

# Comment:

## Implementing Protest-free Zones around Abortion Clinics in Australia

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### *Abstract*

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

### I Introduction

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

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

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

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

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

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

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

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

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

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

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

<sup>7</sup> *Ibid* 391 [251] (Heydon J).

<sup>8</sup> *Ibid* 367 [104] (Hayne J).

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

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

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

<sup>12</sup> RHATA s 9.

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

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

prohibitions on approaching within 2.5 metres of a clinic patient<sup>15</sup> and has upheld modest buffer zones (4.5 metres) around abortion clinic entrances.<sup>16</sup> Accepting the common thesis that America's freedom of speech is more expansive than Australia's implied freedom of political communication,<sup>17</sup> it appears unlikely that the Australian High Court would strike down the *RHATA* in its entirety to allow an unfettered right to protest outside abortion clinics. This article discusses what restrictions on these protests the High Court might accept and how such restrictions could be reconciled with the freedom of political communication.

## II Background to the Reform

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

Although anecdotal evidence of intimidation and harassment was heard by the inquiry into the *RHATA*,<sup>26</sup> abortion clinic protests are not an endemic feature of

<sup>15</sup> *Hill v Colorado*, 530 US 703, 729 (2000).

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

<sup>17</sup> *Levy* (1997) 189 CLR 579, 641 (Kirby J).

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

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

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

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

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

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

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

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

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

the Tasmanian, or Australian, political landscape. A small number of isolated illegal protests have been documented in Australia, the most infamous of which involved the murder of a security guard at Melbourne's Fertility Control Clinic in July 2001.<sup>27</sup> By comparison, more than 70 000 anti-abortion protesters were reportedly arrested at American abortion clinics between 1987 and 1993.<sup>28</sup> The intensity of these protests overwhelmed traditional police resources, thereby justifying protest-free zones as a means of prevention.<sup>29</sup> Such an impetus does not exist in Australia and, arguably, current protests could be responded to by using existing causes of action.

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

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

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

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

<sup>29</sup> *Schenck*, 519 US 357, 363–4 (1997).

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

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

<sup>32</sup> *Ibid* 282–3.

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

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

<sup>35</sup> *Barloworld* (2001) 108 IR 107, 112 [16].

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

Hospital.<sup>37</sup> The practicalities of this restriction do not appear to have been of particular concern: ‘It seems to me that anyone who wants to stand either with shoe-box coffins or handing out leaflets 3 metres out from the gutter would do so at his own risk.’<sup>38</sup> Although of little assistance in preventing the protests themselves, individual women might also seek to protect their identity or the revelation of their patient status by means of a claim of breach of privacy<sup>39</sup> or confidence.<sup>40</sup> The status of such a claim in Australia is uncertain but it has been accepted that information relating to a woman’s abortion is information of a ‘purely personal nature’.<sup>41</sup> A statutory offence for breaching privacy is applicable in Tasmania, if accessing an abortion clinic is characterised as a ‘private act’.<sup>42</sup> Other criminal offences, such as public annoyance,<sup>43</sup> or organising a public demonstration without a permit,<sup>44</sup> also allow some opportunity for police intervention and therefore control over these protests, albeit not to the same degree as the strict prohibition in the *RHATA*.

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

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

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

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

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

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

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

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

<sup>42</sup> *Police Offences Act 1935* (Tas) s 13A.

<sup>43</sup> *Ibid* s 13.

<sup>44</sup> *Ibid* s 49AB.

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

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

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

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

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

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

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

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

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

<sup>52</sup> *Coleman v Power* (2004) 220 CLR 1, 6 (Gleeson CJ), 90 (Callinan J), 100 (Heydon J) ('*Coleman*'). Stone, above n 50, 90.

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

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

<sup>56</sup> *Lange* (1997) 189 CLR 520, 562.

<sup>57</sup> *Ibid*.

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

### *A Would Protest-free Zones Burden Political Communication?*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>68</sup> Tasmania, *Parliamentary Debates*, House of Assembly, 16 April 2013, 24–87 (Michelle O’Byrne).

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

<sup>70</sup> *Kruger* (1997) 190 CLR 1, 115 (Gaudron J).

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid* 116, 125.

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

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



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

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

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

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

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

<sup>76</sup> *Levy* (1997) 189 CLR 579, 618, 620 (Gaudron J).

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

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

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

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

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

<sup>82</sup> *Frisby v Schultz*, 487 US 474, 486 (1988).

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

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

This proposition has some appeal: if the freedom of political communication is an incident of the constitutional system of government, its application should arguably be instrumental to that end and need only protect communication likely to shed light on political matters in the mind of an elector.<sup>85</sup> The state appellate courts have variously considered this argument in relation to anti-vilification laws. Adopting the opposite conclusion to New South Wales,<sup>86</sup> the Victorian<sup>87</sup> and Queensland Courts of Appeal have voiced support for the argument that anti-vilification laws do not burden the implied freedom because political communication can be ‘sufficiently free’ without victimising minority groups.<sup>88</sup> The same may be said of abortion clinic protests: political debate about abortion can operate freely without personally addressing women accessing abortions. There is obvious truth in the statement that some political communication is not ‘an essential part of any exposition of ideas’, is of ‘slight social value’ and is ‘so unreasonable, so irrational ... not [to] assist the electors to an informed or true choice’.<sup>89</sup> Ultimately, the question of whether Australian governance would continue to operate satisfactorily in the absence of the proscribed speech is ‘too large and diffuse an inquiry’ to be accepted as the test for defining the parameters of protected communication.<sup>90</sup>

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

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

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

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<sup>85</sup> *Coleman* (2004) 220 CLR 1, 104 (Heydon J).

<sup>86</sup> *Sunol v Collier* (2012) 289 ALR 128, 138.

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

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

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

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

<sup>91</sup> *Connolly v DPP* [2008] 1 WLR 276, 286 [32].

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

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

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

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

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

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

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

<sup>94</sup> *RHATA* s 9(1).

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

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

<sup>97</sup> *Ibid* s (9)(1) (definition of ‘Prohibited Behaviour’ (b)).

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

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

<sup>100</sup> *Ibid* 77 (Kirby J).

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

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

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

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

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

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

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

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

<sup>107</sup> *Coleman* (2004) 220 CLR 1, 78 (Kirby J).

<sup>108</sup> *Ibid* 4 (Gleeson CJ).

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

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

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

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

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<sup>111</sup> *Ibid* 6 (Gleeson CJ), 100 (Heydon J).

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

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

<sup>114</sup> *Frisby v Schultz*, 487 US 474, 487 (1988).

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

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

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

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

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

<sup>120</sup> Buss, above n 13, 496.

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

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

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

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

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

<sup>122</sup> *Ibid* 30 (McHugh J).

<sup>123</sup> *RHATA* s 9(1) (definition of ‘Prohibited Behaviour’ (b)).

<sup>124</sup> *Ibid* s 9(1) (definition of ‘Access Zone’).

<sup>125</sup> *Levy* (1997) 189 CLR 579, 627.

<sup>126</sup> *Coleman* (2004) 220 CLR 1, 34 (McHugh J).

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

<sup>128</sup> *RHATA* s 9(1) (definition of ‘Prohibited Behaviour’ (b)).

enlivened by the less certain legislative purpose of preventing political communication that is contrary to contemporary standards. The legitimacy of crafting legislation to provide individuals seeking abortions with ‘absolute impunity’ from unsolicited communication<sup>129</sup> relies upon careful qualification and a ‘close relationship between its construction and its purpose’ of maintaining public order.<sup>130</sup> Because the provision regulates speech on the basis of its content, it may be interpreted as a direct burden upon political communication and therefore judged according to whether it is ‘necessary for the attainment of some overriding public purpose’.<sup>131</sup> As has been discussed, there is little evidence to suggest that these protests are so frequent and unruly that access to abortion clinics is currently being disrupted to the extent that so wide an exclusion zone is necessary.

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

## IV Conclusion

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

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

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

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

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

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

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

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

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