Exclusion Zones for Reproductive Health Facilities in NSW - *Public Health Amendment (Safe Access to Reproductive Health Clinics) Act 2018 (NSW)*

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The *Public Health Amendment (Safe Access to Reproductive Health Clinics) Act 2018 (NSW)* was passed on 7 June 2018. The Act commences on the date of assent which is yet to be announced. The Act amends the *Public Health Act 2010 (NSW)*.

Similar legislation already exists in:

- ACT – *Health Act 1993 (ACT)*;
- Victoria - *the Public Health and Wellbeing Act 2008 (Vic)*; and
- Tasmania – *Reproductive Health (Access to Terminations) Act 2013 (Tas).*

The Act establishes a 150m "safe access zone".

A "safe access zone" means:

(a) the premises of a reproductive health clinic at which abortions are provided; and

(b) the area within 150 metres of:

a. any part of the premises of a reproductive health clinic at which abortions are provided; or

b. a pedestrian access point of a building that houses a reproductive health clinic at which abortions are provided.

A "reproductive health clinic" means any premises *at which medical services relating to aspects of human reproduction or maternal health are provided, but does not include a pharmacy"* (s98A).

Prohibited interference within the safe access zone will include:

- to harass, intimidate, beset, threaten, hinder, obstruct or impede by any means (s98C(1));
- to interfere with any person accessing, leaving, or attempting to access or leave, any reproductive health clinic at which abortions are provided (s98C(2));
- if a person is in a safe access zone, to, without reasonable excuse, obstruct or block a footpath or road leading to any reproductive health clinic at which abortions are provided. (s98B(3)); and
- making a communication that relates to abortions, by any means, in a manner:
  - that is able to be seen or heard by a person accessing, leaving, attempting to access or leave, or inside, a reproductive health clinic at which abortions are provided; and
  - that is reasonably likely to cause distress or anxiety to any such person (s 98D).

However, section 98D does not apply to a person who provides services at a reproductive health clinic. (s98D(1)(a));

- intentionally capturing visual data of another person, by any means, without consent if that person is in a safe access zone (s 98E). The publication and distribution of such visual data is listed as a separate offence (s98E(2)). Section 98E does not apply to the operation of a security camera by the operator of the clinic or premises adjacent or near, people employed or contracted to the clinic, or the police or another person who has another reasonable excuse.

Penalties for all of the above are capped at 50 penalty units or imprisonment for 6 months (or both) for a first offence, and 100 penalty units or imprisonment for 12 months for second and further offences.

There are exemptions to the prohibitions within safe access zones including for conduct within the grounds of a church or other building that is ordinarily used for religious worship (s98F(1)(a)).

As NSW attempts to legislate for safe access zones, the existing regimes in both Victoria and Tasmania are currently facing High Court challenges.

In the Victorian case, *Edwards v Clubb (unreported, Magistrates Court of Victoria 11 October 2017, Case G12298656)* Kathleen Clubb, a member of a group called the "Helpers of God's Precious Infants", became the first person found guilty of an offence under the *Public Health and Wellbeing Act* after attempting to hand a pamphlet about abortion to a couple within the safe access zone of the East Melbourne Fertility Clinic. According to the submissions of the First Respondent in the case, the group provided notice to Victoria Police that they would be breaching the safe access zone on the date of the offence in order to "test the validity of the legislation." (Submissions – First Respondent, 5.5, 18 May 2018) Clubb is appealing the $5,000 fine and good behaviour bond for 2 years (with conviction), and the matter is currently before the High Court *(Clubb v. Edwards & Anor M46/2018)*. The Constitutionality of the restrictions on communication in safe access zone was considered at first instance, and the appeal is based on a perceived denial of the freedom of political communication of Ms Clubb.

Submissions from the Victorian Attorney General on this issue have focused on whether the direct communication to those seeking an abortion, within the safe zone, can be seen to be political, or whether it is effectively an interference into a personal and private matter. The State argues that not all communications about abortion are political; for a communication to be "political", it must be intended to persuade the public, or a sector of the public to a particular view. Whilst the AG agrees that "*some individuals might be engaging in political communication, in other cases the aim is to deter women from having an abortion, often through imposing guilt and shame*". (Submissions – para. 31 Attorney General of Victoria, 11 May 2018)

On 25 May 2018, the Attorneys General for the Commonwealth, NSW, QLD, WA and SA all provided written submissions to intervene in the Clubb matter before the High Court. At the same time, the Human Rights Law Centre, the Castan Centre for Human Rights Law have also sought leave to be considered amicus curiae (*as an advisor to the Court*), and the Fertility Control Clinic (within the safe access zone in which the arrest was made in East Melbourne), have sought to either intervene or be considered amicus.

Discussion and debate about abortion - its methods, risks, morality, ethics, rights, dangers, alternatives and any other aspect can be the subject of authentic political communication – however, none of these are able to be undertaken within the safe access zones. The freedom of political communication is not a right to confront women making personal, and not political, decisions. "The implied freedom does not guarantee a right to a captive audience" (Submissions – para 45 Attorney General of Victoria, 11 May 2018)

The Tasmanian appeal (*Preston v Avery & Anor [H2/2018]* is made on similar facts, under the Tasmanian legislation *Reproductive Health (Access to Termination) Act 2013 (Tas)*, with submissions not yet due in that matter.

It remains to be seen whether a similar test-case scenario will be enacted in New South Wales.