

6 November 2015

*Ms Lizzie Blandthorn MP
Chair
Scrutiny of Acts and Regulations Committee,*

Dear Ms Blandthorn,

Re: *Public Health and Wellbeing Amendment (Safe Access Zones) Bill 2015*

I wish to bring to your attention an Advice on the Bill that has been provided to me today by Neville Rochow SC, a member of the Victorian Bar and Christopher Brohier of Counsel.

The Advice states that there is a strong argument that the 'prohibition of communication within 150 metres' will, in certain cases, offend the implied freedom of political communication and will be found to be unconstitutional and invalid by the High Court.

I trust the Advice is valuable in the Committee's consideration of the Bill.

Yours faithfully,



Daniel Flynn
Victorian Director
Australian Legal Practitioner

**IN THE MATTER
OF THE VALIDITY CLAUSE 5 OF THE *PUBLIC HEALTH AND WELLBEING
AMENDMENT (SAFE ACCESS ZONES) BILL 2015 (VICTORIA) (BILL)***

OPINION IN RELATION TO CLAUSE 5 OF THE BILL AND OTHER MATTERS

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Introduction

1. We are asked to advise as to the compatibility and validity of clause 5 the Bill in the light of the *Charter of Human Rights and Responsibilities 2006* (Vic) (Charter) and the implied freedom of political communication,¹ insofar as it seeks to create "safe access zones" in which "communicating by any means in relation to abortions" is prohibited.²
2. Our view is that if the Charter has application to the Bill,³ the Bill infringes the right of freedom of expression and right of peaceful assembly and freedom of association provided by sections 15 (2) and 16(1) and (2) of the Charter. In that sense it may well be incompatible with Charter. Nonetheless, as it clearly is Parliament's intention to infringe those freedoms, that incompatibility does not render the Bill invalid.
3. Our view is that the Bill effectively burdens the implied freedom of political communication and, while we cannot be definitive in the absence of the facts of a particular case, there are strong arguments that it is not "reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government...,"⁴ and hence may be invalid;
4. We develop our reasons below.

The Bill

5. The Bill aims to insert a new Part 9A into the *Public Health and Wellbeing Act 2008* (PHWA). Proposed section 185A of the PHWA sets out the purpose to Part 9A namely to:

“(a) to provide for safe access zones around premises at which abortions are provided so as to protect the safety and wellbeing and respect the privacy and dignity of—

- (i) people accessing the services provided at those premises; and
- (ii) employees and other persons who need to access those premises in the course of their duties and responsibilities; and

¹ *Monis v the Queen* (2013) 249 CLR 92, at [2] per French CJ.

² Proposed sections 185D and 185B in clause 5 of the Bill. The substance of those provisions are set out below.

³ Whether the Charter applies to the Bill depends on the interpretation given to section 48 of the Charter. This is discussed below.

⁴ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567-568.

(b) to prohibit publication and distribution of certain recordings.”

6. Proposed section 185B is a definitional section. It defines:

a. **abortion** as having the same meaning as in the *Abortion Law Reform Act 2008* (**ALRA**), namely “intentionally causing the termination of a woman's pregnancy by— (a) using an instrument; or (b) using a drug or a combination of drugs; or (c) any other means;”

b. **Prohibited behaviour**, saying it means:

“(a) in relation to a person accessing, attempting to access, or leaving premises at which abortions are provided, besetting, harassing, intimidating, interfering with, threatening, hindering, obstructing or impeding that person by any means; or

(b) subject to subsection (2), **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** (emphasis added); or

(c) interfering with or impeding a footpath, road or vehicle, without reasonable excuse, in relation to premises at which abortions are provided; or

(d) intentionally recording by any means, without reasonable excuse, another person accessing, attempting to access, or leaving premises at which abortions are provided, without that other person's consent; or (e) any other prescribed behaviour;”

c. **safe access zones** as meaning:

“an area within a radius of 150 metres from premises at which abortions are provided.”

7. Proposed section 185C sets out principles which apply to Part 9A. They are very similar to the purposes set out in proposed section 185A. The proposed section says:

“The following principles apply to this Part—

- (a) the public is entitled to access health services, including abortions;
 - (b) the public, employees and other persons who need to access premises at which abortions are provided in the course of their duties and responsibilities should be able to enter and leave such premises without interference and in a manner which—
 - (i) protects the person's safety and wellbeing; and
 - (ii) respects the person's privacy and dignity.”
8. Proposed section 185D is the key operative section. It says:
- “A person must not engage in prohibited behaviour within a safe access zone.
- Penalty: 120 penalty units or imprisonment for a term not exceeding 12 months.”
9. Proposed section 185E makes it an offence to publish or distribute without the consent of the person or without reasonable excuse, a recording of a person accessing or leaving premises at which abortions are provided.
10. As indicated in the introduction to this Opinion, we are instructed to consider the compatibility and validity of proposed section 185D in relation to the prohibition it creates of any communications in relation to abortions which “reasonably likely to cause distress or anxiety” in a safe access zone (**Prohibition of Communications Provision**)

The Charter

11. The Charter aims to protect and promote human rights by:
- i. setting out the human rights that Parliament specifically seeks to protect and promote (Part 2);
 - ii. ensuring that all statutes provisions, are interpreted in a way that is compatible with human rights (s 32(1));
12. The human rights protected by the Charter in Part 2 are civil and political rights, which are primarily derived from the International Covenant on Civil and Political Rights (**ICCPR**).
13. Section 32(1) provides that:

“So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.”

14. Section 32(2) says:

“International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision;”

15. Section 32 applies to all Victorian statutes including the SOA Act. In *Momcilovic v The Queen*⁵ the High Court considered the operation of section 32(1). French CJ said the section operates:

“in the same way as the principle of legality but with a wider field of application”⁶.

16. In *Slaveski v Smith*⁷, the Court of Appeal (per Warren CJ, Nettle and Redlich JJA) said of the High Court’s approach in *Momcilovic*:

“if the words of a statute [sic] are clear, the court must give them that meaning. **If the words of a statute are capable of more than one meaning, the court should give them whichever of those meanings best accords with the human right in question.** Exceptionally, a court may depart from grammatical rules to give an unusual or strained meaning to a provision if the grammatical construction would contradict the apparent purpose of the enactment. Even if, however, it is not otherwise possible to ensure that the enjoyment of the human right in question is not defeated or diminished, it is impermissible for a court to attribute a meaning to a provision which is inconsistent with both the grammatical meaning and apparent purpose of the enactment (emphasis added; word in brackets added).”⁸

The Court of Appeal has applied this approach in subsequent cases.⁹

17. The Charter rights which are relevant in relation to the Bill are the right to freedom of expression (s 15(2))¹⁰ which provides:

⁵ *Momcilovic v The Queen* (2011) 245 CLR 1.

⁶ *Momcilovic v The Queen*, ibid at [51].

⁷ *Slaveski v Smith & Anor* [2012] VSCA 25.

⁸ *Slaveski v Smith & Anor*, ibid at [24].

⁹ *Nigro & Ors v Secretary to the Dept of Justice* [2013] VSCA 213, per Redlich, Osborn and Priest JJA at [85].

“(2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether—

(a) orally; or

(b) in writing; or

(c) in print; or

(d) by way of art; or

(e) in another medium chosen by him or her.

(3) Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary—

(a) to respect the rights and reputation of other persons; or

(b) for the protection of national security, public order, public health or public morality.”

and the right to peaceful assembly and freedom of association (section 16(1) and (2))¹¹:

“(1)Every person has the right of peaceful assembly.

(2)Every person has the right to freedom of association with others, including the right to form and join trade unions.”

18. The rights are subject to limitations or restrictions in two ways. They are subject to internal limits like the right to peaceful assembly (which does not confer a right to engage in violent assemblies) (section 16(1)). There is also the general limitation in section 7(2):

“ A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—

¹⁰ See ICCPR Article 19.

¹¹ See ICCPR Articles 21 and 22.

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.”

19. Section 48 of the Charter provides that:

“Nothing in this Charter affects any law applicable to abortion or child destruction, whether before or after the commencement of Part 2.”

20. The meaning of this section is critical to understanding whether the Charter has any application here. If it is given a broad interpretation and the Bill (once enacted) and the PHWA (as amended by the Bill) are held to be laws applicable to abortion, then the Charter has no work to do. If however it is given a narrow interpretation, i.e. that it only applies to laws which deal with the rights to or procedures in relation to abortion, then the Charter will apply.
21. Unsurprisingly, there are strongly divergent views in this regard. Some have argued that the aim of section 48 was to preserve the status quo in relation to the Victorian abortion laws at the time the Charter was enacted. Others have argued that the presence of section 48 means that the other Charter rights cannot impact on the abortion debate.¹²
22. Section 35 of the *Interpretation Act 1984* enjoins preference for an interpretation that furthers the purposes underlying an Act (in this case the Charter). As the Charter aims to protect and promote human rights,¹³ there good reason to say that a saving provision like section 48 should be construed narrowly. However, it is relatively clear from proposed sections 185A and 185c that Parliament has attempted to fashion the Bill and its amendments to the PHWA as laws in relation to abortion.
23. It is clear that a law like the ALRA would be a law in relation to abortion. So might the provisions in the Bill which prevent the obstruction of access to premises at which

¹² 1.O'Rourke, Anne; de Crespigny, Lachlan; Pyman, Amanda --- "Abortion and Conscientious Objection: The New Battleground" (2012) 38(3) *Monash University Law Review* 87 at 100-102.

¹³ Section 1.

abortions are carried out. However the Prohibition of Communications Provision is more removed from the procedure of abortion than those provisions, so we are of the view that there is a reasonable argument that it will not be affected by section 48, such that the Charter will apply to it. Therefore we will proceed to consider the Charter issues. If we are wrong and the Charter does not apply, then the Bill (if it becomes law) will still have to be considered in the light of the common law rights of the freedom of expression and peaceful assembly.¹⁴ Further, in Victoria, the principle of legality dictates that it will have to be considered in the light of the ICCPR rights.¹⁵

24. We first however turn to the implied freedom of political communication.

The Implied Freedom:

25. Freedom of political communication is an:

“implied incident of the system of representative government which the Commonwealth Constitution creates....”¹⁶

This freedom is not a personal “*freedom to communicate*”¹⁷ but a “*freedom from laws.*”¹⁸ In essence, it is a constraint on state power to interfere with a citizen’s freedom to communicate in relation to political matters.

26. The test as to whether a law impermissibly burdens the freedom is twofold: first:

“ does the law effectively burden freedom of political communication about government or political matters either in its terms, operation or effect;”

And, if so, secondly:

“ is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government....”¹⁹

27. In *Monis* French CJ said:

¹⁴ *DPP v Kaba* [2014] VSC 52 at [138] per Bell J.

¹⁵ *DPP v Kaba* at [181]-[187].

¹⁶ *Lange* at 559.

¹⁷ *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, at [381] per Hayne J: “The implied freedom of political communications is a limitation on legislative power; it is not an individual right”

¹⁸ *Ley v Victoria* (1997) 189 CLR 579 at 622 per McHugh J.

¹⁹ *Lange* at 567-568.

“The now settled questions to be asked when a law is said to have infringed the implied limitation are:

1. Does the law effectively burden freedom of communication about government or political matters in its terms, operation or effect?
 2. If the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 of the Constitution for submitting a proposed amendment to the Constitution to the informed decision of the people?”²⁰
28. The freedom is also implied in the state Constitutions.²¹ It applies to communications between citizens²², protests, including the use of “*signs, symbols, gestures and images,*” silent demonstrations, picketing and:
- “ false, unreasoned and emotional communications....[as] the use of such appeals to achieve political and government goals has been so widespread for so long in Western history that such appeals cannot be outside the protection of the constitutional implication.”²³
29. In *Levy* McHugh J referred to Harlan J in *Cohen v California*²⁴ where His Honour said in delivering the opinion of the United States Supreme Court as to the freedom of expression that it:
- “conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well”.²⁵
30. Even insults may be:
- ‘a legitimate part of political discussion protected by the Constitution.’²⁶

²⁰ *Monis v The Queen*, op cit at [61].

²¹ *Stephens v West Australian Newspapers* (1993-1994) 182 CLR 211 at 232 per Mason CJ, Toohey and Gaudron JJ; *Coleman v Power* (2004) 220 CLR 1 per Gleeson J at [26]; *Levy v Victoria*, op cit at 643-644 per Kirby J.

²² *Lange* at 571; *Levy v Victoria*, op cit at 623 per McHugh J.

²³ *Levy* at 622-623 per McHugh J; see also Kirby J at 641.

²⁴ *Cohen v California* 403 US 15 (1971).

²⁵ *Cohen v California* ibid at 26 referred to in *Levy v Victoria*, op cit at 623.

²⁶ *Coleman v Power* (2004) 220 CLR 1 at 54; Kirby J at 91 and 99-100.

31. In *Monis* 3 judges of the High Court held that the relevant section (which prohibited offensive communications by use of the postal service) was invalid as it infringed the implied freedom. French CJ with (whom Heydon J agreed) considered that - “unreasonable, strident, hurtful and highly offensive” communications fall within the range of robust political debate.²⁷ Hayne J held that elimination of communications giving offence without more was not a legitimate end for legislation. Political debate was not and could not be free from passion or appeal to emotion or insult and invective -the giving and taking offence was inevitable.

The Compatibility and Validity of the Bill in the light of Charter

32. The Prohibition of Communications Provision effectively bars any communications which are contrary to the desirability of abortion in a large area. It applies to content and effectively applies to only one side of the abortion debate. This is because it is very likely that any communications which express opposition to abortion may be said to be “reasonably likely to cause distress or anxiety” (it is a low threshold) and it is also likely that expressions of support for abortion may not have such an effect.
33. The safe access zone is an area of 150 metres from premises at which abortions are carried out. Assuming measurement from a single point, this is an area of 22,500 square metres or 2.25 hectares. It applies over all that area, including to communications which occur on private property. In the case of a large hospital which provides abortions, it may apply over a far wider area, as the measurement may begin from the perimeter of the area. That communications “by any means” are prohibited, mean that even silent protests (such as prayer vigils), without any written banners or such like, are likely to be illegal.
34. It is therefore clear that, *prima facie*, the Prohibition of Communications Provision infringes the right of freedom of expression. However the permissible restrictions in section 15(3) must be considered.
35. Section 15(3) provides that:

“Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary—

(a) to respect the rights and reputation of other persons; or

²⁷ *Monis* at [67].

(b) for the protection of national security, public order, public health or public morality.”

This is a proportionality issue.

36. Given that obstructing or harassing users or employees of an abortion provider is prohibited by portions of the Bill apart from the Prohibition of Communications Provision, there is a good argument that the Prohibition of Communications Provision is not supported by pointing to the rights of others. It is difficult to see how the human rights of a possible user of abortion services (say the right to privacy) is infringed by a silent protest 50 metres from the premises of the provider.
37. There is clearly no effect on national security. It is difficult to see how a silent protest can affect public order, health or morals.
38. The protection of ‘public order’ in s 15(3)(b) has the effect of:
- “giving effect to rights or obligations that facilitate the proper functioning of the rule of law... [it is] a wide and flexible concept and includes measures for peace and good order, public safety and prevention of disorder and crime... [including] laws that enable citizens to engage in their personal and business affairs free from unlawful physical interference to their person and property.”(footnotes omitted and words in brackets added).²⁸
39. The restriction must relate to conduct which amounts to a breach of public order and should only apply where there is:

“ a clear danger of disruption rising far above annoyance.”²⁹

The other provisions in the Bill which prohibit obstructing and harassing etc may readily be seen to relate to public order. In our view, different considerations apply to the Prohibition of Communications Provision. There is a reasonable argument that provision is not supported by the public order exception. Similar arguments may be said to apply to the public morals exception.

²⁸ *Magee v Delaney* (2012) 39 VR 50 [151].

²⁹ *Brooker v Police* [2007] 3 NZLR 91, [42]-[43] per Elias J; see also [56]-[59] per Blanchard J, [90] per Tipping J, applied by the Magistrates Court of Victoria in *VPol v Anderson & Ors* (Criminal) [2012] VMC 22, [64]-[69] per Magistrate Garnett.

40. As to public health while the term has not been judicially defined, guidance may be gained from the *Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR*, which say that public health may be used to limit the right to freedom of expression:

“in order to allow a State to take measures dealing with a serious threat to the health of the population or individual members of the population. These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured.”³⁰

41. If this definition of public health is adopted, there are difficulties in suggesting that there is a public health issue here.
42. In the context of Article 19 of the International Covenant on Civil and Political Rights (**ICCPR**), which is in similar terms to section 15(2) of the Charter, the UN Human Rights Committee has pointed out that the scope of permissible restrictions to Article 19 freedoms is limited

“.. when a State party imposes restrictions of freedom of expression, these may not put in jeopardy the right itself. The Committee recalls that the relation between right and restriction and between norm and exception must not be reversed.”³¹

The Prohibition of Communications Provision effectively removes the right freedom of expression on the topic of arguments against abortion over large areas.

43. We are therefore of the opinion that there is a good argument that the Prohibition of Communications Provision is not protected by section 15(3).
44. The same result is reached when the limitations in section 7(2) of the Charter are considered. They are:

“ only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—

(a) the nature of the right; and

³⁰ Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 41st sess. UN Doc. E/CN.4/1985/4 (1984) [25].

³¹ United Nations Human Rights Committee, General Comment No 34 (2 September 2011), op cit, paragraph 21. see also paragraph 23 Article 19(3) “ .. may never be invoked as a justification for the muzzling of any advocacy of any multi-party democracy, democratic tenets and human rights”..

- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.”

45. The right of freedom of expression is a fundamental right in a free society.³² If the Prohibition of Communications Provision is not protected by section 15 (3) it is unlikely that it will be protected by section 7(2).
46. By way of analogy (and accepting that the High Court has cautioned against recourse to United States First Amendment jurisprudence) it is useful to note that in the United States, content based prohibitions are *prima facie* invalid,³³ and buffer zones of only 35 feet have been held to be invalid.³⁴ The Prohibition of Communications Provision will clearly be invalid in that country.
47. The Prohibition of Communications Provision also abrogates the right of peaceful assembly and association of those who may wish to oppose abortion, by making it illegal for them to assemble in a safe access zone, as such an assembly is likely to be a communication in relation to abortion which may reasonably be said to cause anxiety.
48. The prohibition is absolute, and given the other provisions of the Bill, there is a good argument that section 7(2) will not protect the provision.
49. We conclude therefore that there is a good argument that the Prohibition of Communications Provision is not compatible with the Charter. If the Charter does not apply to the Bill (once enacted) the reasons discussed above dictate that the Prohibition of Communications Provision is not compatible with the ICCPR.
50. That does not mean, however, that the provision, if enacted will be invalid. The Charter makes it clear that incompatibility with the Charter does not make legislation invalid.³⁵ The

³² *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

³³ *Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. 2218 (2015)

³⁴ *McCullen v Coakley* 573 U. S. ____ (2014)

³⁵ Sections 29 and 31.

principle of legality operates in the same way, viz. it must yield to the express will of Parliament.³⁶

Effect of the Implied Freedom of Political Communication:

51. In our view, there are even stronger reasons than in relation to its effect on the freedom of expression, that the Prohibition of Communications Provision effectively burdens the implied freedom.
52. There can be no doubt that the issue of terminations of pregnancy is a political issue.³⁷ The Prohibition of Communications Provision prohibits communications on the issue of abortion (from the point of view of those opposed to the procedure) in the safe access zones. It applies to all forms of communications in the safe access zone, it applies over large areas and it applies even to communications on private property. It applies to communications about electoral matters, so far as they concern the issue of abortion. The penalty for a breach of the prohibition includes a term of imprisonment not exceeding 12 months.
53. In *Monis* all judges accepted that the section effectively burdened the implied freedom.³⁸ Applying the approach of the High Court in *Monis*, it is clear that the implied freedom is effectively burdened by the Prohibition of Communications Provision, and thus the first limb of the *Lange* test is satisfied.
54. Attention then turns to the second limb, viz. the proportionality question. The test of proportionality in relation to the implied freedom is whether:

“ the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government....”³⁹
55. The legitimate end of the Bill is to found in the principles set out in Clause 1 and in proposed sections 185A and 185C, namely to protect the “safety, wellbeing and dignity of people accessing abortion services and of the employees and others who need to the premises at which those services are provided in the course of their duties. This is a legitimate end which is compatible with the “constitutionally prescribed system of representative and responsible government”.

³⁶ *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ)

³⁷ See *Monis v The Queen*, op cit, at [65]–[67] per French CJ; *Attorney General of South Australia v Adelaide City Council*, op cit, at [67] per French CJ, at [159] per Heydon J, and at [209] per Crennan and Kiefel JJ. See also *Re Sublime Pty Ltd and Australian Communications and Media Authority* (2010) 115 ALD 239 at 242.

³⁸ *Monis* per French CJ at [66]–[73], Hayne J at [171] and [220]–[223], Heydon J at [236] and Crennan, Kiefel and Bell JJ at [343].

³⁹ See [27] above.

56. Are the means adopted, namely the Prohibition of Communications Provision, reasonably appropriate and adapted to meet that legitimate end?
57. As we have noted, the Bill separately prohibits conduct such as obstructing, harassing or intimidating persons accessing abortion services. It also prohibits the publishing or distributing of recordings which may identify a person accessing or leaving premises at which abortions are provided. Those provisions, in our view are reasonably appropriate and adapted to meet the legitimate end set out in the Bill.
58. The position is different, in our view, so far as the Prohibition of Communications Provision is concerned.
59. We have noted, at [52] above, the effect of that provision. In *Monis*, the three judges who found the relevant section invalid, substantially agreed that political communications in Australia legitimately included that which was offensive and hurtful,⁴⁰ and that a provision which attempted to prohibit such discourse was invalid.
60. This finding was in accord with *Coleman v Power* where the majority found that the relevant statute did not apply to the relevant conduct. The majority, in different ways used the implied freedom to read down the effect of the relevant section.⁴¹
61. In *Monis*, the plurality, who found the relevant section to be valid, distinguished *Coleman* on the basis that it concerned statements in the public sphere and not offensive private communications received in peoples' homes.⁴² It is quite likely therefore that had the relevant communications been in the public sphere, the plurality would have found with the judges who held the section to be invalid.
62. Therefore applying *Coleman* and *Monis* (construing the reasoning of the plurality as in [61] above) there is a strong argument that the Prohibition of Communications Provision is not reasonably appropriate and adapted to meet the legitimate end and so is invalid.
63. The Prohibition of Communications Provision is readily distinguishable from the provision in *Attorney-General (SA) v Corporation of the City of Adelaide*. There High Court held that a municipal by-law requiring a permit for certain conduct carried out in certain specified public roads (i.e. not every public road) was reasonably adapted to accommodate the implied freedom. French CJ considered the relevant by-law (which required a permit to preach etc) to be proportionate because it was:
 - a. confined in application to particular places;
 - b. directed to unsolicited communications;

⁴⁰ *Monis* per French CJ at [67]-[73], Hayne J at [85], [87], [185], [199], [220]-[223], Heydon J at [236].

⁴¹ See *Coleman* per McHugh J at [104]-[107], Gummow and Hayne JJ at [198]-[199], Kirby J at [237]-[239] and [253].

⁴² *Monis* per Crennan, Kiefel and Bell JJ at [337].

- c. granting of permission was not content-based;
 - d. there was a permitted area where permits were not needed i.e. a “Speakers Corner;”
 - e. the permit did not apply to election or referendum material.⁴³
64. By contrast the Prohibition of Communications Provision applies over large areas, including private property, has no permit provision, is content based, contains no permitted area within the safe access zone in the nature of a “Speakers’ Corner” and applies to all material including election and referendum material.
65. Examples of legislation which, unlike the Prohibition of Communications Provision, have been adapted include:
- a. The *Racial Discrimination Act* 1975 (Cth) provides exceptions to unlawful discrimination, for example in respect of conduct done reasonably and in good faith in relation to artistic works, genuine academic, artistic, scientific discussion or other purpose in the public interest, in addition to the public interest and fair comment exceptions.⁴⁴ These ‘how’ and ‘why’ exceptions have no counterpart in Prohibition of Communications Provision;
 - b. The *Racial and Religious Tolerance Act* 2001 (Vic) – section 11 provides similar exceptions for conduct which otherwise would constitute vilification in contravention of sections 7 or 8;
 - c. The Tasmanian *Workplaces (Protection from Protestors) Act* 2014 only applies to conduct such as invading or hindering businesses or threatening to cause damage or risk to safety.⁴⁵ That is far more appropriate and adapted than the criminalisation of peaceful and even silent communications as is the case with the Prohibition of Communications Provision.
66. For a useful comparator see *Kerrison v Melbourne City Council*.⁴⁶ The Full Federal Court held that the direction to stop using the Treasury Gardens to sleep overnight as part of the Occupy Melbourne protest was proportionate because it was directed at stopping the use of the gardens as a place of overnight lodging and not at stopping Kerrison protesting by wearing a tent as her only clothes. Had this been the aim of the direction, it would not have been proportionate.⁴⁷

⁴³ *Attorney General of South Australia v Corporation of the City of Adelaide*, op cit at [68].

⁴⁴ Section 18D Exemptions

⁴⁵ Sections 6 and 7.

⁴⁶ *Kerrison v Melbourne City Council* [2014] FCAFC 130.

⁴⁷ *Kerrison v Melbourne City Council*, ibid at [233]-[238].

67. Accordingly it is our view that there is a strong argument that the Prohibition of Communications Provision will, in certain cases, offend the implied freedom, and that it is not reasonably appropriate adapted and will be found to be unconstitutional and invalid.
68. Ultimately of course this would be a matter for the High Court.

CONCLUSION

69. We so advise.

Dated 5 November 2015



N.G. ROCHOW



F.C. BROHIER

Liability limited by a scheme approved under the Professional Standards Legislation.