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PROTESTS OUTSIDE ABORTION CLINICS

Constitutionally protected speech?

MITCHELL LANDRIGAN

This article reviews the constitutionality of recently enacted Victorian (and comparable Australian) 'safe access zone legislation' insofar as the laws prohibit protests about abortions near clinics.[1] The safe access zone laws prohibit anti-abortion protestors from: harassing people entering or leaving abortion clinics; engaging in other anti-abortion protest activities (in the case of Victoria, where this is reasonably likely to cause distress or anxiety); and recording people entering or leaving abortion clinics. Similar safe access zone laws exist in Tasmania[2] and comparable laws were recently passed in the Australian Capital Territory.[3]

This article focuses on whether, by banning anti-abortion protests in safe access zones, the legislation might infringe the implied freedom of political discourse ('implied freedom') under the Constitution of the Commonwealth of Australia ('Constitution'). It focuses on the Victorian safe access zone laws while also, by comparison, considering the constitutionality of the bans on protests under the Tasmanian and ACT safe access zone arrangements.

Those seeking to challenge the Australian laws may look to legal decisions about similar laws in other jurisdictions, where the constitutionality of safe access zone laws has been tested.[4] The usefulness of these decisions may be somewhat limited however, in that the court findings in other countries are not all alike. For example, bubble zone legislation has been held to not infringe the right to freedom of expression protected by the *Canadian Charter of Rights and Freedoms*.[5] By contrast, the US Supreme Court held[6] in *First Amendment* jurisprudence that a law establishing a fixed buffer zone outside Massachusetts abortion clinics was *not* constitutionally valid because the law burdened more speech than was necessary to further the government's legitimate interests.[7] While these judicial decisions may be noteworthy, none are binding on the Australian courts. The decisions also reflect the legal principles operating in those jurisdictions and the particular factual circumstances in the cases. If the Australian safe access zone laws are challenged, then the Australian courts (and possibly the High Court) will need to determine the constitutionality of the safe access zone laws according to Australian implied freedom jurisprudence. Against that background, this article reviews the constitutionality of the Australian safe access zone laws.

The Victorian laws

On 18 August 2015, Fiona Patten of the Australian Sex Party (and Member of the Victorian Legislative Council) introduced the Public Health and Wellbeing Amendment (Safe Access) Bill 2015 ('Victorian Bill') into the Legislative Council of the Parliament of Victoria. The Bill's objective was to provide safe access zones around premises offering reproductive health services.

Supportive of the Bill, the Victorian government undertook to enact the Bill but said that it would amend it to include stronger enforceability and administrative provisions as well as penalties that more closely aligned with other public nuisance offences. It did not take long for the amended Bill to then be enacted. The Minister for Health, Jill Hennessy, read the revised Bill in a second reading in the Legislative Assembly on 22 October 2015. The Bill passed the Legislative Assembly by 69 votes to thirteen on 12 November 2015.[8] In the early hours of the morning on 27 November 2015, the Legislative Council approved the Bill (30 votes to eight)[9] and the Bill had passed both houses of the Victorian Parliament.

The *Public Health and Wellbeing Act 2008* (Vic) ('Act') was accordingly amended to include Part 9A. The prohibitions in Part 9A apply from no later than 1 July 2016,[10] prohibiting two kinds of activities. Each carries a maximum penalty of 120 penalty units or imprisonment for a term not exceeding 12 months.[11] First, the Act establishes safe access zones against prohibited behaviour (see below) in relation to premises used for abortions.[12] Secondly, the Act prohibits the publishing or distributing of a recording without reasonable excuse of a person accessing, attempting to access or leaving a premises used for abortions if the recording contains particulars that are likely to identify that person as someone accessing the premises.

Under the Victorian laws, a safe access zone is an area within a radius of 150 m from premises at which abortions are provided.[13] Behaviour that is prohibited within a safe access zone, under s 185(B)(1), includes:

> communicating by any means in relation to abortions in a manner that is able to be seen or heard by a person accessing, attempting to access, or leaving premises at which abortions are provided and is reasonably likely to cause distress or anxiety;[14]

It can be seen from the description of prohibited behaviour that the minimum requirement under the Victorian laws is that the anti-abortion speech in safe zones is 'reasonably likely to generate distress or anxiety'. This phrase distinguishes the Victorian laws from the legislation in Tasmania and ACT, where protests about terminations in safe access zones are prohibited per se.

Tasmanian and ACT anti-abortion protest laws

The Tasmanian safe access zone laws (also 150 metres) prohibit any 'protest in relation to terminations that is able to be seen or heard by a person accessing, or attempting to access, premises at which terminations are provided'.[15] The Tasmanian laws accordingly prohibit *any* protest about terminations within a safe access zone irrespective of whether the protest is likely to cause anxiety or distress.[16] Tasmania lawmakers (like ACT lawmakers) may have considered that any anti-abortion protest near a woman attending a clinic would cause her stress without the need for any further objective proof of a reasonable likelihood of the protest reasonably causing distress or anxiety.

By contrast to the Victorian and Tasmania laws, the ACT laws prohibit protests during a specific period of time (ie, between the times of day

when staff and patients are entering or leaving an approved facility) about the provision of abortions in the approved medical facility. There is no prohibition on protests about abortions around an approved facility outside of those times.[17] Under the ACT law, there is also no *a priori* safe zone of 150 metres. Instead, the Minister must: first, declare an area around an approved medical facility to be a protected area; and, secondly, be satisfied that the area declared is not less than 50 m at any point from the approved medical facility *and* sufficient to ensure the privacy and unimpeded access for anyone entering, trying to enter or leaving an approved medical facility (but in any case no bigger than necessary to ensure that outcome).[18] Like the Tasmanian law, the ACT law (though operating only during specified times) prohibits protests about abortions in a protected area around an approved medical facility irrespective of whether the protest may cause distress.[19]

The protest laws and the implied freedom of political discourse

Could there be an effective burden on speech about government and political matters (the first limb of Lange)?

In order to successfully make out a constitutional claim that an anti-abortion protest in a safe access zone would fall within the protective scope of the implied freedom, a (charged) plaintiff (assuming they otherwise had standing) would need to demonstrate that the laws effectively burden speech about government and political matters.[20]

Based on the High Court jurisprudence, it is possible to outline the principles that would likely apply in relation to a constitutional claim about whether speech in the safe access zones could fall within the protective scope of the implied freedom. Whether a plaintiff could successfully make out such an argument would depend on the nature of the speech that is potentially burdened by the safe access zone laws and — possibly — how the laws burdened that speech. There could, however, be no claim by anyone of any constitutional *right* to freedom of expression to oppose abortions in a safe access zone; the constitutional freedom is not a personal right.[21]

First, the burdened speech must be relevant to government and political matters. It might be argued that anti-abortion protests tend to be directed to women's personal choices and/or the ethics of the professional people who support them and that these are not political matters but personal criticisms. Yet, speech about the lives of foetuses (and/or women's reproductive choices) would likely be regarded as expression about a topic that is within the responsibility of government. It would seem fairly clear that protests of this sort are aimed both at those personally attending abortion clinics *and* towards the political arms of government to legislatively tighten access to abortions. The High Court has also held that personal criticism can fall within the first limb of *Lange* assuming there is a connection with political matters.[22] Further, that there needs only to be *some* burden on political speech.[23]

Secondly, it should not be difficult to satisfy the additional constitutional requirement that the speech be relevant to the *Commonwealth* Parliament.[24] It is true that legislation relating to abortions (and governing protests about abortions near clinics) is principally the responsibility of state and territory governments. The ACT decriminalised abortion in 2002,[25] Victoria decriminalised abortion in 2008[26] and Tasmania decriminalised abortion in 2012.[27] Reproductive health is, however, also a federal government concern.[28] For example, in 2012, RU486 — the drug required for a medical abortion — was included on the Australian Register of Therapeutic Goods.[29] As a result, RU486 could be prescribed in Australia by registered medical practitioners in general, as opposed to only those approved to prescribe the drug through the authorised prescriber process.[30] In June 2013, RU486 was included in the Pharmaceutical Benefits Scheme, making it more affordable for women.

Thirdly, the High Court has held that speech which is highly offensive and at the fringe of politics may be relevant to government and political matters.[31] Even incendiary speech about abortions which is reasonably likely to cause distress or anxiety for those attending or leaving clinics might fall within the protective scope of the implied freedom. This may be the case even though the legislation (in the case of Victoria) specifically prohibits that kind of insulting expression in the safe access zones. This is not to say that the speech would *necessarily* receive constitutional protection; it is instead to say that the expression could be recognised as protected 'political speech' under the first limb of *Lange*.

Fourthly, it seems likely that *some* anti-abortion protests would be religiously motivated. Anti-abortion protests would not necessarily lose constitutional protection *only* by reflecting a religious viewpoint. The High Court has, arguably, accepted that there can be an effective burden on religiously motivated speech in *Attorney-General (SA) v Adelaide City Corp*.[32] If, however, the burdened speech was *entirely* religiously motivated — consider a Bible verse on a placard (with no further political implication) — then the case law suggests that such speech may *not* fall within the protective scope of the *Lange* freedom. Such speech may be considered entirely religious and not relevant to government or political matters. In *APLA*, Gleeson CJ and Heydon J held that the implied freedom does not protect communications that are entirely about commercial activity.[33] The Court of Appeal of the Supreme Court of Victoria held in *Catch the Fire*[34] that the speech of two Christian evangelical pastors about Islam did not fall within the protective scope of the implied freedom (because it was religious speech) and the Court followed the High Court's reasoning in *APLA* in reaching that conclusion.

Fifthly, even *if* the burdened speech was religiously motivated but it also included a governmental policy implication, then a court may find that that speech *did* fall within the protective scope of the implied freedom. Consider, for example, a (potentially prohibited) anti-abortion placard stating 'God believes abortion is a crime'. There may be an *arguable* case that the burdened speech pertained to government and political matters because of its relevance to decriminalising abortion.[35] The policy links between state, territory and Commonwealth governments on matters of reproductive health may give the (burdened) speech sufficient relevance to the Commonwealth Parliament.

It is also possible that a court might consider that the safe access zone legislation could effectively burden speech about government and political matters irrespective of a specific plaintiff's speech.[36] A court may consider it sufficient for a plaintiff to establish that the relevant safe access zone law had the potential to place *an* effective burden on relevant political speech in a safe access zone. If a court took this approach, then it may not be necessary for a plaintiff to demonstrate that *their* speech was subject to an effective burden under the law.

Would the anti-abortion protest legislation satisfy the second limb of Lange?

If the safe access zone laws were found to effectively burden political speech, then it would be necessary for a court to also examine the operation of the constitutional freedom by reference to the second limb of *Lange*. The question to be asked under the second limb of *Lange* is whether the law is reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of representative and responsible government provided for in the Constitution.[37]

Recently, four members of the High Court, in a joint judgment, explained the criteria to be applied under the second limb of *Lange*.[38] In *McCloy*, French CJ, Kiefel, Bell and Keane JJ held that a threshold question is whether the purpose of the law and the means to achieve it are compatible with the constitutionally prescribed system of government in the sense that they do not adversely impinge upon the functioning of the system of representative government.[39] Their Honours noted that the purpose of the law must not impede the functioning of the system

of representative government and that the means chosen to achieve the statutory objective must be compatible with that system.[40]

Applying to protests about abortions by a small number of people in designated zones, the safe access zone legislation — Victoria, Tasmania and ACT — would likely satisfy the two-fold compatibility test posed in the joint judgment in *McCloy*. In the first place, protests outside well-established clinics may lead women to seek more risky assistance from less experienced abortion providers who are less well known and therefore less likely to be subject to protests. Further, even if the laws do restrict expression about political matters, their purpose is to provide women (and professional staff) with non-confrontational access to abortion clinics. Rather than impeding the functioning of the system of representative government, the laws could be seen as consistent with a woman's right to terminate a pregnancy unhindered by protest, or ensuring that anti-abortion protests do not lead to unwarranted harm to the dignity of pregnant women.

The second question the four High Court judges posed in *McCloy* with respect to the second limb of *Lange* is that of proportionality. This is determined by whether the effective burden imposed by the law on political speech is: suitable, necessary and adequate in balance.[41] The law (or other burden) in question must satisfy each of these three criteria.

In relation to the first criterion, suitability, the question for a court to consider is whether the law could rationally achieve the statute's legitimate purpose.[42] The Victorian, Tasmania and ACT legislation would likely satisfy this criterion. A rational way to limit public insults and criticism of vulnerable women, their partners and health workers, is to restrict what can be said about their choices (and in their presence), when they attend clinics for private consultations and procedures. This is also a rational measure to try to ensure that pregnant women undergo safe pregnancy terminations and are not — by embarrassment or fear — driven to less safe procedures. This is not like the situation in *Unions NSW* where there was no rational connection between a law confining political donations to people on the electoral roll and the legislative objective of preventing corruption.[43]

On the second criterion, necessity, the issue to be considered is whether there are other equally effective means of achieving the legislative object which have a less restrictive effect on the implied freedom of political discourse and which are obvious and compelling.[44] Put differently, are there alternative, reasonably practicable and less-restrictive means to achieve the same legitimate end?[45] In this respect, it might be thought that a zone of 150 metres around a clinic is a relatively large area in which to ban all anti-abortion protests. The 150-metre limit in Victoria and Tasmania relegates anti-abortion protests to a minimum distance of three Olympic swimming pools — lengthways — from clinics. A shorter distance might be regarded as less restrictive on freedom of political expression. The sanctions under the Victorian and Tasmanian laws are also *criminal* sanctions, with a maximum penalty of 12-months imprisonment.[46]

Yet, depending on where a clinic is located (eg, in a private, isolated, or public space) and the available transport and pedestrian access routes to it (including vehicular access and footpaths), a distance of 150 metres might be considered necessary, perhaps even minimally so, to protect people attending or leaving the clinic from potentially distressing anti-abortion protests. If, for example, there was a single 200-metre walkway to a clinic, with no alternative pedestrian access, the Victorian (and Tasmanian) laws could allow protestors to mill on the walkway, so long as they were no closer than 150 metres from the facility. The protestors would have unimpeded access to an audience of pregnant mothers and health workers, and could protest their opposition to abortions at a legally compliant distance. The protests at that distance would not be regulated under the safe access zone legislation.

By contrast, the ACT arrangements (where the Minister declares the area, which need not be 150 metres and may, conversely, be no greater than is necessary to achieve privacy and unimpeded access) provide more limited restrictions on (political) speech. Unlike the Victorian and Tasmanian laws, the ACT prohibitions also do not apply at all times, but only during specified periods (between 7am and 6pm on days the facility is open, with the Minister able to designate other times). The ACT laws also regulate protest speech in relation to the *provision of abortions in the approved medical facility*. On the one hand, allowing anti-abortion protests only during working hours might itself be considered restrictive by preventing protestors from *ever* having access to the audience they regard as most relevant and necessary for hearing or witnessing protests during business hours.[47] On the other hand, the ACT laws allow anti-abortion protestors to protest in and around the specified zones outside the designated hours. The ACT laws also have relatively small penalties for people who may be convicted of unlawfully protesting about abortions in safe access zones: a maximum of 25 penalty units, or $3750, with no custodial sentence.

A further consideration in relation to necessity is whether (as in the case of Tasmania and the ACT laws) it is necessary to ban all anti-abortion protests in the safe access zones no matter whether the protests are likely to reasonably cause anxiety or distress. On this point, any protests directed towards women and health workers attending or leaving a reproductive health clinic may tend to cause anxiety and distress at such a time. It is not clear what, practically, those words add to the Victorian legislation, although the Victorian laws apply to communications (and not protests) about abortions.

The third criterion of proportionality, according to the joint judgment in *McCloy*, is whether the law in question is adequate in balance. This criterion compares the positive effect of realising the law's proper purpose with the negative effect of the limits on constitutional rights or freedoms.[48] The restrictions under the Victorian (as well as Tasmanian and ACT) laws are likely to affect only a relatively small number of people, namely, those who choose to oppose abortions within the vicinity of abortion clinics.[49] What is more, the laws may not apply to calmly-expressed, arguably unobtrusive, 'side-walk counselling'.[50] The same burdens do not apply outside the safe access zones. The restrictions seem slight compared to the likely benefits of liberating potentially sensitive, vulnerable women and professional health workers from possible insult near a place that should be safe, secure and private. The laws may also help to ensure that women do not, due to embarrassment or shame, try less safe pregnancy termination measures.[51]

Conclusion

In light of challenges to safe access zone laws overseas, this article has reviewed whether Australian safe access zone laws might infringe the implied freedom of political discourse by disproportionately burdening speech about government and political matters.

There can be little doubt that the safe access zone laws in Victoria, Tasmania and the ACT are likely to restrict speech of some kind. However whether the laws would be susceptible to a successful constitutional challenge would depend on whether the (presumably) burdened speech relates to government and political matters. It is not possible to answer this question in abstract; it would depend on the kind of speech that is said to be burdened in a particular case and, possibly, the way the laws burden that expression. Yet, unless the speech was *entirely* religious or unrelated in any way to matters that concern government, it seems likely that most anti-abortion speech in safe access zones would fall within the protective scope of the implied freedom.

Concerning the second limb of *Lange*, it seems likely that the laws in each jurisdiction would satisfy the test of compatibility. It is legitimate for

governments to regulate speech by some members of society so as to protect vulnerable others, particularly those seeking medical care. The laws protect women and health care workers from protests by a relatively small number of people who wish to protest about abortions within close proximity of reproductive health care clinics. Doing so is unlikely to be regarded as adversely impinging upon the system of representative (or responsible) government.

On the question of proportionality, the laws would generally seem likely to satisfy the criteria of suitability and balance. It might, however, be queried whether a zone as large as 150 metres from clinics is necessary and whether there are not less restrictive measures available to law-makers — such as a smaller anti-protest zone — to achieve the laws' goals. Arguably, the more limited scope of the ACT laws (ie, during business hours, and only applying to protests about the provision of abortions in the approved medical facility), as well as the less severe penalties under the ACT legislation, make the arrangements in that jurisdiction less open to successful constitutional challenge.

The ultimate legal answer to the question of necessity (and proportionality more generally) may depend on relatively prosaic matters such as the kind of pedestrian and transport access routes to a clinic. Such information may not be clear until the facts emerge in a particular case. The laws arguably would not apply to counselling or other similar kinds of peaceful expression in the safe access zones. It is also noteworthy that none of the safe access zone laws prohibit anti-abortion protests outside designated zones. The laws only prohibit protests *about abortions or terminations* within the safe access zones and they do not operate more generally to prohibit other kinds of protests in those areas or elsewhere.

MITCHELL LANDRIGAN is a Visiting Fellow at the Faculty of Law, University of Technology Sydney. The author thanks the two anonymous referees for their valuable comments on an earlier draft.

REFERENCES

1. The article focuses on the prohibitions on *protests* in the safe access zones. These laws are sometimes referred to as 'bubble zones' or 'buffer zones'. The article does not consider whether the laws might be inconsistent with state or territory human rights Charters or laws in Victoria and the Australian Capital Territory.

2. *Reproductive Health (Access to Terminations) Act 2013* (Tas), s 9.

3. *Health (Patient Privacy) Amendment Act 2015* (ACT), passed on 29 October 2015, to come into effect no later than six months after its passing.

4. In Victoria, in litigation seeking to require Melbourne City Council to enforce nuisance laws against abortion protestors, rather than in challenge to legislation, the Council did not press its argument (which it made in written submissions), that to restrict protest in this way infringed the implied freedom or was inconsistent with the *Charter of Human Rights and Responsibilities (Vic)* (2006): see *Fertility Control Clinic v Melbourne City Council* [2015] VSC 424 (26 August 2015).

5. See *R v Spratt* 2008 BCCA 340 (Court of Appeal for British Columbia). The Supreme Court of Canada denied the plaintiffs leave to appeal from the Court of Appeal on 18 June 2009. See also *R v Breeden* 2009 BCCA 463.

6. *McCullen v Coakley* 134 SCt 2518 (2014) ('*McCullen*').

7. The case (relating to Massachusetts laws) was brought by Eleanor McCullen, a pro-life activist who offered 'sidewalk counselling', avoided confrontation, maintained a calm demeanour and had a calm tone of voice. For contrasting US Supreme Court decisions, see *Hill v Colorado*, 530 US 703 (2000); *Schenck v Pro-Choice Network of Western New York*, 519 US 357 (1997) (fixed buffer zones); *Madsen v Women's Health Center Inc*, 512 US 753 (1994). See also *Public Health Code* (France), arts L2223–2.

8. Victoria, *Parliamentary Debates*, Legislative Assembly, 12 November 2015, 4418 (Telmo Languiller, Speaker).

9. Victoria, *Parliamentary Debates*, Legislative Council, 26 November 2015, 5016 (Bruce Atkinson, Speaker).

10. *Public Health and Wellbeing Amendment (Safe Access Zones) Act 2015* (Vic), s 2(2).

11. Approximately $18,200: see Victoria Legal Aid, Penalty Units (as at 13 December 2015), https://www.legalaid.vic.gov.au/find-legal-answers/fines-and-infringements/penalty-units.

12. Section 185B, as amended.

13. Such premises do not include pharmacies. 'Abortion' has the meaning in the *Abortion Law Reform Act 2008* (Vic).

14. The prohibition in s 185B(b) does not apply to an employee or person who provides services at a centre where abortions occur.

15. *Reproductive Health (Access to Terminations) Act 2013* (Tas), s 9(1)(b).

16. Punishable by fine not exceeding 75 penalty units or imprisonment for a term not exceeding 12 months, or both.

17. Defined as the period between 7 am and 6 pm on each day the facility is open or any other period declared by the Minister.

18. *Health Act 1993* (ACT) s 86, as amended by *Health (Patient Privacy) Amendment Act 2015* (ACT).

19. The ACT protest provision applies to protests 'in relation to the provision of abortions in the approved medical facility' and arguably would not prohibit more general anti-abortion protests unrelated to those being carried out inside the facility.

20. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 ('*Lange*'). See also *Coleman v Power* (2004) 220 CLR 1.

21. *Lange* (1997) 189 CLR 520, 560; *McCloy v State of NSW* (2015) 89 ALJR 857 ('*McCloy*'), [29]–[30], [317]; *Unions NSW v State of New South Wales* (2013) 252 CLR 530 ('*Unions NSW*'), 551, 554.

22. *Monis v R* (2013) 249 CLR 92 ('*Monis*'), 174 (Hayne J).

23. *McCloy* (2015) 89 ALJR 857, [24], [126]; *Monis* ibid, 130, 142, 212.

24. *Hogan v Hinch* (2011) 243 CLR 506 ('*Hogan v Hinch*'), 543; *Wotton v Queensland* (2012) 246 CLR 1, 15.

25. *Medical Practitioners (Maternal Health) Amendment Act 2002* (ACT).

26. *Abortion Law Reform Act 2008* (Vic).

27. *Reproductive Health (Access to Terminations) Act 2013* (Tas).

28. Section 51(xxiiiA) *Constitution*.

29. Ronli Sifris, 'State by State, "Safe Access Zones" Around Clinics Are Shielding Women from Abortion Protesters', *The Conversation* (online), (30 November 2015) <http://theconversation.com/state-by-state-safe-access-zones-around-clinics-are-shielding-women-from-abortion-protesters-51407>.

30. Ibid.

31. *Monis* (2013) 249 CLR 92, 174.

32. *Attorney-General (SA) v Adelaide City Corp* (2013) 249 CLR 1 ('*AG v Adelaide*').

33. *APLA Ltd v Legal Services Commissioner* (NSW) (2005) 224 CLR 322, 351.

34. *Catch the Fire Ministries Inc v Daniel Nalliah and Daniel Scot v Islamic Council of Victoria Inc and Attorney General for the State of Victoria* (2006) 206 FLR 56.

35. *AG v Adelaide* (2013) 249 CLR 1.

36. *Sunol v Collier No 2* (2012) 260 FLR 414, 424–5 (Bathurst CJ); *Owen v Menzies* (2012) 265 FLR 392, 415.

37. *Lange* (1997) 189 CLR 520, 561–2.

38. *McCloy* (2015) 89 ALJR 857, [2]–[3].

39. Ibid [31].

40. Ibid. It is not clear why the judges focused only on the system of representative government and not also the system of responsible government.

41. Ibid [3] (French CJ, Kiefel, Bell and Keane JJ); by contrast, see [98], [140] (Gageler J).

42. Ibid [3]; *Unions NSW* (2013) 252 CLR 530, 558–9.

43. *McCloy* (2015) 89 ALJR 857, [55].

44. Ibid [81] (French CJ, Kiefel, Bell and Keane JJ).

45. *Unions NSW* (2013) 252 CLR 530, 556.

46. The counter argument is that a serious sanction is necessary as a deterrent and a maximum sentence of 12 months imprisonment is (a) a maximum and (b) at the lower end of penalties.

47. It might be said that the ACT laws only limit speech in a way that is incidental to a legitimate objective (protecting vulnerable women, their partners and health professionals): see *Monis* (2013) 249 CLR 92, 211.

48. *McCloy* (2015) 89 ALJR 857, [87].

49. Cf *Gaynor v Chief of the Defence Force* (No 3) [2015] FCA 1370 (4 December 2015), Buchanan J, in relation to disciplinary measures against a Catholic member of the Australian Defence Force (a Major in the Australian Army Reserve).

50. *McCullen* 134 SCt. 2518 (2014).

51. In *McCloy* (2015) 89 ALJR 857, neither Gageler J nor Nettle J endorsed the proportionality test. Nettle J, dissenting in relation to the property developer provisions, arguably applied the 'reasonably appropriate and adapted test' quite strictly: [266]. It is *possible* that a court may follow his Honour's reasoning in relation to the safe access zone laws rather than the proportionality test employed in the joint judgment.