

ANTI-ABORTION PROTEST AND THE EFFECTIVENESS OF VICTORIA'S SAFE ACCESS ZONES: AN ANALYSIS

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I INTRODUCTION

This article is concerned with conduct which is aimed at averting women from terminating a problem pregnancy and takes place around clinics that provide abortion services. Such conduct is widely referred to by the seemingly benign term of 'protest' but in fact encompasses a range of harmful activities targeted at individuals seeking access to premises at which abortions are provided. We will examine the impact of this conduct and the operation of laws which seek to address it.

Legislation providing for safe access zones around clinics which provide abortion services has been introduced in five Australian jurisdictions, namely: Tasmania, the Australian Capital Territory ('ACT'), Victoria, the Northern Territory ('NT') and New South Wales ('NSW').¹ Safe access zones are also sometimes referred to as 'buffer zones' or 'bubble zones' because they create a bubble around abortion clinics within which no anti-abortion protesting can take place.

After outlining the safe access zone legislation enacted in Australia, we examine the operation of the Victorian legislation with reference to qualitative empirical research that we have undertaken.² We have conducted semi-structured interviews with Victorian health professionals on the nature and effect of anti-abortion protest around clinics and the impact of the safe access zone legislation. Interview participants were recruited through personal contacts and referral by interviewees. They included the executive officer of a not-for-profit organisation concerned with women's health and 11 staff working in medical clinics which provide abortion services in Victoria. The clinic staff we interviewed included four doctors, one clinical psychologist, one social worker, one health service coordinator, one clinic manager, one nurse practitioner and midwife and two nurses. After careful consideration, we decided not to interview anti-abortion protesters on the basis that conducting such interviews may have a negative effect

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1 See *Reproductive Health (Access to Terminations) Act 2013* (Tas); *Health (Patient Privacy) Amendment Act 2015* (ACT); *Public Health and Wellbeing Amendment (Safe Access Zones) Act 2015* (Vic); *Termination of Pregnancy Law Reform Act 2017* (NT); *Public Health Amendment (Safe Access to Reproductive Health Clinics) Act 2018* (NSW).

2 Informed consent was obtained in writing from all participants. Five of the interviews were conducted via telephone or mobile technology and the remainder conducted face-to-face.

on the relationship of trust that we felt important to establish between ourselves and the abovementioned health professionals. We also decided not to interview patients who had experienced the protests in order to avert the risk of exacerbating any trauma caused by the experience.

Drawing on the observations of the health professionals we have interviewed, we consider the context in which the Victorian legislation was introduced, including the experience of protest outside the Fertility Control Clinic ('FCC') in East Melbourne. The impact of anti-abortion protest outside clinics is then considered in conjunction with the objectives of Victoria's safe access zone legislation and an examination of whether these objectives are being met.

The final portion of our article examines objections to safe access zones. Those who oppose safe access zones have characterised them as an infringement of their rights. The right to free speech is the most frequently cited basis for their resistance to these provisions. We therefore consider whether the legislation is vulnerable to challenge on constitutional or human rights grounds. We analyse whether the legislation infringes the freedom of political communication implied in the *Australian Constitution* and conclude by examining the compatibility of safe access zones with the protesters' rights under international human rights law.

II SAFE ACCESS ZONE LEGISLATION IN AUSTRALIA

In 2013, Tasmania became the first Australian jurisdiction to introduce safe access zones as part of a broader legislative move to decriminalise abortion. The Tasmanian legislation prevents protesters from engaging in prohibited behaviour within 150 metres of a clinic at which terminations are provided.³ Prohibited behaviour includes harassment, intimidation or obstruction of a person; visible anti-abortion protesting; footpath interference and recording a person entering premises at which terminations are provided.⁴ The penalty for engaging in prohibited behaviour within an access zone is a '[f]ine not exceeding 75 penalty units or imprisonment for a term not exceeding 12 months, or both'.⁵ In July 2016, John Graham Preston became the first protester to be convicted of violating the safe access zone provisions; he was fined \$3000 for protesting outside a Hobart clinic.⁶

The ACT passed legislation in 2015 which amends the *Health Act 1993* (ACT) so as to introduce safe access zones.⁷ Like the Tasmanian legislation, the ACT provisions prohibit conduct including the harassment, intimidation and recording of women entering an 'approved medical facility', and prevent anti-abortion

3 *Reproductive Health (Access to Terminations) Act 2013* (Tas) ss 9(1)–(2).

4 *Ibid* s 9(1).

5 *Ibid* s 9(2).

6 Edith Bevin, 'Anti-Abortion Campaigner John Preston Fined over Tasmanian Protest', *ABC News* (online), 27 July 2016 <<http://www.abc.net.au/news/2016-07-27/fine-for-anti-abortion-protester-over-tasmanian-protest/7665776>>.

7 *Health (Patient Privacy) Amendment Act 2015* (ACT).

protesting from taking place within the safe access zone.⁸ Unlike the Tasmanian legislation, the ACT law does not provide for a specific geographical zone but rather provides a minimum zone of 50 metres and leaves the maximum to the discretion of the Minister.⁹

On the one hand, the more flexible approach of the ACT legislation is beneficial in that it enables the Minister to provide for an area of exclusion that is appropriate in the circumstances, rather than a blanket area of 150 metres, thus ensuring that women are adequately protected from harassment while preventing potentially excessive interference with free speech. On the other hand, such flexibility is a double-edged sword as it can prove detrimental to women, for example, if the Minister in question prioritises free speech over the health, safety and privacy of women entering a clinic. Further, the maximum penalty for engaging in prohibited behaviour is lower in the ACT than in Tasmania, that being 25 penalty units for engaging in prohibited behaviour and 50 penalty units and/or imprisonment for six months where the behaviour includes publishing visual data of a person entering the clinic.¹⁰ These provisions were enforced for the first time in April 2016 when police fined an anti-abortion protester who breached the exclusion zone outside a medical clinic.¹¹

In November 2015, soon after the passage of the ACT legislation, Victoria passed the *Public Health and Wellbeing Amendment (Safe Access Zones) Act* which amends the *Public Health and Wellbeing Act 2008* (Vic) so as to provide for safe access zones around a clinic at which abortion services are provided.¹² Like Tasmania and the ACT, the Victorian Act prohibits behaviour such as harassing or intimidating persons accessing a clinic; communicating in relation to abortions in a manner likely to cause distress or anxiety; interfering with access and recording a person accessing a clinic.¹³ The Victorian provisions bear a greater resemblance to the Tasmanian provisions than the ACT provisions in that the safe access zone is stipulated to be '150 metres from premises at which abortions are provided'¹⁴ and the prescribed penalty is '120 penalty units or imprisonment for a term not exceeding 12 months'.¹⁵ Kathleen Clubb became the first person to be convicted under these provisions after she approached two people walking into the FCC in August 2016 and attempted to hand them anti-abortion pamphlets.¹⁶

8 *Health Act 1993* (ACT) s 85(1).

9 *Ibid* s 86.

10 *Ibid* ss 87(1)–(2).

11 Christopher Knaus, 'New Police Powers Used Against Anti-Abortion Protesters for First Time', *The Canberra Times* (online), 19 April 2016 <<https://www.canberratimes.com.au/national/act/new-police-powers-used-against-antiabortion-protesters-for-first-time-20160419-go9x8d.html>>.

12 *Public Health and Wellbeing Amendment (Safe Access Zones) Act 2015* (Vic) s 5.

13 See *Public Health and Wellbeing Act 2008* (Vic) ss 185B(1)(a)–(e) (definition of 'prohibited behaviour'), as inserted by *ibid*.

14 See *Public Health and Wellbeing Act 2008* (Vic) s 185B(1) (definition of 'safe access zone'), as inserted by *Public Health and Wellbeing Amendment (Safe Access Zones) Act 2015* (Vic) s 5.

15 *Public Health and Wellbeing Act 2008* (Vic) s 185D, as inserted by *Public Health and Wellbeing Amendment (Safe Access Zones) Act 2015* (Vic) s 5.

16 Jacqueline Le, 'Abortion Protester Set to Fight Vic Govt', *The West Australian* (online), 16 December 2016 <<https://thewest.com.au/news/crime/abortion-protester-set-to-fight-vic-govt-ng-s-1645914>>.

The NT passed legislation in March 2017 which introduced safe access zones, decriminalised surgical abortions and legalised medical abortion.¹⁷ Like the Victorian and Tasmanian legislation, the safe access zone extends to the area ‘within 150 metres outside the boundary’¹⁸ of premises providing termination and the penalty for engaging in prohibited conduct within the zone is ‘100 penalty units or imprisonment for 12 months’.¹⁹ Prohibited conduct within the zone includes harassment, intimidation and threats that may result in deterring a person from entering or leaving premises or performing or receiving terminations.²⁰

The most recent Australian jurisdiction to introduce safe access zones is NSW. The *Public Health Amendment (Safe Access to Reproductive Health Clinics) Act 2018* (NSW) was enacted and commenced in June 2018. Like the Tasmanian, Victorian and NT legislation, it creates safe access zones of 150 metres around clinics at which abortions are provided²¹ and prohibits specified conduct within the radius of the zones.²² Penalties for engaging in prohibited conduct include fines and a maximum of six months imprisonment for the first offence and a maximum of 12 months’ imprisonment for subsequent offences.²³

As the above discussion outlines, five Australian jurisdictions have introduced safe access zones around premises that provide abortion services. The next part of this article demonstrates the need for such legislation by considering the anti-abortion protest activity that took place in Victoria prior to the introduction of the legislation.

III ANTI-ABORTION PROTEST ACTIVITY IN VICTORIA

A *The Protesters’ Actions*

Anti-abortion protesters have described themselves as sidewalk counsellors seeking to render assistance to women.²⁴ This characterisation differs markedly from what we heard from interviewees. They spoke of the protesters’ unwelcome intrusions into the personal space of patients, staff and passers-by who were assumed to be patients or staff. Protesters would approach, follow or walk alongside people approaching clinic premises, dispensing brochures or plastic

17 *Termination of Pregnancy Law Reform Act 2017* (NT).

18 *Ibid* s 4 (definition of ‘safe access zone’).

19 *Ibid* s 14(1).

20 *Ibid* s 14(4) (definition of ‘prohibited conduct’).

21 See *Public Health Act 2010* (NSW) s 98A, as inserted by *Public Health Amendment (Safe Access to Reproductive Health Clinics) Act 2018* (NSW) sch 1.

22 See *Public Health Act 2010* (NSW) ss 98C–98E, as inserted by *Public Health Amendment (Safe Access to Reproductive Health Clinics) Act 2018* (NSW) sch 1.

23 *Ibid*.

24 Interview with Susie Allanson, clinical psychologist, Fertility Control Clinic (Victoria, 22 March 2017); Susie Allanson, *Murder on His Mind: The Untold Story of Australia’s Abortion Clinic Murder* (Wilkinson Publishing, 2006) 107.

foetal dolls.²⁵ Equating fetuses with babies, they would implore patients not to kill their baby or castigate them as murderers.²⁶ Patients and staff would be chased, photographed, heckled, threatened and verbally abused.²⁷ Some protesters would position themselves so as to prevent patients from exiting cars, and impede entry to clinics (or clinic carparks) and access along footpaths outside clinics.²⁸ These tactics would provoke an aggressive response from some patients,²⁹ but more often from protective friends or relatives who accompanied patients to clinics.³⁰ Physical altercations involving protesters would sometimes require police intervention.³¹

People of all ages were involved in the protest but most were described as 'older' men.³² Some protesters were accompanied by children, including groups of pre-schoolers. By positioning themselves outside clinics, the protesters could target a captive audience and would not desist from their actions when it was made clear that they were unwelcome.³³ They would carry placards or religious paraphernalia, such as rosary beads and large crosses.³⁴ Some would adorn themselves with poster boards or plastic models depicting stages of foetal development.³⁵ Their posters bore confronting images of dismembered fetuses,³⁶ and 'big graphic photos of fetuses in buckets or fetuses' skulls'³⁷ which clinic staff believed were not what they purported to be.³⁸ The protesters' literature was also described as visually

- 25 Interview with Susie Allanson, clinical psychologist, Fertility Control Clinic (Victoria, 22 March 2017); interview with Tracy Little, Centre Manager, Marie Stopes Maroondah (Victoria, 26 October 2017).
- 26 Interview with Susie Allanson, clinical psychologist, Fertility Control Clinic (Victoria, 22 March 2017); interview with Tracy Little, Centre Manager, Marie Stopes Maroondah (Victoria, 26 October 2017).
- 27 Interview with Susie Allanson, clinical psychologist, Fertility Control Clinic (Victoria, 22 March 2017).
- 28 Interview with Susie Allanson, clinical psychologist, Fertility Control Clinic (Victoria, 22 March 2017); interview with anonymous clinic staff member (Victoria, 12 April 2017).
- 29 Interview with anonymous clinic staff member (Victoria, 12 April 2017).
- 30 Interview with anonymous clinic staff member (Victoria, 12 April 2017).
- 31 Interview with Susie Allanson, clinical psychologist, Fertility Control Clinic (Victoria, 22 March 2017); interview with anonymous clinic staff member (Victoria, 12 April 2017).
- 32 Interview with general practitioner working in sexual health in regional Victoria (Victoria, 2 May 2017).
- 33 Interview with anonymous clinic staff member (Victoria, 12 April 2017); interview with Susie Allanson, clinical psychologist, Fertility Control Clinic (Victoria, 22 March 2017).
- 34 Interview with Susie Allanson, clinical psychologist, Fertility Control Clinic (Victoria, 22 March 2017).
- 35 Interview with Susie Allanson, clinical psychologist, Fertility Control Clinic (Victoria, 22 March 2017); interview with general practitioner working in sexual health in regional Victoria (Victoria, 2 May 2017); interview with medical director, Gateway Health Wodonga (Victoria, 15 May 2017).
- 36 Interview with Susie Allanson, clinical psychologist, Fertility Control Clinic (Victoria, 22 March 2017); interview with general practitioner working in sexual health in regional Victoria (Victoria, 2 May 2017).
- 37 Interview with social worker, Melbourne (Victoria, 20 March 2017).
- 38 Interview with social worker, Melbourne (Victoria, 20 March 2017); interview with Susie Allanson, clinical psychologist, Fertility Control Clinic (Victoria, 22 March 2017); interview with anonymous clinic staff member (Victoria, 12 April 2017).

graphic, with medically inaccurate and misleading information³⁹ warning that abortion results in infertility, failed relationships, mental illness and cancer.⁴⁰

Clinic staff spoke of pervasive concerns about the protesters' unpredictable behaviour. One interviewee perceived 'the physical threat' of harm as 'imminent'⁴¹ and another spoke of her efforts to 'just blend in' when approaching her workplace, and to never speak to the protesters because 'you don't know who you're dealing with'.⁴² One told us that her husband sometimes jokes, 'I hope you don't get shot'.⁴³ Safety concerns arose about protesters purporting to be patients, as described here:

My biggest fear was they were going to send up a plant, and the plant would come and see me ... and something would happen, or they would expose me, or target where I live, or target the kids. Because they'd done that with other doctors ... What am I going to do if ... I all of a sudden think shit, you're a plant, or you've got an ulterior motive. That was my number one fear. I don't care about being slandered or things like that. It was more a safety threat. Or that they would target my house, or my kids ... will there be any physical harm out of this? Are they going to target my car when I come to work?⁴⁴

Interviewees observed a link between the presence of protesters outside clinics and the targeting of health professionals' private and family lives. One health professional recounted warnings from colleagues that protesters 'were quite in your face; that they liked to scream and shout, and carry around pigs' organs, and thrust them at people'.⁴⁵ They would target staff engaged in abortion services by throwing red paint or pigs' blood at their houses⁴⁶ and threatening to 'ring doctors' children's schools and say that they're murderers'.⁴⁷

B Case Study: The FCC

The experience of the FCC clearly demonstrates the need for safe access zones in Victoria. The clinic was established in 1972 by Dr Bertram Wainer, a doctor and advocate of the decriminalisation of abortion. It provides a range of reproductive health services, including contraception, pap smears, sexually-transmitted

39 Interview with social worker, Melbourne (Victoria, 20 March 2017); interview with Susie Allanson, clinical psychologist, Fertility Control Clinic (Victoria, 22 March 2017).

40 Interview with Susie Allanson, clinical psychologist, Fertility Control Clinic (Victoria, 22 March 2017).

41 Interview with nurse practitioner and midwife working in reproductive health (Victoria, 27 March 2017).

42 Interview with anonymous clinic staff member (Victoria, 12 April 2017).

43 Interview with medical director, Gateway Health Wodonga (Victoria, 15 May 2017).

44 Interview with nurse practitioner and midwife working in reproductive health (Victoria, 27 March 2017).

45 Interview with Sarah van der Wal, staff specialist working in reproductive health (Victoria, 1 May 2017).

46 Interview with Sarah van der Wal, staff specialist working in reproductive health (Victoria, 1 May 2017).

47 Interview with nurse practitioner and midwife working in reproductive health (Victoria, 27 March 2017).

infections ('STI') testing, treatment of miscarriages and abortion (medical and surgical). Anti-abortion protests in front of the clinic have occurred since its inception and have taken the form of offensive posters, verbal insults, dispensing of anti-abortion pamphlets as well as physical obstacles impeding women from entering the clinic. Members of a group known as the Helpers of God's Precious Infants maintained a presence outside the clinic six mornings a week. They would routinely follow or chase patients and staff and accuse them of being child murderers or spilling the blood of innocent children. The rhetoric and imagery of violence were readily invoked by the protesters, with sandwich boards and posters emblazoned with statements such as 'babies are murdered here', 'abortion mutilates and kills babies' and 'massacre of the innocents here'.⁴⁸

We were told of a four-year-old child approaching the clinic with his mother being told that 'your mummy's going to kill your baby brother, or sister'.⁴⁹ Patients who tried to access a rear entrance were followed, yelled at and chased down a bluestone laneway, where protesters would sometimes stand directly outside clinic windows, shout and sing.⁵⁰ Susie Allanson, who worked for 26 years as the FCC's clinical psychologist, told us that the protesters were there to stop women from having abortions or contraception and 'to shut down the clinic'.⁵¹

The Helpers of God's Precious Infants is associated with the Roman Catholic Church, thus adding a religious dimension to the protests.⁵² For example, on the fourth Saturday of each month, the congregation of St Patrick's Cathedral would conduct a 'Rosary Parade' to the clinic following mass, at a time coinciding with the running of its surgical list. Allanson observed that 'the whole congregation ... would come down and so then you'd have 50–100 people; they'd have the kids in the pushers; they'd have the Virgin Mary [in the form of a large statue suspended on a platform]; they'd have all that'.⁵³ Even once inside, patients and staff could not avoid exposure to the actions taking place outside the clinic. Allanson told us that the anti-abortion protesters could be heard inside the clinic 'singing, praying, yelling and other people yelling at them' with the consequence that 'the noise ... would come up through the window' and 'my room, always felt so unprofessional, [like I was] not providing women with a safe space'.⁵⁴

48 Interview with Susie Allanson, clinical psychologist, Fertility Control Clinic (Victoria, 22 March 2017); Allanson, *Murder on His Mind*, above n 24, 10–11. See, eg, the case of *Fertility Control Clinic v Melbourne City Council* (2015) 47 VR 368 which also describes some of the protest activities: at 375 [15].

49 Interview with Susie Allanson, clinical psychologist, Fertility Control Clinic (Victoria, 22 March 2017).

50 Interview with Susie Allanson, clinical psychologist, Fertility Control Clinic (Victoria, 22 March 2017).

51 Interview with Susie Allanson, clinical psychologist, Fertility Control Clinic (Victoria, 22 March 2017).

52 The organisation was founded in 1989 by Monsignor Philip Reilly in New York, USA: Life and Family, *Helpers of God's Precious Infants — Founder* <<http://www.lifeandfamily.com.au/helpers-of-gods-precious-infants-founder/>>.

53 Interview with Susie Allanson, clinical psychologist, Fertility Control Clinic (Victoria, 22 March 2017).

54 Interview with Susie Allanson, clinical psychologist, Fertility Control Clinic (Victoria, 22 March 2017); see also Allanson, *Murder on His Mind*, above n 24, 98.

The protests outside the FCC created persistent safety concerns. We heard about protesters identifying staff members' cars⁵⁵ and staff apprehending that they were being followed home. Staff were particularly conscious of personal details being accessed by protesters and family members were briefed about dealing with anonymous phone calls.⁵⁶ They took steps to avoid contact with the protesters, including arriving at work early, using rear entrances and taking detours to prevent protesters from locating their homes.⁵⁷ The protesters were described as 'very, very creepy ... and the difficulty is if someone steps over a line, you're just not sure how far they're going to go ... a lot of them were unbalanced'.⁵⁸

The protesters would sometimes be joined by people with a serious criminal history who were under police surveillance.⁵⁹ Security guards employed to escort patients and staff into the clinic were subjected to threats and abuse.⁶⁰ A guard resigned after a protester made a face-to-face death threat to her and another staff member.⁶¹ The damage caused by the protests reached its most extreme in July 2001 when clinic security guard Steven Rogers was murdered by Peter Knight, an anti-abortion protester who had previously stood outside the clinic. Teague J in the Supreme Court of Victoria found that Knight planned a massacre of everyone inside the clinic, was armed with weaponry to carry out his plan and murdered Rogers because he 'got in the way'.⁶² The murder did not abate protest activity. Allanson told us that 'the very next day after the murder, the extremists were there again and the police let them be there — and I just didn't understand'.⁶³

Frustrated by Melbourne City Council's failure to act to combat the protesting, the clinic initiated a legal action in 2015 against the Council on the basis that the activities of the protesters constituted a nuisance and that the Council is obligated to remedy such a nuisance. The action was unsuccessful as the Court decided that the Council had the power to decide not to act so as to bring an end to the protesting.⁶⁴ The inadequacy of legal remedies meant that anti-abortion protesters continued to cause harm with impunity.⁶⁵ It is against this backdrop of unremitting harassment that the Victorian State Parliament passed the safe access zone legislation.

55 Interview with Susie Allanson, clinical psychologist, Fertility Control Clinic (Victoria, 22 March 2017).

56 Interview with Susie Allanson, clinical psychologist, Fertility Control Clinic (Victoria, 22 March 2017).

57 Allanson, *Murder on His Mind*, above n 24, 111.

58 Interview with Susie Allanson, clinical psychologist, Fertility Control Clinic (Victoria, 22 March 2017).

59 Interview with Susie Allanson, clinical psychologist, Fertility Control Clinic (Victoria, 22 March 2017).

60 Allanson, *Murder on His Mind*, above n 24, 12.

61 Ibid 11.

62 *R v Knight* [2002] VSC 498 (19 November 2002) [16].

63 Interview with Susie Allanson, clinical psychologist, Fertility Control Clinic (Victoria, 22 March 2017).

64 See *Fertility Control Clinic v Melbourne City Council* (2015) 47 VR 368.

65 Susie Allanson, 'Abortion Access versus Anti-Choice Nuisance: Supreme Court Action Update' (Paper presented at 2nd National Sexual & Reproductive Health Conference, Melbourne, 18 November 2014).

C Addressing the Impact of Anti-Abortion Protests

In order to understand the motivation behind the Victorian Parliament's decision to enact safe access zone legislation, it is necessary to appreciate the extent of the negative impact of anti-abortion protesting on patients and staff.

1 Impact of the Protests

While women respond in various ways to being confronted by anti-abortion protests, it is clear that anti-abortion protests frequently have a negative impact on staff and patients entering and leaving clinics which provide abortion services. Such protests not only invade the privacy of women who are already in a vulnerable situation, but they also undermine the health and wellbeing (and sometimes safety) of such women. One of the ways in which anti-abortion protests may undermine women's health and wellbeing is by stigmatising abortion and the women seeking to terminate a pregnancy. Given that abortion is the only aspect of health care that is the subject of overt and explicit public protest aimed at preventing individuals from obtaining care, it is difficult to avoid the conclusion that such protests have a stigmatising effect.

The deeply stigmatising, traumatising and 'absolutely devastating' effect of the protest on patients was recognised in our interviews.⁶⁶ The failure to prevent protesters from targeting women seeking abortions was seen as a 'silencing of women's voices, minimising of what's actually important to women'⁶⁷ and we heard about 'days when everyone coming in was crying'.⁶⁸ A sense of moral condemnation was created by the protest.⁶⁹ The reality that many of the protesters are elderly men and therefore authority figures in society was seen to convey a sense to patients that the whole of society is judging them.⁷⁰ We were told that teenagers are particularly vulnerable to shaming and stigmatisation, and that 'as older women, to a degree we let the younger women down because they're the ones we should be extra careful about protecting from this kind of thing'.⁷¹

Brenda Major and Richard Gramzow researched the health effects of stigmatising abortion. They found that:

women who felt stigmatized by abortion were more likely to feel a need to keep it a secret from family and friends. Secrecy was related positively to suppressing thoughts of the abortion and negatively to disclosing abortion-related emotions

66 Interview with general practitioner working in sexual health in regional Victoria (Victoria, 2 May 2017).

67 Interview with Susie Allanson, clinical psychologist, Fertility Control Clinic (Victoria, 22 March 2017).

68 Interview with anonymous clinic staff member (Victoria, 12 April 2017); interview with Susie Allanson, clinical psychologist, Fertility Control Clinic (Victoria, 22 March 2017).

69 Interview with general practitioner working in sexual health in regional Victoria (Victoria, 2 May 2017).

70 Interview with general practitioner working in sexual health in regional Victoria (Victoria, 2 May 2017).

71 Interview with general practitioner working in sexual health in regional Victoria (Victoria, 2 May 2017).

to others. Greater thought suppression was associated with experiencing more intrusive thoughts of ... abortion. Both suppression and intrusive thoughts, in turn, were positively related to increases in psychological distress over time.⁷²

In general, it seems that stigmatisation gives rise to increased risk of numerous health problems, including depression, hypertension, coronary heart disease, and stroke.⁷³ Consequently, if it is accepted that anti-abortion protests contribute to the stigmatisation of abortion and that individuals who feel stigmatised may suffer negative health consequences as a result of such stigmatisation, this provides a powerful health indication for safe access zones.⁷⁴

According to Dean and Allanson:

Such intimidation, harassment and intrusion of privacy can cause psychological or physical harm, especially when those targeted may already be under stress or anxious about an impending operation, an unplanned pregnancy, or a health-related medical or counselling appointment.⁷⁵

Allanson has also noted that '[h]igh anxiety levels may increase the physical pain women experience during or following an examination or surgery. And for those women with a history of victimisation, the protesters' tactics can pose a tremendous barrier to accessing a necessary health service.'⁷⁶

In our interview with Allanson, we were told of the importance of a supportive environment for patient wellbeing and the deleterious impact of an unsupportive or discriminatory environment.⁷⁷ Allanson's views were echoed by a social worker, who told us that evidence-based research has consistently found that the impact of an abortion should not be traumatic, long lasting and negative but that there are risk factors which contribute to negative consequences and these include stigma, misinformation, shame and guilt, all of which are associated with the protesters' activities.⁷⁸ While some patients recover quickly, others remain traumatised, angry and at heightened risk of ongoing psychological problems.⁷⁹ This risk is particularly high for women with a history of sexual or physical

72 Brenda Major and Richard H Gramzow, 'Abortion as Stigma: Cognitive and Emotional Implications of Concealment' (1999) 77 *Journal of Personality and Social Psychology* 735, 735. See also David A Grimes et al, 'Unsafe Abortion: The Preventable Pandemic' (2006) 368 *The Lancet* 1908, 1914 on the link between stigma related to abortion and negative health consequences.

73 Brenda Major and Laurie T O'Brien, 'The Social Psychology of Stigma' (2005) 56 *Annual Review of Psychology* 393, 409.

74 For further discussion of abortion and stigma see: Ronli Sifris, 'A Woman's Right to Choose: Human Rights and Abortion in Australia' in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Lawbook, 2013) 251.

75 Rebecca Elizabeth Dean and Susie Allanson, 'Abortion in Australia: Access versus Protest' (2004) 11 *Journal of Law and Medicine* 510, 512.

76 Interview with Susie Allanson, clinical psychologist, Fertility Control Clinic (Victoria, 22 March 2017).

77 Interview with Susie Allanson, clinical psychologist, Fertility Control Clinic (Victoria, 22 March 2017).

78 Interview with social worker (Melbourne, 20 March 2017).

79 Interview with general practitioner working in sexual health in regional Victoria (Victoria, 2 May 2017).

violence or other vulnerabilities.⁸⁰ Protest outside a clinic in Albury, NSW, one of the remaining jurisdictions without safe access zones, has been reportedly linked with teenage girls engaging in self-harm and attempted suicide.⁸¹

The negative health consequences of anti-abortion protesting were further reiterated in a 2010 study which considered the impact of anti-abortion protesters outside the FCC on the women entering the clinic.⁸² The study demonstrates that anti-abortion protesting may cause damage to a woman's physical or mental health and may prevent her from accessing the health care that she requires. This conclusion is supported by our empirical research, which revealed that protest action has resulted in some patients delaying treatment or follow-up appointments⁸³ and some not exercising their reproductive choices.⁸⁴ Some patients would seek alternative services for which they were ineligible and others would experience delays due to protesters booking appointments in order to fill operating lists.⁸⁵ A regional health service coordinator described patients as 'very traumatised by the prospect of having to negotiate their way through protesters ... and more inclined to delay the initial contact with the service, knowing what they're going to be up against when they eventually get into the service which ... [is] sometimes booked out two or three weeks in advance'.⁸⁶ Protest action has therefore operated as a barrier to access to abortion which, like other barriers to access, is most acutely felt by the most vulnerable and disadvantaged women.⁸⁷

In her second reading speech, the Victorian Minister for Health noted that the Victorian Bill 'acknowledges that Victorian women have a right to access legal reproductive services without fear, intimidation or harassment' and that '[w]omen also have a right to access these services without having their privacy compromised'.⁸⁸ Similarly, the Explanatory Statement to the ACT legislation stipulates the aim of ensuring that 'women can access the health facilities in privacy, and free from intimidating conduct'.⁸⁹ Thus the desirability of protecting the privacy of patients entering and leaving these clinics was clearly a primary rationale for the introduction of safe access zones, as is the desirability of protecting women's right to access an essential health service, free from intimidation and harassment. In order to gauge whether the Victorian legislation

80 Interview with Susie Allanson, clinical psychologist, Fertility Control Clinic (Victoria, 22 March 2017).

81 Melissa Davey, 'Albury's Only Abortion Clinic: Protests "Push Women to Point of Self-Harm"', *The Guardian* (online) 9 December 2014 <<https://www.theguardian.com/world/2014/dec/09/women-seeking-abortions-harassed-by-protesters-to-point-of-suicide>>.

82 Alexandra Humphries, *Stigma, Secrecy and Anxiety in Women Attending for an Early Abortion* (Masters Thesis, The University of Melbourne, 2011).

83 Interview with Susie Allanson, clinical psychologist, Fertility Control Clinic (Victoria, 22 March 2017); interview with health coordinator, Gateway Health Wodonga (Victoria, 1 May 2017).

84 Interview with general practitioner working in sexual health in regional Victoria (Victoria, 2 May 2017).

85 This tactic was attributed to the Helpers of God's Precious Infants in Albury: interview with health coordinator, Gateway Health Wodonga (Victoria, 1 May 2017).

86 Interview with health coordinator, Gateway Health Wodonga (Victoria, 1 May 2017).

87 Interview with social worker (Melbourne, 20 March 2017).

88 Victoria, *Parliamentary Debates*, Legislative Assembly, 22 October 2015, 3975 (Jill Hennessy).

89 Explanatory Statement, Health (Patient Privacy) Amendment Bill 2015 (ACT) 2.

is meetings its objectives, we have drawn on the observations of staff working in clinics, including the FCC.

2 Are Safe Access Zones Meeting Their Objectives?

Our interviews reveal that, generally speaking, the safe access zones are achieving their objectives of protecting the right of patients and staff to privacy, facilitating safe access to health services without fear and reducing misinformation and stigma.⁹⁰ That said, protesters have maintained their presence outside the radius of safe access zones around some Victorian clinics including the FCC and there has been some testing of the zones' parameters, with one calculated breach outside the FCC which resulted in the conviction of Kathleen Clubb in October 2017.⁹¹

All Victorian interviewees took the view that the zones were operating to distance protesters from clinics and prevent them from targeting individuals. Protest action has accordingly been de-individualised, sending 'a wonderful positive message ... that society won't condone that sort of behaviour' targeted at women accessing health services.⁹² Further, because protesters were no longer 'one step away from you', fears around protesters purporting to be clients and threats to safety were also diminishing.⁹³

The legislation was understood to acknowledge women's freedom over their reproductive health⁹⁴ and remove 'the completely fabricated shame of accessing the service'.⁹⁵ It was described as a statement 'that women are equal and entitled to reproductive health services without fear of judgment, vilification, non-acceptance and gender-based vilification'⁹⁶ and a mark of respect for women by recognising them 'as human beings who can make their own decision' and respecting their decision-making capacity.⁹⁷

The legislation was seen to give 'permission for women to make the decisions that need to be made', stop them from feeling marginalised and '[allow] them to feel strong and confident that they know the right thing for their body, for their life, for their family, for their children' while providing 'a sense of empowerment and

90 Interview with social worker (Melbourne, 20 March 2017).

91 For a discussion of this conviction see Tania Penovic and Ronli Sifris, 'Anti-Abortion Protesters Have Acted with Impunity for Decades. That Ends Now', *The Guardian* (online), 13 October 2017 <<https://www.theguardian.com/commentisfree/2017/oct/13/anti-abortion-protestors-have-acted-with-impunity-for-decades-that-ends-now>>.

92 Interview with social worker (Melbourne, 20 March 2017).

93 Interview with nurse practitioner and midwife working in reproductive health (Victoria, 27 March 2017).

94 Interview with social worker (Melbourne, 20 March 2017).

95 Interview with Sarah van der Wal, staff specialist working in reproductive health (Victoria, 1 May 2017).

96 Interview with nurse practitioner and midwife working in reproductive health (Victoria, 27 March 2017).

97 Interview with medical director, Community Health Centre (Victoria, 3 May 2017); see also interview with nurse practitioner and midwife working in reproductive health (Victoria, 27 March 2017).

control over their bodies'.⁹⁸ Empowerment was seen as an important corollary of safe access zones. Allanson told us that the legislation was 'so empowering' and an acknowledgement of the need to address violence against women and observed that substantially fewer patients require the services of a clinical psychologist since the legislation took effect.⁹⁹

Addressing the stigmatising effect of the protest was vital to women's empowerment. One interviewee described safe access zones as having 'changed everything completely, as far as that feeling that society is morally judging them, and that they're bad people'¹⁰⁰ and another spoke of her strong belief that the service should be available 'but that it's no one's business if you're accessing it', noting that the legislation has 'probably made a huge difference to women's ability to access that without shame [and] I think it's so important'.¹⁰¹

Those who oppose safe access zones frequently do so on the grounds that they purportedly violate human rights or constitutional norms. Therefore, this article now turns to consider some of the challenges to the safe access zone provisions.

IV CHALLENGING SAFE ACCESS ZONES

While safe access zones have been characterised as a victory for women's rights, they have also been castigated as a violation of protesters' rights. Angela Shanahan has described them as 'an unnecessary infringement of citizens' rights', a 'dangerous development' and observed that 'our freedom of speech is under attack from restrictive anti-protest laws that prioritise political ideologies over individual rights'.¹⁰² The zones have been seen as an attack on religious freedom which criminalises the holding of anti-abortion opinions¹⁰³ and described as unconstitutional and totalitarian in nature.¹⁰⁴ The final portion of this article examines the argument that the legislation is unconstitutional and a breach of the protesters' human rights.

98 Interview with general practitioner working in sexual health in regional Victoria (Victoria, 2 May 2017).

99 Interview with Susie Allanson, clinical psychologist, Fertility Control Clinic (Victoria, 22 March 2017).

100 Interview with general practitioner working in sexual health in regional Victoria (Victoria, 2 May 2017).

101 Interview with Sarah van der Wal, staff specialist working in reproductive health (Victoria, 1 May 2017).

102 Angela Shanahan, 'Free Speech against Abortion Hasn't Got a Prayer', *The Australian* (online), 30 July 2016 <<http://www.theaustralian.com.au/opinion/columnists/angela-shanahan/free-speech-against-abortion-hasnt-got-a-prayer/news-story/694519c03c92853ef1ff8a2c15460aa2>>.

103 Monica Doumit, 'How New Abortion Clinic Laws Prey on Those Who Pray', *The Catholic Weekly* (online), 12 May 2016 <<https://www.catholicweekly.com.au/how-new-abortion-clinic-laws-prey-on-those-who-pray/>>.

104 The Freedoms Project, *About My Legal Challenge to Victoria's Safe Access Zones* <<https://www.thefreedomsproject.com/safe-access-zones/>>.

A *Would the Laws Survive a Constitutional Challenge?*

There are those who argue that safe access zone laws infringe the protesters' right to free speech.¹⁰⁵ It should be noted that in Australia there is no constitutionally entrenched right to free speech. However, it is arguable that safe access zones infringe the constitutionally implied freedom of political communication.¹⁰⁶ In order to make a case for constitutional invalidity it would need to be established that the laws impose an unjustifiable burden on political communication. A burden on political communication may be justified if it meets the requisite 'compatibility testing' and 'proportionality testing' constraints.¹⁰⁷

When the Tasmanian legislation was passed in 2013, scholars were divided on this issue. Michael Stokes, for example, argued that '[t]he provision breaches the freedom of political communication and is therefore outside the powers of the parliament'.¹⁰⁸ In contrast, Adrienne Stone commented that the 'High Court's established approach to freedom of political communication ... provides strong arguments in favour of the validity of this law'.¹⁰⁹ Constitutional arguments have already been mounted before the courts; in Victoria, for example, Kathleen Clubb, the first person to be prosecuted (and convicted) for violating Victoria's safe access zone provisions, has argued that the provisions are constitutionally invalid.¹¹⁰ When the case came before the Melbourne Magistrates' Court in October 2017, the Magistrate held that there was no burden on political communication and the provisions were therefore constitutionally valid.¹¹¹ Clubb and Preston (who was convicted of breaching Tasmania's safe access zone legislation) have appealed to the High Court and it seems likely that the hearing will take place in the latter part of 2018.¹¹²

105 For a discussion on the right to access abortion services versus freedom of speech and freedom to protest against such services see, eg, Dean and Allanson, above n 75, 512.

106 For an overview of the jurisprudence relating to the implied freedom of political communication see Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (Thomson Reuters, 4th ed, 2014). For a debate as to the legitimacy of the implied freedom as a constitutional doctrine see Patrick Emerton, 'Political Freedoms and Entitlements in the *Australian Constitution* — An Example of Referential Intentions Yielding Unexpected Legal Consequences' (2010) 38 *Federal Law Review* 169 (in defence of the doctrine) and Jeffrey Goldsworthy, 'Implications in Language, Law and the *Constitution*' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (Federation Press, 1994) 150 (setting out the originalist objection).

107 See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567, citing *Cunliffe v Commonwealth* (1994) 182 CLR 272, 300, 324, 340, 387–8; *McCloy v New South Wales* (2015) 257 CLR 178, 194–5. It is beyond the scope of this paper to engage in an in-depth analysis of the formulation and application of this test.

108 Michael Stokes, 'Tasmanian Ban on Abortion Clinic Protests May Not Be Constitutionally Valid', *The Conversation* (online), 25 November 2013 <<https://theconversation.com/tasmanian-ban-on-abortion-clinic-protests-may-not-be-constitutionally-valid-20650>>.

109 Adrienne Stone, 'Tasmania's Abortion Protest Law is Probably Constitutionally Valid', *The Conversation* (online), 29 November 2013 <<https://theconversation.com/tasmanias-abortion-protest-law-is-probably-constitutionally-valid-20784>>.

110 The Freedoms Project, *About My Legal Challenge to Victoria's Safe Access Zones* <<https://www.thefreedomsproject.com/safe-access-zones/>>.

111 *Edwards v Clubb* (Unreported, Magistrates' Court of Victoria, Magistrate Bazzani, 23 December 2017).

112 Transcript of Proceedings, *A-G (Vic) v Clubb* [2018] HCATrans 60 (23 March 2018).

It is worth noting that in the October 2017 decision of *Brown v Tasmania*¹¹³ the High Court invalidated the anti-protest provisions of Tasmania's *Workplaces (Protection from Protestors) Act 2014* (Tas), which operated to limit anti-forestry protests, on the basis that the provisions violated the implied freedom of political communication. The majority of the High Court held that the impugned provisions imposed a burden on political communication and that, while the law served the legitimate purpose of protecting business activities and therefore satisfied the compatibility testing requirements, the provisions failed the proportionality analysis.¹¹⁴ Thus in their joint judgment Kiefel CJ, Bell and Keane JJ held that '[i]n the measures it adopts to deter protesters the Protesters Act goes far beyond those reasonably necessary for its purpose'.¹¹⁵

On the one hand, this case is authority for the position that limiting protest may constitute a burden on political communication and may fail the proportionality testing requirements. While it is not clear that the safe access zone legislation constitutes a burden on political communication (the Magistrate in *Edwards v Clubb*¹¹⁶ held that it does not), High Court precedents suggest that the threshold for this limb is low and that the High Court is likely to find that such a burden is imposed by the legislation.¹¹⁷ However, the legislation in *Brown v Tasmania*¹¹⁸ had very different aims to Victoria's safe access zone legislation and the means used to achieve those aims, while both limiting protest, are quite different.¹¹⁹ The aim of the safe access zone legislation is to protect the privacy, dignity, health and wellbeing of women seeking to access a medical service whereas the aim of the legislation in *Brown v Tasmania*¹²⁰ was to prevent interference with business activities. Given that the High Court in *Brown v Tasmania* held that the protection of business activities constitutes a legitimate aim for the purposes of determining whether the legislation is compatible with the implied freedom,¹²¹ it is likely that the compatibility testing requirement will be satisfied with respect to the safe access zone legislation. In *Brown v Tasmania*¹²² the court was particularly concerned about the indeterminacy of the zone covered by the Tasmanian law;¹²³ the Victorian legislation is much clearer. For example, it explicitly applies to the area within '150 metres from premises at which abortions are provided'.¹²⁴ Thus the key question that the High Court is likely to focus on is whether the 150

113 (2017) 349 ALR 398.

114 Ibid 430 [152].

115 Ibid 429 [146].

116 (Unreported, Magistrates' Court of Victoria, Magistrate Bazzani, 23 December 2017).

117 See, eg, *Levy v Victoria* (1997) 189 CLR 579, 624–6 (McHugh J).

118 (2017) 349 ALR 398.

119 See Part III(C)(2) above for a discussion of the objectives of the safe access zone legislation.

120 (2017) 349 ALR 398.

121 Ibid 421 [101].

122 Ibid 434 [168].

123 For a discussion on this point see Brendan Gogarty, 'Bob Brown Wins His Case, but High Court Leaves the Door Open to Laws Targeting Protestors', *The Conversation* (online), 18 October 2017 <<https://theconversation.com/bob-brown-wins-his-case-but-high-court-leaves-the-door-open-to-laws-targeting-protestors-85742>>.

124 *Public Health and Wellbeing Act 2008* (Vic) s 185B.

metre zone is a proportional means of achieving the legitimate objectives of the legislation at issue.

Assuming that the High Court adopts a structured proportionality analysis which, per *McCloy v New South Wales*, involves consideration of whether the safe access zones are suitable, necessary and adequate in the balance,¹²⁵ discussion of the ‘necessity’ aspect will arguably be the most challenging facet of the test to establish. It is indeed possible to argue that the safe access zone extends too far or that the prospective penalties are too harsh. Yet such arguments are essentially quibbling over technical aspects of an issue which is inherently context specific and therefore requires legislation capable of accommodating the different contexts. The real issue is whether safe access zones per se are necessary to protect women’s health, privacy and wellbeing. In light of the above discussion, this question must be answered in the affirmative. Further, it must be recalled that anti-abortion protesters may still protest in most public places. They may stand in public parks with placards, they may write letters to the editor of newspapers and they may give television and radio interviews. All that safe access zone provisions prohibit is protests within a specific sphere of a clinic that provides abortion services. Arguing over the precise radius of the zone or the exact nature of possible penalties loses sight of this key point. Safe access zones only apply within a certain distance of a clinic, and this is necessary to safeguard women’s privacy, health and wellbeing. Therefore, the necessity criterion is likely to be satisfied and the decision in *Brown v Tasmania*¹²⁶ should not be construed as foreshadowing a decision that the safe access zone provisions are unconstitutional.

B Are the Laws Consistent with International Human Rights Norms?

Determining whether the safe access zone provisions are consistent with international human rights norms requires a balancing of the rights of patients and clinic staff which the safe access zones protect (such as their right to privacy and health care) against the rights of anti-abortion protesters (such as the right to free speech). With reference to rights enshrined in treaties ratified by Australia, this Part begins by considering the rights of the protesters. It then moves on to an analysis of the rights of staff and patients before considering the extent to which the rights of protesters may be restricted in accordance with international human rights law.

1 Protesters’ Rights

Victoria’s safe access zone legislation prohibits a range of conduct, including communicating about abortions in a manner that is reasonably likely to cause distress or anxiety. The expression of views about abortion, including views

¹²⁵ (2015) 257 CLR 178, 217 [79].

¹²⁶ (2017) 349 ALR 398.

of a religious nature, is restricted within the radius of the zones. This has resulted in the characterisation of safe access zones as a breach of protesters' rights under international human rights law, including the rights to free speech, freedom of religion and the right of peaceful assembly.¹²⁷ These rights are enshrined in international law under the *International Covenant on Civil and Political Rights*¹²⁸ ('*ICCPR*') and Victoria's state law under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Charter*').¹²⁹ The *Charter* seeks to incorporate the *ICCPR*'s obligations into Victorian law. However, s 48 of the *Charter* provides that '[n]othing in this Charter affects any law applicable to abortion'.¹³⁰ The question of whether (and to what extent) legislation facilitating safe access to premises at which abortions are provided falls within the ambit of 'law applicable to abortion' has not been interpreted judicially and therefore remains uncertain. However, even in circumstances where the safe access zone legislation may be found to fall outside the ambit of the *Charter*, the protections enshrined in human rights treaties ratified by Australia remain relevant. While these protections have for the most part not been incorporated into Australia's domestic law (with Victoria's *Charter* constituting a notable exception), Australia is bound under international law to respect, protect and fulfil the rights enshrined in treaties that it has ratified and to implement legislative and other measures in order to give effect to its treaty obligations.

Under international human rights law, the rights to religious freedom, free speech and peaceful assembly are not absolute.¹³¹ This position is reflected in art 19 of the *ICCPR* which provides that free speech encompasses the freedom to impart information and ideas of all kinds subject to restrictions which are provided by law and necessary for the respect of the rights or reputations of others, or for the protection of public order, morals or health.¹³² The right to freedom of thought, conscience and religion is enshrined in art 18 and includes the freedom to manifest one's religion in public or private. Like the right to peaceful assembly enshrined in art 21 of the *ICCPR*, it is subject to limitations prescribed by law which are necessary to protect public safety, order, health, morals or the fundamental rights and freedoms of others. The rights of others encompass those enshrined in the *ICCPR* and other human rights instruments.¹³³ These include the *International*

127 See, eg, Gordon Taylor, "'Right to Life' Campaigners Deny Prayers Outside Clinic Were in Protest, Court Hears', *ABC News* (online), 8 November 2017 <<http://www.abc.net.au/news/2017-11-07/three-right-to-life-campaigners-face-court-after-alleged-protest/9127610>>.

128 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 18(1), 19, 21 ('*ICCPR*').

129 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 14–16 ('*Charter*').

130 Ronli Sifris, 'The Approach of the Victorian *Charter* to Women's Rights' in Matthew Groves and Colin Campbell (eds), *Australian Charters of Rights a Decade On* (Federation Press, 2017) 147, examining *ibid* s 48.

131 The limitations on these rights under international law are reflected in the *Charter*. See *Charter* s 15(3) for restrictions on free speech and s 7(2) for limitations of rights generally.

132 *ICCPR* art 19(2)–(3).

133 Human Rights Committee, *General Comment No 34 — Article 19: Freedoms of Opinion and Expression*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011) 7 [28] ('*General Comment No 34*').

*Covenant on Economic, Social and Cultural Rights*¹³⁴ ('ICESCR') and the *Convention on the Elimination of All Forms of Discrimination against Women* ('CEDAW').¹³⁵ Examined below is the extent to which it is necessary to limit the protesters' actions in order to protect the rights of others.

2 The Rights of Others

Australia's obligations to protect, respect and fulfil norms of international human rights law extend to addressing the conduct of private actors such as anti-abortion protesters.¹³⁶ Limitations on the protesters' actions can be justified with reference to a range of human rights norms in treaties ratified by Australia. These include the following: the right to privacy,¹³⁷ the right to the highest attainable standard of health¹³⁸ and equality of access to health care services,¹³⁹ the right to enjoy the benefits of scientific progress and its applications,¹⁴⁰ the right to equality and non-discrimination,¹⁴¹ the right to security of person,¹⁴² freedom from cruel, inhuman or degrading treatment¹⁴³ and women's equal rights to decide freely and responsibly on the number and spacing of their children.¹⁴⁴ These rights are considered below.

Women's decision-making in matters concerning their reproductive function, including the decision to have an abortion, falls within the purview of the right to privacy.¹⁴⁵ Article 17 of the *ICCPR* prohibits arbitrary or unlawful interferences with privacy and enshrines a right to legal protection against such interference or attacks. The protesters have interfered in women's private decision-making concerning their own bodies in the context of accessing confidential medical treatment. Women have been unable to seek redress for the protesters' actions

134 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('ICESCR').

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

136 See, eg, Human Rights Committee, *General Comment No 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) 3 [8].

137 *ICCPR* art 17.

138 *ICESCR* art 12(1).

139 *CEDAW* art 12(1).

140 *ICESCR* art 15(1)(b).

141 See, eg, *CEDAW* arts 1–2; *ICCPR* art 3; *ICESCR* art 3.

142 *ICCPR* art 9(1).

143 *Ibid* art 7; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) art 16 ('*Convention against Torture*').

144 *CEDAW* art 16(1)(c).

145 See, eg, Human Rights Committee, *Views: Communication No 1153/2003*, 85th sess, UN Doc CCPR/C/85/D/1153/2003 (22 November 2005) 10 [6.4]; Human Rights Committee, *Views: Communication No 1608/2007*, 101st sess, UN Doc CCPR/C/101/D/1608/2007 (28 April 2011) 11 [9.3]; Human Rights Committee, *CCPR General Comment No 28: Article 3 (The Equality of Rights between Men and Women)*, 68th sess, UN Doc CCPR/C/21/Rev.1/Add.10 (29 March 2000) [20]; Committee on the Elimination of Discrimination against Women, *General Recommendation No 24: Article 12 of the Convention (Women and Health)*, 20th sess, UN Doc A/54/38/Rev.1, chap.I (1999) [12(d)] ('*CEDAW General Recommendation No 24*').

without further incursions into their privacy, described as 'advertis[ing] yourself' as having an abortion.¹⁴⁶ With respect to Victoria's safe access zone legislation, the Health Minister's statement of compatibility (a document addressing the compatibility of Bills introduced into Parliament with human rights set out in the *Charter*)¹⁴⁷ recognises the problem of obtaining redress for conduct which has often extended to criminal conduct in circumstances in which patients are unwilling to expose themselves to the stress and publicity associated with criminal proceedings. The statement observes that 'the intensely private nature of the decision that the protesters seek to denounce, effectively operates to protect the protesters from prosecution'.¹⁴⁸ Victoria's safe access zone legislation was introduced with the explicit purpose of protecting the right of patients and staff to privacy and preventing the protesters' breaches of privacy.¹⁴⁹

The stress and anxiety generated by the protesters' actions has harmed the health and wellbeing of patients and staff, undermining their enjoyment of the right to the highest attainable standard of health enshrined in art 12 of *ICESCR*. An integral part of this right is sexual and reproductive health,¹⁵⁰ which encompasses unhindered access to health facilities and 'the right to make free and responsible decisions and choices, free of violence, coercion and discrimination, regarding matters concerning one's body and sexual and reproductive health'.¹⁵¹ The United Nations committee which supervises the implementation of the *CEDAW* has recognised that breaches of patient confidentiality may have a disproportionate effect on women by deterring them from seeking medical treatment and thereby adversely affecting their health and wellbeing.¹⁵² Protest action has deterred and obstructed women from accessing timely medical treatment¹⁵³ and furthermore undermined service availability by deterring health professionals from offering abortion services. Regional and rural areas have been significantly affected by protest-related service disruption. For example, the closure of the abortion service operated by Bendigo Health, which services Victoria's expansive Loddon Mallee region, from January 2012 until August 2013 was associated with the conduct of protesters who would threaten to target doctors personally and shame them publicly.¹⁵⁴

146 Interview with medical director, Community Health Centre (3 May 2017).

147 See *Charter* s 28.

148 Victoria, *Parliamentary Debates*, Legislative Assembly, 22 October 2015, 3973 (Jill Hennessy).

149 *Ibid* 3975 (Jill Hennessy).

150 Committee on Economic, Social and Cultural Rights, *General Comment No 22 on the Right to Sexual and Reproductive Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc E/C.12/GC/22 (2 May 2016) 1 [1].

151 *Ibid* 2 [5].

152 *CEDAW General Recommendation No 24*, UN Doc A/54/38/Rev.1, chap.I [12(d)].

153 For a discussion on the right to access abortion services versus freedom of speech and freedom to protest against such services, see, eg, Dean and Allanson, above n 75.

154 Bendigo Weekly, 'GPs Could Help Staff Abortion Clinic', *Bendigo Weekly* (online), 25 January 2013 <<http://www.bendigoweeklyarchive.com/news/gps-could-help-staff-abortion-clinic>>; see also Karen Kissane, 'R U Serious?', *The Age* (Online), 19 November 2005 <<https://www.theage.com.au/national/r-u-serious-20051119-ge19qx.html>>; Jill Stark, 'Abortions Not Performed in Bendigo for More Than a Year', *The Age* (online), 17 March 2013 <<https://www.theage.com.au/national/victoria/abortions-not-performed-in-bendigo-for-more-than-a-year-20130316-2g7kq.html>>.

Protest action has furthermore reduced the availability of medical abortion services, preventing women from accessing medical abortions. In obviating the need for a surgical procedure, medical abortion has been recognised by the World Health Organisation as an important, low-risk alternative to surgical abortion.¹⁵⁵ Access to medical abortion falls within the ambit of the right to enjoy the benefits of scientific progress and its applications enshrined in art 15(1)(b) of *ICESCR*. An explicit link was drawn in our interviews between the introduction of safe access zones and increased availability of medical abortion services in Victoria. In jurisdictions without safe access zones, it was reported that some doctors consider medical abortion services to be ‘a no-go zone’¹⁵⁶ due to the prospect of protest action outside clinics. In preventing women in three Australian states from accessing medical abortion, the threat constituted by anti-abortion protest has operated to deny women access to the benefits of scientific progress.

Anti-abortion protest outside clinics is furthermore a form of targeted discrimination against women. Women’s right to equality and freedom from discrimination is a fundamental principle of international human rights law.¹⁵⁷ Article 1 of *CEDAW* defines discrimination against women as encompassing any distinction made on the basis of sex which has the effect or purpose of impairing or nullifying the enjoyment or exercise of human rights or fundamental freedoms on a basis of equality with men. The gendered nature of the protest was a recurring theme in our interviews, as was the reality that abortion services are required only by women and that no other medical procedure is targeted in this way. Women who have been targeted by the protesters have not been in a position to enjoy a range of fundamental rights on a basis of equality with men. These rights include all of the human rights considered above as well as the freedom from cruel, inhuman or degrading treatment¹⁵⁸ or the right to security of person,¹⁵⁹ which in essence entails a right to protection against intentional infliction of bodily or mental injury.¹⁶⁰ By seeking to override women’s reproductive autonomy, the activities of anti-abortion protesters have furthermore impaired women’s equal rights to decide freely and responsibly on the number and spacing of their children¹⁶¹ and equality of access to family planning services.¹⁶²

The actions of the protesters fall within the purview of another form of gender-based discrimination that seriously inhibits women’s ability to enjoy rights and

155 Thoi D Ngo et al, ‘Comparative Effectiveness, Safety and Acceptability of Medical Abortion at Home and in a Clinic: A Systematic Review’ (2011) 89 *Bulletin of the World Health Organization* 360.

156 Interview with medical director, Gateway Health Wodonga (Victoria, 15 May 2017).

157 See, eg, *ICCPR* arts 3, 26; *ICESCR* arts 3, 2(2).

158 *ICCPR* art 7; *Convention against Torture* art 16.

159 *ICCPR* art 9(1).

160 *Ibid*; Human Rights Committee, *General Comment No 35: Article 9 (Liberty and Security of Person)*, 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014) 2 [9].

161 *CEDAW* art 16(1)(e).

162 *Ibid* art 12(1).

freedoms on a basis of equality with men: violence against women.¹⁶³ Violence against women encompasses acts and threats that inflict physical or psychological harm within the general community which are directed at women or affect women disproportionately¹⁶⁴ and includes the abuse and mistreatment of women seeking sexual and reproductive health services.¹⁶⁵ The obligation to prohibit such conduct (whether perpetrated by public authorities or private actors)¹⁶⁶ falls within the scope of Australia's obligations under *CEDAW* and has been recognised as a principle of customary international law.¹⁶⁷ Legislative restrictions on the conduct of anti-abortion protests outside clinics are consistent with Australia's obligations under international law to protect women from acts of gender-based violence.

3 Rationalising Limitations on Protesters' Rights

Restrictions on the rights to free speech, peaceful assembly and to manifest one's religious views in the context of anti-abortion protest are justified by the need to protect the rights of others, namely women seeking abortions and others requiring access to premises at which abortions are provided such as staff seeking to access their place of employment. While limitations on these rights do not require multiple rationales, safe access zones may be justified on a number of additional grounds under arts 18 and 19 of the *ICCPR*. The impact of protest activity on psychological wellbeing and access to health services makes it arguable that safe access zones could also be justified on the ground of protecting public health.¹⁶⁸ The zones may furthermore be considered necessary to protect public order and the safety of persons requiring access to clinics. Safety threats and disturbances have been a corollary of the protesters' continued presence outside clinics and the extent to which public order and safety may be undermined by the actions of anti-abortion protesters is amply demonstrated by the experience of the FCC.

163 Committee on the Elimination of Discrimination against Women, *General Recommendation No 35 on Gender-Based Violence against Women, Updating General Recommendation No 19*, UN Doc CEDAW/C/GC/35 (14 July 2017) ('*CEDAW General Recommendation No 35*'); Committee on the Elimination of Discrimination against Women, *General Recommendation No 19: Violence against Women*, 11th sess, UN Doc A/47/38 (1992) [6] ('*CEDAW General Recommendation No 19*'). See also *Declaration on the Elimination of Violence against Women*, GA Res 48/104, UN GAOR, 48th sess, 85th plen mtg, UN Doc A/RES/48/104 (23 February 1994) art 1 ('*GA Resolution 48/104*').

164 *CEDAW General Recommendation No 35*, UN Doc CEDAW/C/GC/35, 6–7 [20]; *CEDAW General Recommendation No 19*, UN Doc A/47/38, [6]. See also *GA Resolution 48/104*, UN Doc A/RES/48/104, art 1.

165 *CEDAW General Recommendation No 35*, UN Doc CEDAW/C/GC/35, 6 [18].

166 *Ibid* 7–8 [24], 8–9 [26].

167 *Ibid* 2 [2].

168 While the Human Rights Committee (which supervises the implementation of the *ICCPR*) has not had cause to consider cases that address the public health limitation to free speech (or speech which constitutes a manifestation of one's religion or belief), Nowak has posited in his *ICCPR* commentary that restrictions on advertising harmful substances and laws prohibiting misinformation about health-threatening activities would fall within the scope of permissible limitations to free speech: Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (N P Engel, 1993) 357–8; see also Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford University Press, 3rd ed, 2013) 623 [18.65].

In addition to pursuing a legitimate aim, restrictions on the protesters' rights must conform to the principle of proportionality with reference to the aims pursued by the legislation and the degree to which the zones' 150 metre radius has restricted the protesters' rights to free speech, right of peaceful assembly and/or freedom to manifest their religion.¹⁶⁹ The distance required to protect persons attending clinics is context specific and influenced by a number of factors, including geography and space. The context specific operation of the zones was reflected in our interviews. For example, 150 metres was seen to prevent the targeting of patients attending large hospitals which provide a comprehensive range of health services but did not necessarily eliminate the possibility of identification and targeting of patients arriving at the FCC¹⁷⁰ which is located in two terrace houses in a busy Melbourne thoroughfare. The prevailing view of interviewees was that 150 metres is a minimum distance required to meet the objectives of safe access zones.

As noted above in the context of the discussion of constitutional validity, it is arguable that the aims of the legislation could be achieved through means of a narrower zone. But in order to achieve its protective function, the legislation must be flexible enough to accommodate the different contexts in which it applies. The empirical data we have obtained concerning the impact of protest and the operation of safe access zones supports the conclusion that the zones' 150 metre radius is appropriate to achieve the legislation's protective function.¹⁷¹

The conclusion that the legislation complies with the principle of proportionality is supported by the work of the United Nations Human Rights Committee on the implementation of the *ICCPR*.¹⁷² In determining whether restrictions on the right to free speech are overbroad, the committee has observed that the principle of proportionality must take account of the form of expression, the means of its dissemination¹⁷³ and the importance of the interests which the restriction serves to protect.¹⁷⁴ The protesters' form of expression has been confrontational and harmful and the means of its dissemination has entailed the targeting of

169 *General Comment No 34*, UN Doc CCPR/C/GC/34, 6–7 [22]–[26]; Human Rights Committee, *CCPR General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993) [8] ('*CCPR General Comment No 22*').

170 Interview with Susie Allanson, clinical psychologist, Fertility Control Clinic (Victoria, 22 March 2017).

171 Interview with social worker (Melbourne, 20 March 2017); Interview with anonymous clinic staff member (Victoria, 12 April 2017); interview with Sarah van der Wal, staff specialist working in reproductive health (1 May 2017); interview with health coordinator, Gateway Health Wodonga (Victoria, 1 May 2017); interview with general practitioner working in sexual health in regional Victoria (Victoria, 2 May 2017); interview with medical director, Gateway Health Wodonga (Victoria, 15 May 2017); interview with Rita Butera, Executive Director, Women's Health Victoria (Victoria, 25 May 2017); interview with Tracy Little, Centre Manager, Marie Stopes Maroondah (Victoria, 26 October 2017).

172 See generally *General Comment No 34*, UN Doc CCPR/C/GC/34; Human Rights Committee, *CCPR General Comment No 22*, UN Doc CCPR/C/21/Rev.1/Add.4 [8]; Human Rights Committee, *Views: Communication No 1128/2002*, 83rd sess, CCPR/C/83/D/1128/2002 (18 April 2005) 14 [6.8] ('*Rafael Marques de Morais v Angola*').

173 *General Comment No 34*, UN Doc CCPR/C/GC/34, 8 [34].

174 *Rafael Marques de Morais v Angola*, UN Doc CCPR/C/83/D/1128/2002, 14 [6.8].

individuals in the context of access to confidential medical services. The interests which the legislation seeks to protect are ventilated above. Their paramount importance is incontrovertible. The distancing of the protesters from individuals requiring access to clinics has furthermore not impaired their ability to assemble and express their views. It has instead imposed limitations within a tailored geographic space, operating to ensure that the protesters do not engage in the harassment and abuse that are a concomitant of protest outside clinics. This position was eloquently described by one of our interviewees as follows:

There is absolutely nothing about safe access zones that stops people from expressing the view that they do not support terminations of pregnancy. You can write a newspaper article, you can tell anybody who wants to listen, you can write a book, you can go on social media. There's absolutely every right for you to have that. You can stand 150 metres away from the hospital and loudly declare that you do not support termination. What you can't do is restrict people's access, and I think that's what the safety zones allow. They stop people from physically obstructing, and emotionally obstructing, access to the service. So I don't think it is curbing people's right to free speech, because no one is suggesting that you cannot have that opinion, or vocalise that opinion. What they are suggesting is that you can't throw pig's blood at people.¹⁷⁵

The proportionality of the restriction imposed by safe access zones must also be considered with reference to the penalties for prohibited behaviour within the zones, which include a term of imprisonment of up to 12 months. The penalties are not mandatory; they are a sentencing option which falls within the scope of judicial discretion. The penalty imposed on Kathleen Clubb provides a useful illustration of the exercise of judicial discretion under the legislation.¹⁷⁶ Clubb's offending was regarded as planned, deliberate and remorseless but there was no evidence of duress or violence¹⁷⁷ and she was fined \$5000. In sentencing, Magistrate Luisa Bazzani observed the importance of deterrence and noted that the availability of imprisonment as a sentencing option demonstrates the serious nature of the offence and the harm that offending may cause.¹⁷⁸ While the majority of protests would not warrant 12 months' imprisonment, it is possible to envisage situations where protesting causes real and intentional harm and such imprisonment is therefore proportionate in the circumstances.

The dignity and rights of patients, staff and others have for too long been subordinated by protesters who have engaged in harassment and intimidation with impunity. The experience of anti-abortion protest in Victorian clinics has demonstrated that the rights of persons requiring access to premises at which abortions are provided cannot be safeguarded when protesters retain a presence outside those premises. Victorian law has prescribed limitations which are necessary and proportionate with reference to the interests the legislation seeks to protect and the form of expression it restricts. We consider that safe access zones

175 Interview with Sarah van der Wal, staff specialist working in reproductive health (1 May 2017).

176 *Edwards v Clubb* (Unreported, Magistrates' Court of Victoria, Magistrate Bazzani, 23 December 2017).

177 Ibid.

178 Ibid.

should operate in all Australian jurisdictions and be recognised as a necessary concomitant of compliance with Australia's obligations under international human rights law.

V CONCLUSION

Five Australian jurisdictions, including Victoria, have introduced safe access zones around clinics that provide the full range of reproductive health services. These zones protect patients and clinic staff from the conduct of anti-abortion protesters which have included harassment, intimidation and obstruction. Such conduct has frequently had a negative impact on women seeking to access a legal health service, breaching fundamental rights, such as the right to privacy and equality of access to health care. Our interviews with twelve Victorian health professionals have revealed that protest action outside Victorian clinics has had a traumatising, stigmatising and damaging effect on patients and others accessing premises at which abortions are provided. Safe access zones have been operating to distance protesters from clinics and facilitate access to lawful health services while protecting privacy, safety, health and wellbeing.

While both constitutional and human rights challenges have been directed at the safe access zone provisions, it is our belief that safe access zones represent a crucial vehicle for protecting women's fundamental rights. The same rights are not accorded to women in three Australian states where safe access zones have not been introduced. As one health professional in regional Victoria observed with reference to the protest, 'by allowing it to continue really you're opening up ... women to huge risks for their health, for their emotional health and also their right to choose — it's unacceptable'.¹⁷⁹ It is to be hoped that Australian jurisdictions which continue to tolerate such protest will recognise these risks and take action to avert them by introducing safe access zone legislation in the near future.

Postscript: please note that this article was written prior to the decriminalisation of abortion in Queensland and introduction of safe access zones in that jurisdiction. Further, Clubb and Preston's High Court appeal, referred to in the text accompanying n 112 of this article, did in fact take place in October 2018. At the time of publication, judgment has not yet been handed down.

179 Interview with health coordinator, Gateway Health Wodonga (Victoria, 1 May 2017).