably necessary' to ensure the privacy and unimpeded access of a person entering or leaving the facility. The Minister must also be satisfied that the declared area is no bigger than is 'reasonably necessary' to achieve those purposes.
- It is questionable whether the standard of 'reasonably necessary' is an appropriate threshold for triggering an intrusion on human rights. International human rights standards require interferences with human rights, including the right to freedom of expression, to be 'necessary' for a legitimate objective. The standard of 'reasonably necessary' appears to be lower than the standard of 'necessary' and may not be fully consistent with human rights.

Prohibition on capturing and publishing images

- Similar to the Tasmanian legislation, the bill makes it an offence to intentionally record a person accessing or leaving an approved medical facility in a protected area without their consent. The bill also makes it an offence to publish such images without the consent of the person, with imprisonment as a penalty. A limited exception is provided for law enforcement officers who undertake such activity in the course of exercising their functions.
- We are concerned that these provisions as currently drafted are overly broad and are likely to capture behaviour that is unconnected to the objectives of the legislation. To ensure compatibility, recording the image of a person in a protected area should only be prohibited where it is done for a purpose that is related to the provision of abortion services, see, for example, *Access to Abortion Services Act 1995* (BC, Canada), s 3.
- We also note that in contrast to the other types of prohibited activities set out in the bill, the act of visually recording a person entering or leaving a facility in a protected area does not appear to be subject to any time restrictions. The reason for the discrepancy is not immediately apparent and an explanation should be provided.

We will be happy to provide further advice on these matters if necessary. The contact officer for this matter is Sean Costello, on

Yours sincerely



Helen Watchirs
Human Rights and Discrimination Commissioner



Mary Durkin
Health Services Commissioner

24 June 2015

Campbell, Kevin

From: Dixon, Megan
Sent: Wednesday, 24 June 2015 2:44 PM
To: Field, Julie
Cc: Jorgensen, Alex
Subject: FW: Health Patient Privacy Amendment Bill_exclusion zones_comments
Attachments: Health Patient Privacy Amendment Bill_exclusion zones_comments.docx

On reflection, Alex and I don't think our brief needs any 'massaging'...

Megan Dixon | Acting Director, Civil Law; Human Rights Adviser

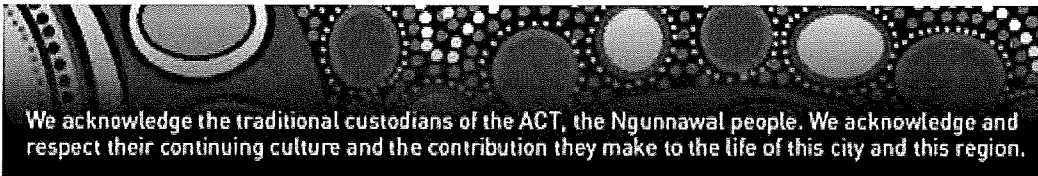
Phone 02 6207 0595 | Fax 02 6205 0937

Legislation, Policy and Programs | Justice and Community Safety Directorate | **ACT Government**

Level 2, 12 Moore Street Canberra ACT 2601 | GPO Box 158 Canberra ACT 2601 | www.act.gov.au



Human Rights



From: Costello, Sean
Sent: Wednesday, 24 June 2015 2:15 PM
To: Dixon, Megan; Field, Julie; Jorgensen, Alex; Beddoe, Julie
Cc: Watchirs, Helen; Durkin, Mary; Thilagaratnam, Renuka; Hingston, Matt
Subject: Health Patient Privacy Amendment Bill_exclusion zones_comments

Hello All

Here is our close to final **draft** response to the Attorney regarding the Health Patient Privacy Amendment Bill, for your information. We'll forward final version to yourselves and Attorney later this afternoon.

Cheers

Sean

Campbell, Kevin

From: Costello, Sean
Sent: Wednesday, 24 June 2015 3:21 PM
To: Field, Julie
Cc: Dixon, Megan; Jorgensen, Alex; Beddoe, Julie; Durkin, Mary; Hingston, Matt; CORBELL; Hosking, Kim; Barnard, Belinda; Thilagaratnam, Renuka; Thomson, Jane; Watchirs, Helen
Subject: Health Privacy Amendment Bill

Dear All

Please find attached a letter from the ACT Human Rights Commission regarding a draft Health Privacy Amendment Bill provided to us by the LPP area of JACS. We understand the Attorney General was seeking our advice on the draft Bill.

Regards

Sean Costello
Senior Human Rights Legal Adviser
ACT Human Rights Commission
t: (02) 6205 2222
f: (02) 6207 1034
www.hrc.act.gov.au



Health Patient
Privacy Amendme..

Campbell, Kevin

From: Field, Julie
Sent: Wednesday, 24 June 2015 5:30 PM
To: Jorgensen, Alex
Cc: Dixon, Megan
Subject: AG Brief HPPA Bill human rights implications revised.DOCX
Attachments: AG Brief HPPA Bill human rights implications revised.docx

Marked up for info only. Thanks for all your work Alex.

JUSTICE AND COMMUNITY SAFETY

Issues Brief - Initiated

Health (Patient Privacy) Amendment Bill 2015 Abortion exclusion zones advice

MIN:2015/004268



Correspondent:
Receiving Minister

Tracking

Receipt date
Date referred to directorate 24/06/2015
Date due to Minister
Date response rec'd in MO / /

Action

Priority **Routine** Critical date
Division **LEGISLATION, POLICY AND PROGRAMS**
Required action
For reply by
Action officer *alex jorgensen* Ext. 70 534
Action notes

Clearance

Director-General:
Approved
Approved subject to changes indicated / /
Resubmit with changes indicated
Deputy Director-General:
Approved
Approved subject to changes indicated 25/6/15
Resubmit with changes indicated
Chief Finance Officer / /
Executive Director *Julie Field* 24/6/15

Notes:

Please discuss ASAP.

Filing

External file number _____
External file source _____
Date Filed / /

*When all action is complete, please file papers and provide file number.
'External file source' is the record keeping system on which the file is captured (e.g. ACT Record Services, Objective IDMS etc).

Campbell, Kevin

From: Pearse, Melissa
Sent: Friday, 26 June 2015 10:00 AM
To: Jorgensen, Alex
Subject: HP Records Manager Issues Brief - Initiated : MIN:2015/004268 : Health (Patient Privacy) Amendment Bill 2015 Abortion exclsuion zones advice
Attachments: Health (Patient Privacy) Amendment Bill 2015 Abortion exclsuion zones advice.tr5
Importance: High

Good morning Alex

The DDG has requested edits to the brief and ATT D. I have scanned these and the coversheet with a brief note to TRIM for your reference.

This record has been marked back to you for amendments.

Kind regards

Melissa Pearse | A/g Ministerial Liaison Officer Phone 02 620 76411 | Ministerial Services Unit | Justice and Community Safety | ACT Government Level 9 12 Moore Street Canberra City | GPO Box 158 Canberra ACT 2601 | www.justice.act.gov.au

-----< HP Records Manager Record Information >-----

Record Number : MIN:2015/004268
Title : Health (Patient Privacy) Amendment Bill 2015 Abortion exclsuion zones advice

Campbell, Kevin

From: Dixon, Megan
Sent: Friday, 26 June 2015 3:34 PM
To: Parker, Vicki
Cc: Jorgensen, Alex; Field, Julie; Wahren, Lee-Anne; Schofield, Karen; Warren, Prue
Subject: HP Records Manager Issues Brief - Initiated : MIN:2015/004268 : Health (Patient Privacy) Amendment Bill 2015 Abortion exclsuion zones advice
Attachments: Health (Patient Privacy) Amendment Bill 2015 Abortion exclsuion zones advice.tr5

Hi Vicki,

As requested I have cleared this through quickly (in Julie's absence)... It should come to you as a matter of urgency...

Kind regards,

Megan

-----< HP Records Manager Record Information >-----

Record Number : MIN:2015/004268

Title : Health (Patient Privacy) Amendment Bill 2015 Abortion exclsuion zones advice

JUSTICE AND COMMUNITY SAFETY

Issues Brief - Initiated

Health (Patient Privacy) Amendment Bill 2015 Abortion exclusion zones advice

MIN:2015/004268



Correspondent:
Receiving Minister

Tracking

Receipt date
Date referred to directorate 24/06/2015
Date due to Minister
Date response rec'd in MO 01/07/15

Action

Priority Routine Critical date
Division LEGISLATION, POLICY AND PROGRAMS
Required action
For reply by
Action officer alex Jorgensen Ext. 70 534
Action notes

Clearance

Director-General: Approved cleared by DG per brief.
Approved subject to changes indicated 1/1
Resubmit with changes indicated
Deputy Director-General: Approved EMP 26/6/15
Approved subject to changes indicated 25/6/15
Resubmit with changes indicated
Chief Finance Officer 1/1
Executive Director Julie Field 24/6/15

Notes: M. Dixon 26/6/15

Please discuss ASAP.

Resubmission - 26/6/15.

DG requested back to LPP for changes 29.6.

Resubmission 1.7.15 with requested changes.

Filing

External file number _____
External file source _____
Date Filed 1/1

*When all action is complete, please file papers and provide file number.
*External file source' is the record keeping system on which the file is captured (e.g. ACT Record Services, Objective IDMS etc).

UNCLASSIFIED

TRIM No.: MIN:2015/004268

Date Rec'd Minister's Office 1..7/15

To: Attorney-General

From: Executive Director Legislation, Policy and Programs

Subject: Greens Health (Patient Privacy) Amendment Bill 2015 human rights implications

Critical Date: Urgent

Critical Reason: Your office asked for urgent advice

- DG (JACS) 1..7/15
- DDG 26/6/15

Purpose

1. On 22 June 2015 your office requested urgent advice on the human rights implications of the *Health (Patient Privacy) Amendment Bill 2015* (the 'HPPA Bill'). This brief provides a preliminary assessment of the legal issues relating to measures to introduce exclusion zones around abortion clinics.

Background

2. On 25 March 2015 Greens Member Shane Rattenbury was reported in the *Canberra Times* (Attachment A) as calling for an exclusion zone around Canberra's abortion clinics to prevent the harassment and intimidation of women accessing the services of abortion clinics.
3. Under part six of the *Health Act 1993* ('Health Act') abortions are legal in the ACT if carried out by doctors in approved medical facilities.
4. In the *Canberra Times* article Mr Rattenbury was reported as proposing legislation which would create buffer zones similar to those implemented in 2013 in Tasmania, in the *Reproductive Health (Access to Terminations) Act 2013* (Attachment C), where protests are banned within 150m of abortion clinics.
5. The article reported that various 'right to life' groups had been protesting outside the ACT Health Building on Moore Street for approximately 16 years.
6. Mr Rattenbury's office has drafted the HPPA Bill (Attachment B) which if passed would likely make acts constituting this protest unlawful.

Issues*The HPPA Bill structure*

7. The HPPA Bill proposes to amend the Health Act to introduce a new division in part six relating to patient privacy in protected areas.
8. The HPPA Bill would introduce s87(1) which would make it an offence for a person to engage in 'prohibited behaviours' in a 'protected area' around 'approved' medical facilities.

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9. The 'protected area' would be declared by the Minister and must be no bigger than as reasonably necessary to ensure a person's privacy and unimpeded access (s86). 'Prohibited behaviours' in that area includes various forms of harassment, acts that prohibit access to the medical facility, protests, and filming of people without their consent. Behaviours are prohibited only during a 'prohibited period', between 8am and 6pm each business day (or other time as declared by the Minister)(s85(1)). Unauthorised filming is prohibited at all times.
10. The Bill contains two offences. The first, engaging in prohibited behaviour in a prohibited area, carries a maximum penalty of 25 penalty units (s87(1)). The second is an unauthorised filming offence, which carries a penalty of 50 penalty units and/or imprisonment for six months (s87(2)).

Comparison with Tasmanian legislation

11. Tasmania recently enacted similar 'exclusion zone' provisions in its *Reproductive Health (Access to Terminations) Act 2013* (The Act). This Act was part of a series of reforms to decriminalise abortions in that State.
12. The main difference between the Tasmanian legislation and the HPPA Bill is that Tasmania legislates a 150m boundary for the 'protected area', rather than leaving it to the Minister's declaration.
13. Specific police powers are also given to Tasmanian police in the legislation (name and address demand, stop, search and seize powers), where they believe someone is committing or has committed an offence. These do not appear in the HPPA Bill, but would most likely be available in any case.
14. The Tasmanian legislation also contains clauses allowing police to issue infringement notices in respect of offences in the Act prescribed by regulation as 'infringement offences'. Infringement notices could be provided in relation to the HPPA Bill offences once passed by way of a regulation.

Human Rights Implications

15. The HPPA Bill engages, and will potentially limit, a number of human rights in the *Human Rights Act 2004* ('HRA') in relation to anti-abortion protesters: the right to freedom of movement (s13), the right to freedom of thought, conscience, religion and belief (s14), the right to peaceful assembly and freedom of association (s15) and the right to freedom of expression (s16).
16. Facilitating access to health care services (including abortion) by women engages and could be argued to improve the protection of women's rights - protection from discrimination (s8); protection of the family and children (s11); privacy (s12) and security of the person (s18).

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- 17.** Women have a number of rights in international human rights law which have not been directly adopted in the HRA including a general right to the highest attainable standard of physical and mental health under article 12 of the International Covenant on Economic, Social and Cultural Rights and article 12 of the Convention for the Elimination of All Forms of Discrimination Against Women which provides that -
- “States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning”.
- 18.** In determining whether the clear limitations on rights to assembly are compatible with the HRA, an assessment of the purpose and nature of the exclusion zone proposal would need to be undertaken.
- 19.** As the HPPA Bill is not a Government Bill, it is not subject to the same pre-legislative scrutiny processes, normally requiring you satisfy yourself that a bill is consistent with Human Rights.
- 20.** Subject to the consideration of this issue in the ACT context and the views of ACT stakeholders to inform an evidence base, it is likely that such legislation could be justifiable and therefore compatible with the HRA.
- 21.** An indicative consideration of the human rights issues in the ACT context is at Attachment D.

Financial Implications

- 26.** Nil.

JACS Directorate and Cross Directorate Consultation

- 27.** Consultation with Police and the Director of Public Prosecutions would be necessary to determine the enforceability of the offences in the HPPA Bill.
- 28.**

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29. The HRC has provided advice to your office separately. That advice raised similar considerations as discussed in this brief. The HRC concluded that the HPPA Bill was 'appropriately circumscribed' and would be compatible with human rights, subject to some refinements to the standard of belief for declaring a protected area, and the restriction on filming in the protected area. The HRC advice did not address the constitutional issues.

Next steps

30. Consideration of the HPPA at the Social Inclusion and Equality subcommittee of Cabinet may assist to develop a Government position on it. We suggest you consider raising this matter at the subcommittee under cover of an Information Cabinet submission prepared by Justice and Community Safety (JACS) Directorate.

External Consultation

31. This is an internal matter.

Benefits/Sensitivities

32. The Opposition Leader, Jeremy Hanson MLA is reported as opposing exclusion zone laws in the *Canberra Times* article.

Media Implications

33. Media attention is anticipated in relation to the government's response to the HPPA. Media materials will be provided to your office on request.

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Recommendations

That you:

- 1. note that a advice is being sought from the Solicitor-General as to the constitutionality of the HPPA;

Noted/ Please Discuss

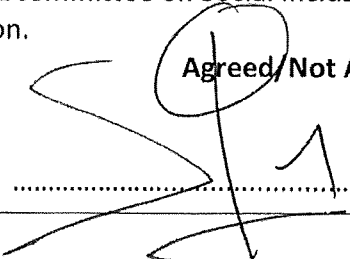
- 2. agree that JACS undertake further consultation with the Health Directorate, ACT policing, the DPP and the Human Rights Commission, to ascertain and consider the scope of proposed prohibited conduct to better inform the HRA implications; and

Agreed/Not Agreed/ Please Discuss

- 3. agree to progress the Bill to Cabinet's subcommittee on Social Inclusion and Equality by way of an Information Cabinet submission.

Agreed/Not Agreed/ Please Discuss

Simon Corbell MLA /...../.....

Minister's Comments		7.7.15
---------------------	--	--------

Signatory Name:	Julie Field	Phone:	70522
Title:	Executive Director, LPP		
Date:	1 July 2015		
Action Officer:	Alex Jorgensen	Phone:	70534

UNCLASSIFIED

Attachment D - Indicative considerations for determining whether the exclusion zone proposal for the Health (Patient Privacy) Amendment Bill 2015 is compatible with human rights.

Section 28 of the *Human Rights Act 2004* (HRA) provides that “human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society”. The section also provides a set of criteria against which to assess if the limit on a right is reasonable.

- a. **Nature of the right affected** – the rights to freedom of assembly and expression is a well recognised and fundamental part of Australian democratic society, allowing people to voice their beliefs and opinions in public. Consideration of the nature of the freedom of assembly and freedom of expression rights that are being exercised would also be necessary – is the ACT anti-abortion protest contrary to contemporary standards and beyond simple expression of opinion? Can protestors express their opinion otherwise than in a way that shames or victimises women seeking to have an abortion? Are people accessing this health service ‘captive’ in the sense that they are compelled by medical circumstance to subject themselves to shame and ridicule at the hands of the protestors in order to be able to access medical health care services? Abortion is an intensely private decision – attempts to communicate personal views on this topic may go beyond what is reasonable ‘free expression or political communication’ to become harassment;
- b. **Importance of the purpose of the limitation** – preventing prohibited conduct in protected areas (so as to create ‘protest’ exclusion zones) is aimed at protecting women accessing legal health care services from intimidation or harassment or interference with their privacy. Access to safe abortion services is a clear health imperative. Studies demonstrating the impact of such protest in terms of emotional distress or reluctance to access this health care service would assist in building a case that exclusion zones are necessary to facilitate women being able to make informed choices about their own health and being able to access appropriate health care. Cases of violence to women accessing health services would also be relevant;
- c. **Nature and extent of the limitation** – the proposal clearly creates significant limitations on the rights to peaceful assembly and expression by making a range of acts including peaceful protest unlawful in a ‘protected area’. The acts range from more intrusive conduct such as harassment or intimidation to more innocuous conduct (in a legal sense) such as “an act that can be seen or heard by a person, which is intended to stop a person from entering an approved medical facility”. This could potentially cover conduct such as praying, singing hymns, handing out pamphlets etc depending on whether the prosecution could prove an intention to stop a person entering a clinic or having or providing an abortion. In contrast to the Tasmanian legislation the HPPA Bill does not fix a particular exclusion zone distance but would allow the Minister to declare a ‘protected area’ that is as big as reasonably necessary to ensure the privacy an unimpeded access for anyone, entering, trying to enter or leaving an approved medical facility. Finally it would prohibit conduct outside the protected area, but within the protected period that could be seen or heard by a person accessing a facility. Again, this limitation is quite extensive, and could cover conduct several hundreds of meters away from a facility, for example if protesters are using a megaphone to chant or use abusive language from a distance at people accessing a clinic.
- d. **Relationship between the limitation and its purpose** – for the HPPA bill to be assessed as compatible with the HRA, the explanatory statement to the Bill would need to clearly articulate that

the prohibiting anti-abortion protest behaviours and any infringement on human rights that involves is necessary and proportionate to protect another persons right to privacy. Questions about the enforceability of these provisions and difficulties that might be faced in establishing a specific intention to prevent access to a clinic in order to successfully prosecute a protestor would also be relevant. It would be harder to find a sufficient nexus between the new offences and their stated objective if they are unlikely to be enforced or prosecuted successfully.

e. **Any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve** – the policy area would need to explain why other alternatives to the creation of offences in relation to abortion protests would not be effective in providing for womens' and health practitioners' private and unimpeded access to abortion facilities. For example it would need to be explained why current legal remedies such as public or public annoyance nuisance laws, torts of battery or privacy laws are insufficient to achieve the purpose. These avenues might arguably all be used, albeit with greater difficulty, to prevent intrusive conduct. Other legislative options would be to extend the application of harassment or vilification laws to women seeking to have an abortion. Proposals of the ACT Law Reform Advisory Council in relation to its review of the *Discrimination Act 1991* could be adopted to apply to this situation so as to prevent conduct likely to 'offend, insult, humiliate or intimidate' women accessing abortion services. Such an approach would likely require increased evidence as to the effect on the woman of the protest behaviour, but may be more likely to stand up to Constitutional challenge.



tasmanian legislation

TASMANIA'S CONSOLIDATED LEGISLATION ONLINE

VIEW SUMMARY

The legislation that is being viewed is valid for 24 Mar 2014.

Reproductive Health (Access to Terminations) Act 2013 (No. 72 of 2013)

Requested:24 Jun 2015

Consolidated:24 Mar 2014

INFORMATION

- Notes: Not specified
- Links: Not specified
- Table of Amending Instruments: [\(click to view Table of Amendments\)](#)
- Responsible Minister and Department: Not specified

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Reproductive Health (Access to Terminations) Act 2013

An Act to regulate the termination of pregnancies by medical practitioners and to amend the *Criminal Code Act 1924* and the *Guardianship and Administration Act 1995*

[Royal Assent 19 December 2013]

Be it enacted by His Excellency the Governor of Tasmania, by and with the advice and consent of the Legislative Council and House of Assembly, in Parliament assembled, as follows:

PART 1 - Preliminary

1. Short title

This Act may be cited as the *Reproductive Health (Access to Terminations) Act 2013*.

2. Commencement

This Act commences on a day to be proclaimed.

3. Interpretation

(1) In this Act, unless the contrary intention appears –

midwife means a person registered under the Health Practitioner Regulation National Law (Tasmania) in the midwifery profession;

nurse means a registered nurse or an enrolled nurse;

terminate means to discontinue a pregnancy so that it does not progress to birth by –

- (a) using an instrument or a combination of instruments; or
- (b) using a drug or a combination of drugs; or
- (c) any other means –

but does not include –

- (d) the supply or procurement of any thing for the purpose of discontinuing a pregnancy; or
- (e) the administration of a drug or a combination of drugs for the purpose of

discontinuing a pregnancy by a nurse or midwife acting under the direction of a medical practitioner;

woman means a female person of any age.

(2) A note in the text of this Act does not form part of this Act.

PART 2 - Access to Terminations

4. Terminations by medical practitioner at not more than 16 weeks

The pregnancy of a woman who is not more than 16 weeks pregnant may be terminated by a medical practitioner with the woman's consent.

5. Terminations by medical practitioner after 16 weeks

(1) The pregnancy of a woman who is more than 16 weeks pregnant may be terminated by a medical practitioner with the woman's consent if the medical practitioner –

(a) reasonably believes that the continuation of the pregnancy would involve greater risk of injury to the physical or mental health of the pregnant woman than if the pregnancy were terminated; and

(b) has consulted with another medical practitioner who reasonably believes that the continuation of the pregnancy would involve greater risk of injury to the physical or mental health of the pregnant woman than if the pregnancy were terminated.

(2) In assessing the risk referred to in subsection (1), the medical practitioners must have regard to the woman's physical, psychological, economic and social circumstances.

(3) At least one of the medical practitioners referred to in subsection (1) is to be a medical practitioner who specialises in obstetrics or gynaecology.

Note The *Criminal Code* sets out the circumstances in which a person is guilty of a crime in relation to a termination.

6. Conscientious objection and duty to treat

(1) Subject to subsection (2), no individual has a duty, whether by contract or by any statutory or other legal requirement, to participate in treatment authorised by section 4 or 5 of this Act if the individual has a conscientious objection to terminations.

(2) Subsection (1) does not apply to an individual who has a duty set out in subsection (3) or (4).

(3) A medical practitioner has a duty to perform a termination in an emergency if a termination is necessary to save the life of a pregnant woman or to prevent her serious physical injury.

(4) A nurse or midwife has a duty to assist a medical practitioner in performing a termination in an emergency if a termination is necessary to save the life of a pregnant woman or to prevent her serious physical injury.

7. Obligations on medical practitioners and counsellors

(1) In this section –

counsellor means a person who holds himself or herself out as a provider of a

counselling service, or conducts himself or herself in a manner consistent with a provider of a counselling service, whether or not that service or conduct is engaged in, or provided, for fee or reward;

health service means a health service which provides advice, information or counselling on the full range of pregnancy options.

(2) Subject to subsection (3), if a woman seeks a termination or advice regarding the full range of pregnancy options from a medical practitioner and the practitioner has a conscientious objection to terminations, the practitioner must, on becoming aware that the woman is seeking a termination or advice regarding the full range of pregnancy options, provide the woman with a list of prescribed health services from which the woman may seek advice, information or counselling on the full range of pregnancy options.

(3) Subsection (2) does not apply to a medical practitioner who has a duty set out in section 6(3).

(4) Nothing in this section prevents a medical practitioner from continuing to provide treatment, advice or counselling, in respect of matters other than a termination or advice regarding the full range of pregnancy options, to a woman who the medical practitioner has provided a list of prescribed health services from which the woman may seek advice, information or counselling on the full range of pregnancy options.

8. Woman not guilty of crime or offence

Notwithstanding any other Act or law, a woman who consents to, assists in or performs a termination on herself is not guilty of a crime or any other offence.

9. Access zones

(1) In this section –

access zone means an area within a radius of 150 metres from premises at which terminations are provided;

distribute includes –

(a) communicate, exhibit, send, supply or transmit to someone, whether to a particular person or not; and

(b) make available for access by someone, whether by a particular person or not; and

(c) enter into an agreement or arrangement to do anything mentioned in paragraph (a) or (b); and

(d) attempt to distribute;

prohibited behaviour means –

(a) in relation to a person, besetting, harassing, intimidating, interfering with, threatening, hindering, obstructing or impeding that person; or

(b) a protest in relation to terminations that is able to be seen or heard by a person accessing, or attempting to access, premises at which terminations are provided; or

- (c) footpath interference in relation to terminations; or
- (d) intentionally recording, by any means, a person accessing or attempting to access premises at which terminations are provided without that person's consent; or
- (e) any other prescribed behaviour.

(2) A person must not engage in prohibited behaviour within an access zone.

Penalty:

Fine not exceeding 75 penalty units or imprisonment for a term not exceeding 12 months, or both.

(3) A person is not guilty of engaging in prohibited behaviour within an access zone by intentionally recording, by any means, a person accessing or attempting to access premises at which terminations are provided without that person's consent if, at the time of making the recording –

(a) the first-mentioned person is a law enforcement officer acting in the course of his or her duties as such an officer; and

(b) his or her conduct is reasonable in the circumstances for the performance of those duties.

(4) A person must not publish or distribute a recording of another person accessing or attempting to access premises at which terminations are provided without that other person's consent.

Penalty:

Fine not exceeding 75 penalty units or imprisonment for a term not exceeding 12 months, or both.

(5) If a police officer reasonably believes a person is committing or has committed an offence –

(a) under subsection (2) that involves recording, by any means, a person accessing or attempting to access premises at which terminations are provided, without that person's consent; or

(b) under subsection (4) –

the police officer may –

(c) detain and search that person; and

(d) seize and retain the recording and any equipment used to produce, publish or distribute the recording found in the possession of that person.

(6) If a person is convicted or found guilty of an offence under subsection (2) or (4), any item seized under subsection (5) is forfeited to the Crown and is to be destroyed or disposed of in a manner approved by the Minister administering the *Police Service Act 2003*.

(7) If a police officer reasonably believes a person is committing or has committed an offence under subsection (2) or (4), the police officer may require that person to state his or her name and the address of his or her place of abode.

(8) A person must not fail or refuse to comply with a requirement under subsection (7) or, in response to such a requirement, state a name or address that is false.

Penalty:

Fine not exceeding 2 penalty units.

(9) A police officer making a requirement under subsection (7) may arrest, without warrant, a person who fails or refuses to comply with that requirement or who, in response to the requirement, gives a name or address that the police officer reasonably believes is false.

10. Proceedings

(1) Proceedings for an offence against this Part may only be instituted by –

(a) a police officer; or

(b) the Secretary of the Department or a person authorised in writing to institute proceedings by the Secretary of the Department.

(2) Proceedings for an offence under this Part must be instituted within 24 months after the date on which an offence is alleged to have been committed.

11. Infringement notices

(1) In this section –

infringement offence means an offence against this Part that is prescribed by the regulations made under this Act to be an infringement offence.

(2) A person referred to in section 10(1) may issue and serve an infringement notice on a person if he or she reasonably believes that the person has committed an infringement offence.

(3) An infringement notice may not be served on an individual who has not attained the age of 16 years.

(4) An infringement notice is to be in accordance with section 14 of the *Monetary Penalties Enforcement Act 2005*.

(5) The regulations made under this Part –

(a) may prescribe, for infringement offences, the penalties payable under infringement notices; and

(b) may prescribe different penalties for bodies corporate and individuals.

12. Regulations

(1) The Governor may make regulations for the purposes of this Part.

(2) The regulations may be made so as to apply differently according to matters, limitations or restrictions, whether as to time, circumstance or otherwise, specified in the regulations.

(3) The regulations may authorise any matter to be from time to time determined, applied or regulated by any person or body specified in the regulations.

PART 3 - Criminal Code Act 1924 Amended

13.

The amendments effected by this Part have been incorporated into the authorised version of the Criminal Code Act 1924.

14.

The amendments effected by this Part have been incorporated into the authorised version of the Criminal Code Act 1924.

PART 4 - Guardianship and Administration Act 1995 Amended

15.

The amendments effected by this Part have been incorporated into authorised versions of the following Acts:

- (a) Criminal Code;
- (b) Guardianship and Administration Act 1995.

16.

The amendments effected by this Part have been incorporated into authorised versions of the following Acts:

- (a) Criminal Code;
- (b) Guardianship and Administration Act 1995.

PART 5 - Miscellaneous

17. Administration of Act

Until provision is made in relation to this Act by order under section 4 of the Administrative Arrangements Act 1990 –

- (a) the administration of this Act is assigned to the Minister for Health; and
- (b) the department responsible to that Minister in relation to the administration of this Act is the Department of Health and Human Services.

EXPOSURE DRAFT

Mr Shane Rattenbury

(Prepared by Parliamentary Counsel's Office)

Health (Patient Privacy) Amendment Bill 2015

A Bill for

An Act to amend the *Health Act 1993*

The Legislative Assembly for the Australian Capital Territory enacts as follows:

Section 1

1 Name of Act

This Act is the *Health (Patient Privacy) Amendment Act 2015*.

2 Commencement

This Act commences on the day after its notification day.

Note The naming and commencement provisions automatically commence on the notification day (see Legislation Act, s 75 (1)).

3 Legislation amended

This Act amends the *Health Act 1993*.

4 New division 6.1 heading

insert

Division 6.1 Abortions—generally**5 New division 6.2**

insert

Division 6.2 Patient privacy in protected areas**85 Definitions—div 6.2**

(1) In this division:

approved medical facility means a medical facility approved under section 83.

prohibited behaviour, in a protected area around an approved medical facility, means any of the following:

- (a) the harassment, hindering, intimidation, interference with, threatening or obstruction of another person in the protected period that is intended to stop the person from—
 - (i) entering the approved medical facility; or
 - (ii) having or providing an abortion in the approved medical facility;
- (b) an act that—
 - (i) can be seen or heard by a person in the protected period; and
 - (ii) is intended to stop a person from—
 - (A) entering the approved medical facility; or
 - (B) having or providing an abortion in the approved medical facility;
- (c) a protest, by any means, in the protected period in relation to the provision of abortions in the approved medical facility;
- (d) the intentional capturing of visual data of a person who is entering, trying to enter or who has left an approved medical facility without the person's consent.

protected area means an area declared under section 86.

- (2) For this section, *protected period*, in relation to an approved medical facility, means the period between 8 am and 6 pm on each day the facility is open or any other period declared by the Minister.

Section 5

- (3) A declaration is a disallowable instrument.

Note A disallowable instrument must be notified, and presented to the Legislative Assembly, under the Legislation Act.

86 Declaration of protected area

- (1) The Minister may declare an area around an approved medical facility to be a protected area.
- (2) The Minister may make a declaration only if satisfied that—
- (a) declaring an area is reasonably necessary to ensure the privacy and unimpeded access for anyone entering, trying to enter or leaving an approved medical facility; and
 - (b) the area declared is no bigger than reasonably necessary to ensure that outcome.
- (3) A declaration is a disallowable instrument.

Note A disallowable instrument must be notified, and presented to the Legislative Assembly, under the Legislation Act.

87 Prohibited behaviour in or in relation to protected area

- (1) A person commits an offence if the person—
- (a) is in a protected area; and
 - (b) engages in prohibited behaviour.
- Maximum penalty: 25 penalty units.
- (2) A person commits an offence if—
- (a) the person publishes captured visual data of another person (the *recorded person*) who is entering or trying to enter, or who has left, an approved medical facility; and

(b) the recorded person did not consent to the publication.

Maximum penalty: 50 penalty units, imprisonment for 6 months or both.

(3) This section does not apply to the capture of visual data, or the publication of captured data, by a law enforcement officer acting reasonably in the exercise of the officer's functions.

Note The defendant has an evidential burden in relation to the matters mentioned in s (3) (see Criminal Code, s 58).

(4) In this section:

capture visual data—a person *captures visual data* of another person if the person captures moving or still images of the other person by a camera or any other means in such a way that—

- (a) a recording is made of the images; or
- (b) the images are capable of being transmitted in real time with or without retention or storage in a physical or electronic form; or
- (c) the images are otherwise capable of being distributed.

law enforcement officer means—

- (a) a police officer; or
- (b) a member of the staff of the Australian Crime Commission established under the *Australian Crime Commission Act 2002* (Cwlth), section 7.

publish, captured visual data—

- (a) means communicate or distribute visual data in a way or to an extent that makes it available to, or likely to come to the notice of, the public or a section of the public or anyone else not lawfully entitled to the visual data; and

Section 6

(b) includes—

- (i) entering into an agreement or arrangement to do a thing mentioned in paragraph (a); and
- (ii) attempting to do a thing mentioned in paragraph (a) or subparagraph (i).

6 Dictionary, note 2

insert

- police officer

7 Dictionary, new definitions

insert

approved medical facility, for division 6.2 (Patient privacy in protected areas)—see section 85.

prohibited behaviour, for division 6.2 (Patient privacy in protected areas)—see section 85.

protected area, for division 6.2 (Patient privacy in protected areas)—see section 85.

Endnotes

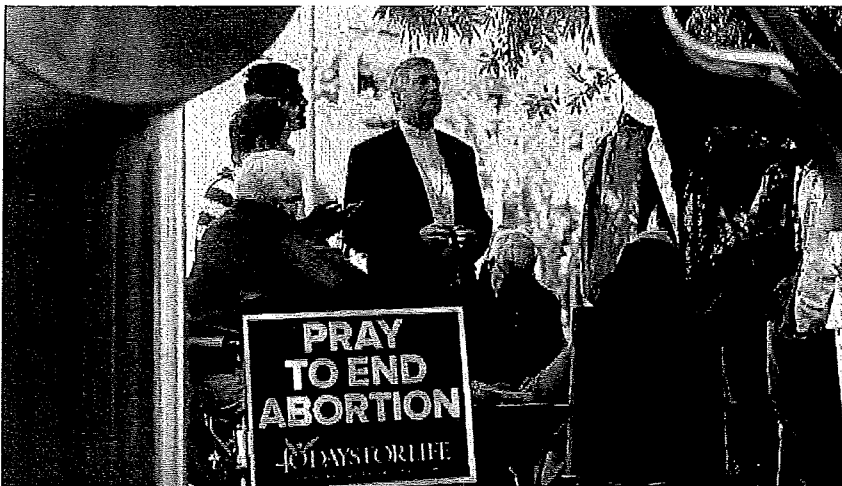
- 1 **Presentation speech**
Presentation speech made in the Legislative Assembly on 2015.
 - 2 **Notification**
Notified under the Legislation Act on 2015.
 - 3 **Republications of amended laws**
For the latest republication of amended laws, see www.legislation.act.gov.au.
-

Shane Rattenbury calls for abortion clinic exclusion zones to deter protesters

March 25, 2015

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Megan Gorrey

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Catholic Archbishop of Canberra and Goulburn Christopher Prowse, centre, attends a prayer vigil outside the ACT Health building in Moore Street, Civic, on Tuesday. Photo: Graham Tidy

ACT Greens minister Shane Rattenbury has called for exclusion zones around Canberra's abortion clinics to thwart protesters who harassed or intimidated women seeking abortions.

It comes after Canberra Goulburn's Catholic Archbishop led prayers during a vigil outside a city abortion clinic on Tuesday as part of a global pro-life movement in the lead-up to Easter.

Mr Rattenbury said the proposed legislation would create buffer zones similar to those in place in Tasmania, where protests were banned within 150 metres of abortion clinics.

He said anyone who disagreed with abortion should be free to voice their beliefs, but not to upset or intimidate women outside clinics when they could be "vulnerable or in a difficult circumstance".

"This is not a freedom-of-speech issue; this is an issue of safe and accessible healthcare.

"Women have the legal right to medical privacy and the human right to make choices about their own health without interference or harassment."

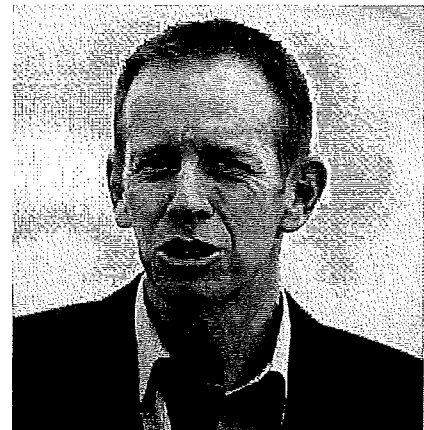
Archbishop Christopher Prowse was among a clutch of anti-abortion demonstrators, many linked to religious groups, who gathered outside the ACT Health building in Moore Street.

Members of the group held rosary beads and displayed signs in support of the 40 Days for Life campaign, a worldwide movement that advocates the eradication of abortion.

Supporters of the pro-life cause have prayed outside the clinic regularly for the past 16 years.

ACT Right to Life Association president Bev Cains said the gathering was a vigil rather than a protest.

"We are not acting in a confrontational manner, people can come and go as they please.



Greens minister Shane Rattenbury has put forward a proposal for protest exclusion zones around abortion clinics. Photo: Rohan Thomson

6/24/2015

Shane Rattenbury calls for abortion clinic exclusion zones to deter protesters

"We are simply praying to hopefully raise the social conscience of people who may or may not be seeking an abortion."

Ms Cains believed the proposed exclusion zones would intrude on pro-life advocates' right to protest.

"The general philosophy is that so many people want to have only their opinion aired.

"We think we have to become more vocal and more open and more active if we are to raise the social conscience of Australians to the horrors of abortion."

Women's Centre for Health Matters health promotion officer Angela Carnovale said their right to protest should not impede on any woman's right to access healthcare.

"The protest has been going for some 16 years now and women are reporting to the workers in the clinic that they have been distressed by the protesters and by having to navigate that on their way to the clinic.

"All it's doing is shaming, stigmatising and creating anxiety in the women accessing the clinic, it's not furthering the public debate on this issue, which is what they say they're aiming to do.

"Protesters should be pursuing conversations in other forums where those conversations can be had."

Ms Carnovale said the organisation would be keen to work with Minister Rattenbury to explore the possibility of introducing the zones in the ACT.

Opposition Leader Jeremy Hanson said he believed the prayer vigil was "a peaceful activity".

"The right to freedom of speech is an important one -- I would be reluctant to remove the right of any individual wishing to express their view, regardless of whether I agree with them or not.

"I encourage those who feel passionately about this issue to always treat others with respect and understanding and if there were any behaviour at this or any other protest that was unlawful then there are existing laws to deal with that."

An ACT Health spokeswoman said abortion was legal in the territory and access to safe termination services was important.

Students from the Australian National University began a push for exclusion zones around abortion clinics in response to the Civic protest in 2013.

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Input to ACT Health for Ministers Burch and Corbell – Meeting with Women’s Centre for Health Matters

1. On 25 March 2015 Greens Member Shane Rattenbury was reported in the *Canberra Times* ([Attachment A](#)) as calling for an exclusion zone around Canberra’s abortion clinics to prevent the harassment and intimidation of women accessing the services of abortion clinics.
2. Under part 6 of the *Health Act 1993* abortions are legal in the ACT if carried out by doctors in approved medical facilities.
3. Mr Rattenbury’s office has drafted the Health (Patient Privacy) Amendment Bill 2015 (‘HPPA Bill’) ([Attachment B](#)) which if passed would likely make acts constituting this protest unlawful.
4. In the *Canberra Times* article Mr Rattenbury was reported as proposing legislation which would create buffer zones similar to those implemented in 2013 in Tasmania, in the *Reproductive Health (Access to Terminations) Act 2013* ([Attachment C](#)), where protests are banned within 150m of abortion clinics.
5. The article reported that various ‘right to life’ groups had been protesting outside the ACT Health Building on Moore Street for approximately 16 years.

Issues

The HPPA Bill structure

6. The HPPA Bill proposes to amend the Health Act to introduce a new division in part 6 relating to patient privacy in protected areas.
7. The HPPA Bill would introduce section 87(1) which would make it an offence for a person to engage in ‘prohibited behaviours’ in a ‘protected area’ around ‘approved’ medical facilities.
8. The ‘protected area’ would be declared by the Minister and must be no bigger than reasonably necessary to ensure a person’s privacy and unimpeded access (s86). ‘Prohibited behaviours’ in that area includes various forms of harassment, acts that prohibit access to the medical facility, protests, and filming of people without their consent. Behaviours are prohibited only during a ‘prohibited period’, between 8am and 6pm each business day (or other time as declared by the Minister) (s85(1)). Unauthorised filming is prohibited at all times.
9. The Bill contains two offences. The first, engaging in prohibited behaviour in a prohibited area, carries a maximum penalty of 25 penalty units (s87(1)). The second is an unauthorised filming offence, which carries a penalty of 50 penalty units, imprisonment for six months or both (s87(2)).

Comparison with Tasmanian legislation

10. Tasmania recently enacted similar 'exclusion zone' provisions in its *Reproductive Health (Access to Terminations) Act 2013* (the 'Tasmanian Act'). This Act was part of a series of reforms to decriminalise abortions in that State.
11. The main difference between the Tasmanian Act and the HPPA Bill is that Tasmania legislates a 150m boundary for the 'protected area', rather than leaving it to the Minister's declaration.
12. Specific police powers are also given to Tasmanian police in the legislation (name and address demand, stop, search and seize powers), where they believe someone is committing or has committed an offence. These do not appear in the HPPA Bill, but would most likely be available in any case.
13. The Tasmanian Act also contains clauses allowing police to issue infringement notices in respect of offences in the Act prescribed by regulation as 'infringement offences'. Infringement notices could be provided in relation to the HPPA Bill offences once passed by way of a regulation.

Human Rights Implications

14. The HPPA Bill engages, and will potentially limit, a number of human rights in the *Human Rights Act 2004* (HRA) in relation to anti-abortion protesters: the right to freedom of movement (s13), the right to freedom of thought, conscience, religion and belief (s14), the right to peaceful assembly and freedom of association (s15) and the right to freedom of expression (s16).
15. Facilitating access to health care services (including abortion) by women engages and could be argued to improve the protection of women's rights - protection from discrimination (s8); protection of the family and children (s11); privacy (s12) and security of the person (s18).
16. Women have a number of rights in international human rights law which have not been directly adopted in the HRA including a general right to the highest attainable standard of physical and mental health under article 12 of the International Covenant on Economic, Social and Cultural Rights and article 12 of the Convention for the Elimination of All Forms of Discrimination Against Women which provides that -

"States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning".
17. In determining whether the clear limitations on rights to assembly are compatible with the HRA, an assessment of the purpose and nature of the exclusion zone proposal would need to be undertaken.
18. As the HPPA Bill is not a Government Bill, it is not subject to the same pre-legislative scrutiny processes as a Government Bill, which requires the Attorney assess whether a bill is consistent with the HRA.

19. Subject to the consideration of this issue in the ACT context and the views of ACT stakeholders to inform an evidence base, it is likely that such legislation could be justifiable and therefore compatible with the HRA.

20. On 25 August 2015 the Victorian Supreme Court handed down a decision that, although the protests constituted nuisance, the Melbourne City Council was not in breach of a duty of care to women accessing abortion services by failing to enforce nuisance laws to restrict anti-abortion protests (<http://www.austlii.edu.au/au/cases/vic/VSC/2015/424.html>).

21. In response to this decision, on 1 September 2015 the Victorian Government announced an intention to introduce legislation to provide exclusion zones in similar terms to that in Tasmania and proposed in the ACT.

Campbell, Kevin

From: Jorgensen, Alex
Sent: Thursday, 8 October 2015 2:00 PM
To: Marion-Landais, Stephanie (Health)
Cc: Richter, Matthew (Health); Field, Julie; Jenkins, Pam; Beddoe, Julie; Wijemanne, Naveen
Subject: Health (Patient Privacy Amendment) Bill 2015 brief
Attachments: Clearance Page - 1892015.pdf

Hi Stephanie,

Please attached the brief that we provided to the Attorney-General in July 2015.

The brief notes that the Health (Patient Privacy) Amendment Bill 2015 is likely to be able to be compatible with human rights.

It also foreshadows that consultation with enforcement agencies and the Human Rights Commission

This could occur in the circulation of the Cabinet submission.

I also note that the Victorian Government has announced an intention to introduce equivalent legislation.

Please let me know if you require anything further.

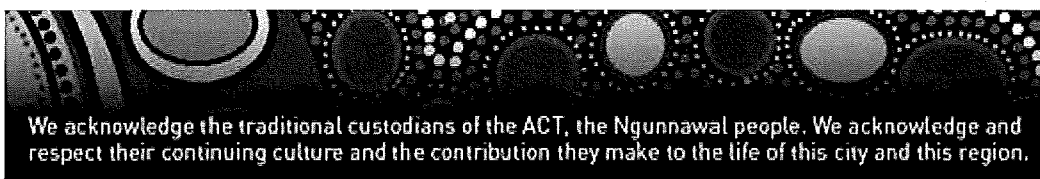
Thanks
 Alex

Alexander Jorgensen-Hull | Senior Policy Officer (Civil Law)

Phone 02 6207 0534 | Fax 02 6205 0937

Legislation, Policy and Programs | Justice and Community Safety Directorate | ACT Government

Level 2, 12 Moore Street Canberra ACT 2601 | GPO Box 158 Canberra ACT 2601 | www.act.gov.au



Human Rights

From: Marion-Landais, Stephanie (Health)
Sent: Thursday, 8 October 2015 1:24 PM
To: Jorgensen, Alex
Cc: Richter, Matthew (Health)
Subject: FW: Voice Mail from Jorgensen, Alex (1 minute and 29 seconds)

Hi Alex,

Thank you for your voicemail and for getting back to me so quickly. Your offer to forward the Ministerial that you developed is greatly appreciated – it will be very helpful for us to have a look.

Thanks as well for the update from your ED about being supportive in principle of the Bill. My supervisor and I will be drafting the Cabinet Submission this afternoon and will keep you in the loop with our progress.

Kind regards,

Stephanie

Stephanie Marion-Landais, MPH | Senior Policy Officer
Phone (02) 6205 1875
Chronic and Primary Health Policy Unit | ACT Health
ACT Health work days: Tuesdays, Wednesdays and Thursdays

From: Microsoft Outlook **On Behalf Of** Jorgensen, Alex
Sent: Thursday, 8 October 2015 11:55 AM
To: Marion-Landais, Stephanie (Health)
Subject: Voice Mail from Jorgensen, Alex (1 minute and 29 seconds)

You received a voice mail from Jorgensen, Alex at 70534

Caller-Id: [70534](#)
Job Title: Senior Policy Officer
Work: [\(02\) 6207 0534](#)
E-mail: Alex.Jorgensen@act.gov.au
IM Address: Alex.Jorgensen@act.gov.au

JUSTICE AND COMMUNITY SAFETY

Function Brief

Meeting with Angela Carnovale - Women's Centre for Health Matters

MIN:2015/005706



Correspondent:
Receiving Minister

Tracking

Receipt date
Date referred to directorate 27/08/2015
Date due to Minister 30/09/2015
Date response rec'd in MO / /

Action

Priority Routine Critical date
Division JACS, LEGISLATION, POLICY AND PROGRAMS
Required action
For reply by
Action officer ALEX JORGENSEN Ext. 70534
Action notes

Clearance

Director-General:
Approved
Approved subject to changes indicated / /
Resubmit with changes indicated
Deputy Director-General:
Approved
Approved subject to changes indicated 18/9/15
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Chief Finance Officer / /
Executive Director Julie Field 17/9/2015

Notes:

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External file number _____
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Date Filed / /

*When all action is complete, please file papers and provide file number.
'External file source' is the record keeping system on which the file is captured (e.g. ACT Record Services, Objective IDMS etc).

Campbell, Kevin

From: Jorgensen, Alex
Sent: Thursday, 8 October 2015 2:06 PM
To: Marion-Landais, Stephanie (Health)
Subject: RE: Health (Patient Privacy Amendment) Bill 2015 brief
Attachments: Returned packet from MO 87..pdf

Sorry. Now attached.

From: Marion-Landais, Stephanie (Health)
Sent: Thursday, 8 October 2015 2:05 PM
To: Jorgensen, Alex
Subject: RE: Health (Patient Privacy Amendment) Bill 2015 brief

Thanks again, Alex. I was only able to see a clearance page attached. Could you try to resend the brief please?

Stephanie Marion-Landais, MPH | Senior Policy Officer
Phone (02) 6205 1875
Chronic and Primary Health Policy Unit | ACT Health
ACT Health work days: Tuesdays, Wednesdays and Thursdays

From: Jorgensen, Alex
Sent: Thursday, 8 October 2015 2:00 PM
To: Marion-Landais, Stephanie (Health)
Cc: Richter, Matthew (Health); Field, Julie; Jenkins, Pam; Beddoe, Julie; Wijemanne, Naveen
Subject: Health (Patient Privacy Amendment) Bill 2015 brief

Hi Stephanie,

Please attached the brief that we provided to the Attorney-General in July 2015.

The brief notes that the Health (Patient Privacy) Amendment Bill 2015 is likely to be able to be compatible with human rights.

It also foreshadows that consultation with enforcement agencies and the Human Rights Commission

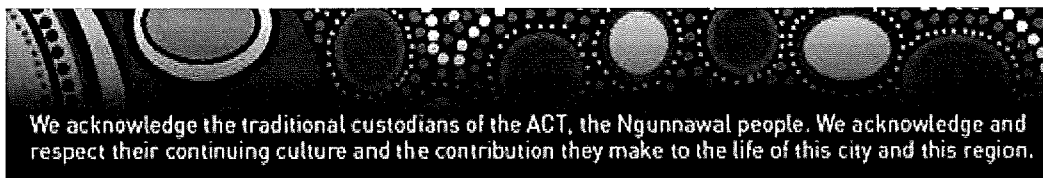
This could occur in the circulation of the Cabinet submission.

I also note that the Victorian Government has announced an intention to introduce equivalent legislation.

Please let me know if you require anything further.

Thanks
Alex

Alexander Jorgensen-Hull | Senior Policy Officer (Civil Law)
Phone 02 6207 0534 | Fax 02 6205 0937
Legislation, Policy and Programs | Justice and Community Safety Directorate | ACT Government
Level 2, 12 Moore Street Canberra ACT 2601 | GPO Box 158 Canberra ACT 2601 | www.act.gov.au



From: Marion-Landais, Stephanie (Health)
Sent: Thursday, 8 October 2015 1:24 PM
To: Jorgensen, Alex
Cc: Richter, Matthew (Health)
Subject: FW: Voice Mail from Jorgensen, Alex (1 minute and 29 seconds)

Hi Alex,

Thank you for your voicemail and for getting back to me so quickly. Your offer to forward the Ministerial that you developed is greatly appreciated – it will be very helpful for us to have a look.

Thanks as well for the update from your ED about being supportive in principle of the Bill. My supervisor and I will be drafting the Cabinet Submission this afternoon and will keep you in the loop with our progress.

Kind regards,

Stephanie

Stephanie Marion-Landais, MPH | Senior Policy Officer
Phone (02) 6205 1875
Chronic and Primary Health Policy Unit | ACT Health
ACT Health work days: Tuesdays, Wednesdays and Thursdays

From: Microsoft Outlook **On Behalf Of** Jorgensen, Alex
Sent: Thursday, 8 October 2015 11:55 AM
To: Marion-Landais, Stephanie (Health)
Subject: Voice Mail from Jorgensen, Alex (1 minute and 29 seconds)

You received a voice mail from Jorgensen, Alex at 70534

Caller-Id:	<u>70534</u>
Job Title:	Senior Policy Officer
Work:	<u>(02) 6207 0534</u>
E-mail:	<u>Alex.Jorgensen@act.gov.au</u>
IM Address:	<u>Alex.Jorgensen@act.gov.au</u>

JUSTICE AND COMMUNITY SAFETY

Issues Brief - Initiated

Health (Patient Privacy) Amendment Bill 2015 Abortion exclusion zones advice

MIN:2015/004268



Correspondent:
Receiving Minister

Tracking

Receipt date
Date referred to directorate 24/06/2015
Date due to Minister
Date response rec'd in MO 01/07/15

Action

Priority Routine Critical date
Division LEGISLATION, POLICY AND PROGRAMS
Required action
For reply by
Action officer alex Jorgensen Ext. 70 534
Action notes

Clearance

Director-General: Approved cleared by DG per brief.
Approved subject to changes indicated 11
Resubmit with changes indicated
Deputy Director-General: Approved end P 26/6/15
Approved subject to changes indicated 25/6/15
Resubmit with changes indicated
Chief Finance Officer 11
Executive Director Julie Field 24/6/15

Notes: M. Dixon 26/6/15

Please discuss ASAP.

Resubmission - 26/6/15.

DG requested back to LPP for changes 29.6.

Resubmission 1.7.15 with requested changes.

Filing

External file number _____
External file source _____
Date Filed 11

*When all action is complete, please file papers and provide file number.
'External file source' is the record keeping system on which the file is captured (e.g. ACT Record Services, Objective IDMS etc).

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TRIM No.: MIN:2015/004268

Date Rec'd Minister's Office 1./7./15

To: Attorney-General**From:** Executive Director Legislation, Policy and Programs**Subject:** Greens Health (Patient Privacy) Amendment Bill 2015 human rights implications**Critical Date:** Urgent**Critical Reason:** Your office asked for urgent advice

- DG (JACS) 1./7./15
- DDG 26/6/15

Purpose

1. On 22 June 2015 your office requested urgent advice on the human rights implications of the *Health (Patient Privacy) Amendment Bill 2015* (the 'HPPA Bill'). This brief provides a preliminary assessment of the legal issues relating to measures to introduce exclusion zones around abortion clinics.

Background

2. On 25 March 2015 Greens Member Shane Rattenbury was reported in the *Canberra Times* (Attachment A) as calling for an exclusion zone around Canberra's abortion clinics to prevent the harassment and intimidation of women accessing the services of abortion clinics.
3. Under part six of the *Health Act 1993* ('Health Act') abortions are legal in the ACT if carried out by doctors in approved medical facilities.
4. In the *Canberra Times* article Mr Rattenbury was reported as proposing legislation which would create buffer zones similar to those implemented in 2013 in Tasmania, in the *Reproductive Health (Access to Terminations) Act 2013* (Attachment C), where protests are banned within 150m of abortion clinics.
5. The article reported that various 'right to life' groups had been protesting outside the ACT Health Building on Moore Street for approximately 16 years.
6. Mr Rattenbury's office has drafted the HPPA Bill (Attachment B) which if passed would likely make acts constituting this protest unlawful.

Issues*The HPPA Bill structure*

7. The HPPA Bill proposes to amend the Health Act to introduce a new division in part six relating to patient privacy in protected areas.
8. The HPPA Bill would introduce s87(1) which would make it an offence for a person to engage in 'prohibited behaviours' in a 'protected area' around 'approved' medical facilities.

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9. The 'protected area' would be declared by the Minister and must be no bigger than as reasonably necessary to ensure a person's privacy and unimpeded access (s86). 'Prohibited behaviours' in that area includes various forms of harassment, acts that prohibit access to the medical facility, protests, and filming of people without their consent. Behaviours are prohibited only during a 'prohibited period', between 8am and 6pm each business day (or other time as declared by the Minister)(s85(1)). Unauthorised filming is prohibited at all times.
10. The Bill contains two offences. The first, engaging in prohibited behaviour in a prohibited area, carries a maximum penalty of 25 penalty units (s87(1)). The second is an unauthorised filming offence, which carries a penalty of 50 penalty units and/or imprisonment for six months (s87(2)).

Comparison with Tasmanian legislation

11. Tasmania recently enacted similar 'exclusion zone' provisions in its *Reproductive Health (Access to Terminations) Act 2013* (The Act). This Act was part of a series of reforms to decriminalise abortions in that State.
12. The main difference between the Tasmanian legislation and the HPPA Bill is that Tasmania legislates a 150m boundary for the 'protected area', rather than leaving it to the Minister's declaration.
13. Specific police powers are also given to Tasmanian police in the legislation (name and address demand, stop, search and seize powers), where they believe someone is committing or has committed an offence. These do not appear in the HPPA Bill, but would most likely be available in any case.
14. The Tasmanian legislation also contains clauses allowing police to issue infringement notices in respect of offences in the Act prescribed by regulation as 'infringement offences'. Infringement notices could be provided in relation to the HPPA Bill offences once passed by way of a regulation.

Human Rights Implications

15. The HPPA Bill engages, and will potentially limit, a number of human rights in the *Human Rights Act 2004* ('HRA') in relation to anti-abortion protesters: the right to freedom of movement (s13), the right to freedom of thought, conscience, religion and belief (s14), the right to peaceful assembly and freedom of association (s15) and the right to freedom of expression (s16).
16. Facilitating access to health care services (including abortion) by women engages and could be argued to improve the protection of women's rights - protection from discrimination (s8); protection of the family and children (s11); privacy (s12) and security of the person (s18).

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17. Women have a number of rights in international human rights law which have not been directly adopted in the HRA including a general right to the highest attainable standard of physical and mental health under article 12 of the International Covenant on Economic, Social and Cultural Rights and article 12 of the Convention for the Elimination of All Forms of Discrimination Against Women which provides that -

 "States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning".
18. In determining whether the clear limitations on rights to assembly are compatible with the HRA, an assessment of the purpose and nature of the exclusion zone proposal would need to be undertaken.
19. As the HPPA Bill is not a Government Bill, it is not subject to the same pre-legislative scrutiny processes, normally requiring you satisfy yourself that a bill is consistent with Human Rights.
20. Subject to the consideration of this issue in the ACT context and the views of ACT stakeholders to inform an evidence base, it is likely that such legislation could be justifiable and therefore compatible with the HRA.
21. An indicative consideration of the human rights issues in the ACT context is at Attachment D.

Financial Implications

26. Nil.

JACS Directorate and Cross Directorate Consultation

27. Consultation with Police and the Director of Public Prosecutions would be necessary to determine the enforceability of the offences in the HPPA Bill.
- 28.

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29. The HRC has provided advice to your office separately. That advice raised similar considerations as discussed in this brief. The HRC concluded that the HPPA Bill was 'appropriately circumscribed' and would be compatible with human rights, subject to some refinements to the standard of belief for declaring a protected area, and the restriction on filming in the protected area. The HRC advice did not address the constitutional issues.

Next steps

30. Consideration of the HPPA at the Social Inclusion and Equality subcommittee of Cabinet may assist to develop a Government position on it. We suggest you consider raising this matter at the subcommittee under cover of an Information Cabinet submission prepared by Justice and Community Safety (JACS) Directorate.

External Consultation

31. This is an internal matter.

Benefits/Sensitivities

32. The Opposition Leader, Jeremy Hanson MLA is reported as opposing exclusion zone laws in the *Canberra Times* article.

Media Implications

33. Media attention is anticipated in relation to the government's response to the HPPA. Media materials will be provided to your office on request.

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Recommendations

That you:

- 1. note that a advice is being sought from the Solicitor-General as to the constitutionality of the HPPA;

Noted/ Please Discuss

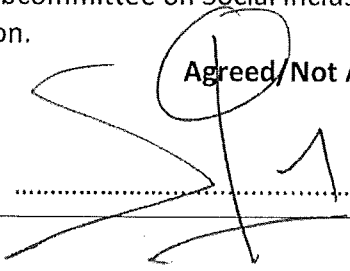
- 2. agree that JACS undertake further consultation with the Health Directorate, ACT policing, the DPP and the Human Rights Commission, to ascertain and consider the scope of proposed prohibited conduct to better inform the HRA implications; and

Agreed/Not Agreed/ Please Discuss

- 3. agree to progress the Bill to Cabinet's subcommittee on Social Inclusion and Equality by way of an Information Cabinet submission.

Agreed/Not Agreed/ Please Discuss

Simon Corbell MLA /.../.....



Minister's Comments	7.7.15
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Signatory Name: Julie Field Phone: 70522
 Title: Executive Director, LPP
 Date: 1 July 2015
 Action Officer: Alex Jorgensen Phone: 70534

UNCLASSIFIED

Campbell, Kevin

From: Jorgensen, Alex
Sent: Wednesday, 14 October 2015 10:39 AM
To: Jenkins, Pam
Cc: Beddoe, Julie
Subject: Abortion clinic exclusion zone fixed distance
Attachments: Health Patient Privacy Amendment Bill HRC Advice.pdf

Follow Up Flag: Follow up
Flag Status: Completed

Hi Pam,

In July we briefed the Attorney on the *Health (Patient Privacy Amendment Bill) 2015*, advising him that the Bill could likely be justified as compatible with human rights.

That brief also noted initial consideration by the Human Rights Commission that the Bill was appropriately circumscribed and would be compatible with human rights, subject to some refinements to the standard of belief for declaring a protected area, and the restriction on filming in the protected area.

In relation to the proposed amendment to provide for a minimum 150m exclusion zone, fixing this could remove an element of discretion in assessing each declared zone in the circumstances. The current formulation of the Bill would allow for smaller zones where appropriate, and therefore may be more likely to satisfy the test that the measure limiting the right to protest, and freedom of expression is the least restrictive measure (s 28(2)(e) *Human Rights Act 2004*).

Civil Liberties Australia have noted that they prefer this approach where the Minister is required to set an exclusion zone, but that the size of the zone is not prescribed in legislation and can be tailored to each clinic, as it is capable of excluding private property from the zone and strengthens arguments that the zone is 'appropriate and adapted to the circumstances'. (Quoted in Parliament of Victoria, Research Note, *Public Health and Wellbeing Amendment (Safe Access) Bill 2015*, http://www.parliament.vic.gov.au/publications/research-papers/9491-public-health-and-wellbeing-amendment-safe-access-bill-2015#_ftn17)

On the other hand the fixing of a set distance in the legislation is likely to make the extent of the exclusion zones clearer and therefore easier to comply with.

I note the *Public Health and Wellbeing Amendment (Safe Access) Bill 2015* introduced in the Victorian Parliament by Australian Sex Party MLC Fiona Patten also adopts a 150m exclusion zone.

Thanks.

Alexander Jorgensen-Hull | Senior Policy Officer (Civil Law)

Phone 02 6207 0534 | Fax 02 6205 0937

Legislation, Policy and Programs | Justice and Community Safety Directorate | ACT Government

Level 2, 12 Moore Street Canberra ACT 2601 | GPO Box 158 Canberra ACT 2601 | www.act.gov.au

