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Health (Abortion Law Reform) Amendment Bill 2016

1. Thank you for the opportunity to make a submission to this inquiry. The focus of my submission is the definition of ‘prohibited behaviour’ in s 24(2)(c) of the Health (Abortion Law Reform) Amendment Bill 2016. In my submission this provision places undue restrictions on freedom of political communication.
2. If enacted, s 24(2)(c) would, in conjunction with s 24(1), make it an offence to engage in ‘prohibited behaviour’ within a ‘protected area for an abortion facility’, particularly where the behaviour involves ‘a protest, by any means, during the protected period for the facility relating to the performance of abortions in the facility’. Unlike s 24(2)(a), which is focussed on behaviour that is ‘harassing’, ‘hindering’, ‘intimidating’, ‘threatening’ or ‘obstructing’, s 24(2)(c) is specifically aimed at protesting. The act of protesting lies at the heart of freedom of political communication. While political communication can be appropriately regulated, restrictions on political speech and protesting must be subjected to rigorous scrutiny.
3. Section s 24(2)(c) is based on s 85 of the *Health Act 1993* (ACT), which defines ‘prohibited behaviour’ as including ‘protest, by any means, in the protected period in relation to the provision of abortions in the approved medical facility’. These provisions are framed differently to the corresponding sections of the *Public Health and Wellbeing Act 2008* (Vic) and the *Reproductive Health (Access to Terminations) Act 2013* (Tas), which prohibit communication or protest that is ‘able to be seen or heard’ by a person accessing premises at which abortions are provided. All of these provisions place significant restrictions on freedom of political communication.
4. Section s 24(2)(c) goes much further than general workplace anti-protest laws that have been enacted in Tasmania and New South Wales and which are the subject of actual or

threatened constitutional challenges.¹ The *Workplace (Protection from Protesters) Act 2014* (Tas), for example, only prohibits protest activities within business premises or business access areas, and its restrictions are limited to that which is necessary to protect the carrying out of business activities or access to business premises, or to prevent damage, threats of damage or risks to the safety of business premises or business access areas. In addition, the Act specifically exempts processions, marches and events that pass by business premises or business access areas. The *Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Act 2016* (NSW) is similarly limited to protests that occur on ‘inclosed lands on which any business or undertaking is conducted’. Moreover, an offence is not committed simply by the staging of a protest. The actions of the protesters must interfere with, or attempt to interfere with, the conduct of the business or undertaking, or give rise to a serious risk to safety. All of this is in stark contrast to s 24(2)(c) of the Health (Abortion Law Reform) Amendment Bill, which targets protest activities generally within a protected area.

5. The implied freedom of political communication, first recognised in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 and affirmed in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, applies to political communication at a state level and includes forms non-verbal communication and protest, such as the protest activities considered in *Levy v Victoria* (1997) 189 CLR 579. In *Levy’s* case, the High Court of Australia affirmed that the freedom of political communication extends, in principle, to conduct that conveys a political message, such as physical entry into a prescribed duck hunting area as a means of protesting against the shooting of ducks.² Protest activities of all kinds are protected by the implied freedom of political communication, including the protest activities targeted by s 24(2)(c) of the Health (Abortion Law Reform) Amendment Bill.
6. In *McCloy v New South Wales* (2015) 325 ALR 15, a majority of the High Court set out a three-stage test to be applied when considering whether a law impermissibly infringes the constitutional freedom of political communication.³ The questions to be asked are:
 - (i) Does the law effectively burden the freedom in its terms, operation or effect?
 - (ii) Are the purpose of the law and the means adopted to achieve that purpose legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative government?
 - (iii) Is the law reasonably appropriate and adapted to advance that legitimate object?
7. **Burden.** A law will effectively burden the freedom of political communication when ‘the effect of the law is to prohibit, or put some limitation on, the making or the content of political communications’.⁴ On the current approach of the High Court, there is little

¹ For more detail, see Nicholas Aroney and Lorraine Finlay, ‘Protesting the Anti-Protest Laws: Will a Constitutional Challenge Succeed?’ (2016) 31 *Australian Environment Review* 67. A copy of this article can be supplied upon request.

² *Levy v Victoria* (1997) 189 CLR 579, 594–5, 613, 622–3, 641.

³ *McCloy v New South Wales* (2015) 325 ALR 15; [2015] HCA 34, [2].

⁴ *Monis v R* (2013) 249 CLR 92; [2013] HCA 4, [108].

doubt that s 24(2)(c) of the Health (Abortion Law Reform) Amendment Bill, if enacted, would effectively burden the constitutionally-protected freedom.

8. **Compatibility.** The purpose of s 24(2)(c) needs to be identified in the context of s 24 as a whole. Section 24(1) makes it an offence to engage in prohibited behaviour in a protected area. Its purposes can only be discerned by a close reading of s 24(2)(a), (b) and (c), which define the prohibited behaviour. Read closely, the manifest purposes of s 24(2)(a) and (b) are to enable persons to enter abortion facilities, to have abortions and to perform abortions, and to protect their privacy while doing so. The manifest purpose of s 24(2)(c) is quite different: it is directed at protests relating to the performance of abortions in abortion facilities. It prohibits such protests, whether not they are or can be seen by persons entering a facility, and whether not such protests are intended to stop a person from entering a facility or from having or performing an abortion. Because s 24(2)(c) is *aimed at protests* there is significant doubt whether its purpose is compatible with the maintenance of the system of representative government prescribed by the Constitution. If it is not compatible, it will be unconstitutional.
9. **Appropriate and adapted.** Even if the purpose of s 24(2)(c) is found to be constitutionally compatible, it is also necessary to consider whether it is a reasonably appropriate and adapted means of achieving such a purpose. The High Court in *McCloy v New South Wales* has stated that this inquiry involves three additional questions.⁵
 - (i) The law must be ‘suitable’ in the sense that it must have a rational connection to the purpose of the provision.
 - (ii) The law must be ‘necessary’ in the sense that there must be no obvious and compelling alternative, reasonable practicable means of achieving the same purpose which has a less restrictive effect on the freedom.
 - (iii) The law must be ‘adequate in its balance’ in the sense that there must be an appropriate balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.
10. To address this last set of questions, it is necessary to identify somehow a purpose of s 24(2)(c) that is compatible with the Constitution. Considered in the context of s 24 as a whole, one purpose that might possibly meet these requirements is that which arises from the language of s 24(2)(a) and (b), namely that it enables persons to enter abortion facilities, to have abortions and to perform abortions. Another possible purpose might be that it protects the privacy of persons to wish to do so. The question would then be whether s 24(2)(c) is a suitable, necessary and balanced means of achieving one of these objectives. However, there are significant doubts whether s 24(2)(c) is a suitable, necessary and balanced means of achieving either of these objectives.
 - (i) **Suitability.** A law will not be a suitable means to achieving an objective unless it contributes to the achievement of the objective.⁶ It is highly questionable whether a law that prohibits protesting in circumstances where it is not necessarily seen,

⁵ *McCloy v New South Wales* (2015) 325 ALR 15; [2015] HCA 34, [2].

⁶ See, eg, *Unions NSW v New South Wales* (2013) 252 CLR 530; [2013] HCA 38, [51]–[60], [61]–[65].

heard or encountered by persons accessing abortion facilities has a rational connection with the objective of enabling persons to enter abortion facilities, to have abortions and to perform abortions, or to maintain their privacy while doing so.

- (ii) **Necessity.** There are many less restrictive laws that could be devised that would enable persons to access abortion facilities without hindrance and to have their privacy protected. Section 24(2)(a) and (b) are examples, noting also the effect of s 25 in prohibiting the publication of images of persons entering or leaving an abortion facility. It is difficult to see why s 24(2)(c) would be needed in the context of those provisions.
- (iii) **Balance.** Even if s 24(2)(c) were considered to be suitable and necessary, there are several reasons to doubt that it is appropriately balanced. On one side of the equation is the importance of the purpose that the law seeks to achieve and the extent to which the provision secures that purpose; on the other side is the importance of freedom of political communication and the severity of the restriction of the freedom. Enabling people to access facilities that provide particular services, or protecting their privacy, may be considered to be objectives that are equally important as the objective of protecting freedom of political communication. But the extent to which s 24(2)(c) secures these objectives of enabling access and protecting privacy is very minimal (if it does so at all), while the restriction on freedom of political communication is very substantial.
- (iv) Moreover, while people will remain free to protest in relation to abortion during non-prescribed times, in other places and using other means, the ability to protest in proximity to places where and when the relevant activities are being conducted is a very significant aspect of freedom of political communication.⁷ It is a well-known fact that protestors routinely direct their protest activities to places where the relevant activities are conducted and when they are being conducted. Bearing this in mind, it is difficult to avoid the conclusion that s 24(2)(c) places restrictions on freedom of political communication that outweigh the very minimal benefits (if any) that are secured by the provision, especially when its effect and scope is compared with s 24(2)(a) and (b) for example.

11. **Conclusion.** There are several reasons to doubt the constitutionality of s 24(2)(c). It places a substantial burden on political communication. Its apparent purpose is to place a restriction on *protesting per se* and there is every reason to doubt that this is compatible with the constitutionally prescribed system of representative government. Section 24(2)(c) restricts protesting even when such protests are not seen or heard by persons accessing abortion facilities, so it lacks a rational connection with objective of enabling

⁷ The restricted time periods are extensive: they are at least during the period between 7am and 6pm on each day an abortion facility is open, and this period can be increased or decreased by the Minister in his or her discretion: s 24 (definition of '*protected period*'). Assuming the facility is open during these hours, the period between 7am and 6pm is reasonable with respect to the prohibitions in s 24(2)(a) and (b), but in relation to s 24(2)(c) it prevents protesting during times that the general populace is most likely to encounter the protest activities. This is a relevant factor in assessing the impact of the law on freedom of political communication.

persons to enter such facilities. There are many less restrictive laws that would enable persons to access abortion facilities without hindrance and would protect their privacy. And even if some legitimate goal could be attributed to s 24(2)(c), its blanket prohibition on protest activities strikes at the very heart of freedom of political communication and is disproportionate for that reason.

12. In this submission my focus has been on s 24(2)(c). I have not addressed the question whether s 24(2)(a) and (b) are compatible with the implied freedom of political communication. While it is strongly arguable that they both place burdens on the freedom, it is also arguable that they pursue objectives that are compatible with the constitutionally prescribed system of representative government, namely to enable persons to have access to abortion facilities and to protect their privacy. Nonetheless, it is important to ask whether s 24(2)(a) and (b) are appropriate and adapted to the purpose of advancing those objectives. In this respect I note that both provisions are limited to behaviour that is intended to stop a person from entering an abortion facility or having or performing an abortion. This element of the two provisions is, in my submission, essential to their constitutional validity. Without this element aspects of s 24(2)(a) and especially s 24(2)(b) would contravene the implied freedom.⁸ This is because a provision that simply prohibited acts that could be seen or heard by a person within a protected area would place a substantial burden on freedom of political communication while either lacking a constitutionally legitimate objective or, if such an objective could be identified, would not be a law that is reasonably appropriate and adapted to the objective of enabling persons to have access to abortion facilities or to protect their privacy.

⁸ Protest activities can often, by their nature, be ‘intimidating’ and sometimes involve ‘obstruction’. A blanket restriction on activities that are intimidating or obstructive would need to be interpreted in a manner that complied with the implied freedom of political communication. For this line of argument as applied to hate speech laws, see Nicholas Aroney, ‘The Constitutional (in)Validity of Religious Vilification Laws: Implications for Their Interpretation’ (2006) 34 *Federal Law Review* 287. A copy of this article can be supplied upon request.