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# Enforcing Conformity: Criminalising religiously inspired acts

Michael Quinlan \*

“My son, if you aspire to serve the Lord prepare yourself for an ordeal.”<sup>1</sup>

## INTRODUCTION

On 10 April 2019 the High Court delivered its judgment in the *Clubb* case.<sup>2</sup> It found that Tasmanian and Victorian exclusion zones did not offend the implied freedom of political communication.<sup>3</sup> Both laws proscribe certain behaviours if they take place within a 150 metre radius from premises which provide abortions.<sup>4</sup> The implied freedom of political communication is a constraint on legislative power rather than a personal right.<sup>5</sup> Its application involves a consideration of the relevant law’s effect on political communication as a whole rather than a consideration of its impact on an individual.<sup>6</sup> Similar legislation to that considered by the High Court operates in most of Australia’s states and territories.<sup>7</sup> This paper is not concerned with the implied freedom. It is instead concerned with the impact of these laws on

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<sup>1</sup> Sirach 2:1 Jerusalem Bible

<sup>2</sup> *Clubb v Edwards; Preston v Avery* [2019] HCA 11 (10 April 2019) (*‘Club v Edwards’*).

<sup>3</sup> Ibid.

<sup>4</sup> *Reproductive Health (Access to Terminations) Act 2013* (Tas) s 9(2) (*‘Access to Terinations Act’*); *Public Health and Wellbeing Act 2008* (Vic) s 185D (*‘Wellbeing Act’*).

<sup>5</sup> *Clubb v Edwards* (n 2) [247].

<sup>6</sup> Ibid.

<sup>7</sup> *Access to Terminations Act* (n 4); *Welbeing Act* (n 4); *Health Act 1993* (ACT) ss 85-87; *Pregnancy Law Reform Act 2017* (NT); *Public Health Amendment (Safe Access To Reproductive Health Clinics) Act 2018* (NSW) (*‘Safe Access Act’*); *Termination of Pregnancy Act 2018* (Qld). Such legislation has been proposed but not, as yet, enacted in Western Australia; see The Greens, ‘Safe Zone Call For Abortion Clinics’ (Web Page, 15 February 2017) <<https://greens.org.au/news/wa/safe-zone-call-abortion-clinics>>; Caroline Winter “South Australia lagging behind the nation in abortion laws”(Web Page, 20 April 2019) <<https://www.abc.net.au/radio/programs/am/south-australia-lagging-behind-the-nation-in-abortion-laws/11033174>>.

religiously inspired actions. It analyses the exclusion zone legislation against the obligations undertaken by Australia under the *International Covenant on Civil and Political Rights (ICCPR)* focusing on Article 18. Unlike the implied freedom of political communication Article 18 (like most other Articles of the *ICCPR*) recognises the existence of personal rights.<sup>8</sup>

Australia has been a party to the *ICCPR* since 1980 but it has not been domesticated into Australian law.<sup>9</sup> Whilst the Ruddock Review into religious freedom in Australia did not recommend that Australia take this step, it remains an option for the Federal Government.<sup>10</sup> In the meantime Australia has an obligation under Article 2 of the *ICCPR* to ‘respect’ the rights guaranteed by the *ICCPR*.<sup>11</sup> Whilst this paper will focus on Article 18, other provisions of the *ICCPR* particularly Articles 19 and 21 are also mentioned as they are relevant to the protection of religious freedom and may also be legislatively adopted in Australia.

The obligation to guarantee religious freedom is one with which many might agree in the abstract. It is in areas of controversy, such as exclusion zone legislation, that support for this fundamental freedom is particularly tested. This paper considers the effect of these laws which criminalise certain religiously inspired actions. It then considers whether they are necessary for any of the purposes identified in the relevant Articles of the *ICCPR*. This is an important question, whether or not Australia decides to domesticate these Articles given that it has ratified the *ICCPR* without relevant reservations. There are also good policy and other reasons for Australia and its states and territories to seek to act in accordance with international law in their domestic laws.<sup>12</sup>

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<sup>8</sup> *International Covenant on Civil and Political Rights*, GA Res 2200A (XXI), UN GAOR, 21<sup>st</sup> Sess, Supp No 16, UN Doc A/6316 (16 December 1966) (*‘ICCPR’*).

<sup>9</sup> George Williams, ‘The Victorian Charter of Human Rights and responsibilities: Origins and Scope’ (2006) 30(3) *Melbourne University Law Review* 892.

<sup>10</sup> Philip Ruddock, ‘Report of the Expert Panel Religious Freedom Review’ (Report, 18 May 2018) 46-47 (*‘Ruddock Review’*).

<sup>11</sup> *Ibid* [1.11]-[1.13]

<sup>12</sup> In relation to the ACT see also Julie Dodds-Streeton and Jack O’Connor, ‘Analysis Report: Implementation of Royal Commission Into Institutional Responses to Child Sexual Abuse Recommendations Regarding the Reporting of Child Sexual Abuse with Implications for the Confessional Seal’ (Report, 2019) [170].

Because of the role of the United Nations Human Rights Committee (UNHRC) in applying the *ICCPR* its decisions in individual communications and its statements in general comments are relevant to the obligations already assumed by Australia, and are briefly considered below. Whilst many of the Articles of the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) are in similar form to those in the *ICCPR*<sup>13</sup> Australia is not party to the Convention. Some decisions of the European Court of Human Rights (ECHR) are influential (particularly those which result in a decision of violation) but the principles it applies differ from those followed by the UNHRC, particularly where the ECHR reaches a decision that there is not a violation after applying a ‘margin of appreciation.’<sup>14</sup> As a result Convention decisions which have applied the margin of appreciation as part of their reasoning to find no violation of the Convention are not considered in this paper.<sup>15</sup>

## I. WHAT ARTICLES 18, 19 AND 21 PROTECT AND THE MEANING OF ‘NECESSARY’

### Article 18

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<sup>13</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 9 provides: ‘1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.’

<sup>14</sup> Compare for example the ECHR finding that Ireland's then proscription of abortion was not a violation of the Convention in *A, B and C v Ireland* (European Court of Human Rights, Grand Chamber, Application No.25579/05, 16 December 2010) with the UNHRC findings of breach of the *ICCPR* in Human Rights Committee, *Views: Communication No 2324/2013*, 116<sup>th</sup> sess, UN Doc CCPR/C/116/D/2324/2013 (31 March 2016) (*‘Mellet v Ireland’*); Human Rights Committee, *Views: Communication No2425/2104*, 119<sup>th</sup> sess, UN Doc CCPR/C/119/D/2425/2014 (17 March 2017) (*‘Whelan v Ireland’*) of no violation. In the context of Article 18 of the *ICCPR* and Article 9 of the Convention see Stephanie Berry, ‘A good faith interpretation of the right to manifest religion? The diverging approaches of the European Court of Human Rights and the UN Human Rights Committee’ 37 (2017) *Legal Studies* 4, 672-694.

<sup>15</sup> For recent Convention cases dealing with restrictions on communications around an abortion clinic see *Annen v Germany* (ECHR, Application No 3690/10, 26 November 2015 (discussed in Article 19 below) and *Dulgheriu v Ealing LBC* [2018] EWHC 1667 (Admin) (from which an appeal is pending) (which applying the margin of appreciation found the relevant orders to be valid). A summary of these cases appears in *Clubb v Edwards* (n 2) [204]-[205].

Article 18 protects the right to freedom of thought, conscience and religion and the manifestation of religion. As the UNHRC has observed that freedom extends to worship, observance, practice and teaching and ‘encompasses a broad range of acts.’<sup>16</sup> In particular ‘worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including...the use of ritual formulae and objects.’<sup>17</sup> The Special Rapporteur on freedom of religion or belief has made the case that practice for the purposes of Article 18 should be interpreted broadly.<sup>18</sup>

### Article 18.3

Article 18.3 permits some limits on the manifestation of religion but only ‘as are prescribed by law and are **necessary to protect** public safety, order, health or morals or **fundamental** rights and freedoms of others.’ The term ‘necessary’ means ‘unable to be done without or dispensed with’ to take the *Macquarie Dictionary* definition.<sup>19</sup> For a restriction to be necessary is a high

bar.<sup>20</sup> The UNHRC has observed that:

To be permissible under Article 18.3] [I]imitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18. The Committee observes that paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they were predicted. **Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.**<sup>21</sup>

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<sup>16</sup> United Nations Human Rights Committee, *General Comment No. 22: The right to freedom of thought, conscience and religion (Art 18)*, 48<sup>th</sup> sess, UN Doc CCPR/C/Rev.1/Add.4 (30 July 1993) [4] (‘*General Comment No. 22*’).

<sup>17</sup> *Ibid.*

<sup>18</sup> Heiner Bielefeldt, *Interim report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/68/290 (7 August 2013) [62].

<sup>19</sup> *The Pocket Macquarie Dictionary* (2<sup>nd</sup> ed, 1989) ‘necessary’.

<sup>20</sup> Bielefeldt (n 18) [30],[46].

<sup>21</sup> *General Comment No. 22* (n 16) [8] (emphasis added).

The Special Rapporteur has argued that states must look at alternative means of achieving their objectives to avoid or minimise interference with religious freedom applying the principle of proportionality. As he put it:

Under the principle of proportionality, States have always to look for less far-reaching and less intrusive restrictions before issuing legislation that infringes on freedom of religion or belief. **Another part of the proportionality test concerns the question of whether limitations are actually conducive to the legitimate purpose they are supposed to foster. It may happen that measures do not only fail to serve the said purposes, they may actually worsen the situation of many individuals**, particularly women, for instance by further restricting their spaces of personal movement and infringing their rights to education and participation in public life.<sup>22</sup>

In the Special Rapporteur's view steps to restrict the free exercise of religion must 'be the least restrictive among all the adequate measures that could possibly be applied and, in any case, without vitiating the right itself.'<sup>23</sup> This approach is consistent with the non-binding Siracusa Principles which the Ruddock Review recommended that all Australian governments have regard to when drafting laws interfering with freedom of religion.<sup>24</sup> These Principles require states applying a limitation to 'use no more restrictive means than are required for the purpose of the achievement of the purpose of the limitation.'<sup>25</sup> It is crucial that restrictive measures which interfere with religious freedom not be imposed, as the Special Rapporteur says that they sometimes are, 'in a rather loose way' and beyond the confines of Article 18.3 or based on mere conjectures.'<sup>26</sup> As he puts it:

[W]hen States wish to impose restrictions they always bear the burden of proof, both at the level of empirical evidence and at the level of normative reasoning. Furthermore, for limitations to be legitimate, they must meet all criteria set out in article 18, paragraph 3, of the International Covenant. Accordingly, limitations must be legally prescribed and they must be **clearly needed** to pursue a legitimate aim, the protection of "public safety, order, health or morals or the fundamental rights and freedoms of others. In

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<sup>22</sup> Bielefeldt (n 18) [50] (emphasis added).

<sup>23</sup> Ruddock Review (n 10) [1.56], quoting Ahmed Shaheed, *Report of the Special Rapporteur on freedom of religion and belief*, UN Doc A/HRC/34/50 (17 January 2017) [11].

<sup>24</sup> Ruddock Review (n 10) see Recommendation 2, 1.

<sup>25</sup> Ruddock Review (n 10) 29 [1.60], quoted in United Nations Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4 (28 September 1984) [10].

<sup>26</sup> Bielefeldt (n 18) [31], [47]

addition restrictions must remain within the realm of proportionality which, inter alia, means they must be limited to a minimum of interference.<sup>27</sup>

## **Articles 19 and 21**

Religion can be an inspiration for many acts including communicating a particular point of view on a contentious moral issue and peaceful demonstrations. Those actions may attract the protection not only of Article 18 of the *ICCPR* but also of Articles 19 and 21. Like religious freedom the scope for states to restrict the rights guaranteed by these articles is to be interpreted strictly as the examples mentioned below demonstrate.

### **Article 19**

Whilst as noted earlier, the application of the margin of appreciation in ECHR cases which find no violation makes such cases unreliable authorities in the application of the *ICCPR*. ECHR cases which do find a violation and are not determined by the application of the margin of appreciation are worthy of consideration in the context of the *ICCPR*. An example is the ECHR decision in *Annen* from 2015. In this case the ECHR found Germany had contravened Article 10 of the Convention. This is in the same form as Article 19 of the *ICCPR*.<sup>28</sup> The state's breach was the issuance and maintenance of an injunction. This prevented the distribution of anti-abortion leaflets outside an abortion clinic and in the letterboxes of those living nearby and also prevented the operation of a website which included an address list of 'abortion doctors.'<sup>29</sup> The leaflets were not mild in tone comparing abortion to the Holocaust.<sup>30</sup> The ECHR emphasised the public interest and the 'acute sensitivity of the moral and ethical issues' about abortion.<sup>31</sup> It found that the presentation of the arguments and the inclusion of the doctors' names and

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<sup>27</sup> Ibid [48] (references omitted) (emphasis added).

<sup>28</sup> *Annen v Germany* (European Court of Human Rights, Application No 3690/10, 26 November 2015) [65], [74].

<sup>29</sup> Ibid [6]-[12], [74].

<sup>30</sup> Ibid [11].

<sup>31</sup> Ibid [62].



professional addresses and the distribution of the leaflets in the immediate vicinity of the clinic enhanced the effectiveness of the complainant's campaign against abortion.<sup>32</sup>

## **Article 21**

In 2013 the UNHRC found that a decision of the Central Administrative District of Moscow to prohibit a peaceful picket outside the Iranian Embassy aimed at focusing attention on the treatment of same sex attracted persons in Iran was a violation of Article 21. In this case the UNHRC observed that:

[T]he freedom of assembly protects demonstrations promoting ideas that may be regarded as annoying or offensive by others and that in such cases States parties have a duty to protect those participating in a demonstration in the exercise of their rights against violence by others. [The Committee] also notes that an unspecified and general risk of a violent counter-demonstration or the mere possibility that the authorities would be unable to prevent or neutralize such violence is not sufficient to ban a demonstration.<sup>33</sup>

More recently the UNHRC observed that:

[T]he Committee recalls that the right of peaceful assembly, as guaranteed under article 21 of the Covenant, is a fundamental human right that is essential for the public expression of an individual's views and opinions and indispensable in a democratic society. This right entails the possibility of organizing and participating in a peaceful assembly, including a stationary assembly (such as a picket) in a public location. The organizers of an assembly generally have the right to choose a location within sight and sound of their target audience and no restriction to this right is permissible unless if it is (a) imposed in conformity with the law; and (b) necessary in a democratic society, in the interests of national security or public safety, public order, protection of public health or morals or protection of the rights and freedoms of others. When a State party imposes restrictions with the aim of reconciling an individual's right to assembly and the aforementioned interests of general concern, it should be guided by the objective of facilitating the right, rather than seeking unnecessary or disproportionate limitations to it. The State party is thus under the obligation to justify the limitation of the right protected by article 21 of the Covenant.<sup>34</sup>

## **II. THE RELIGIOUS IMPULSE AND EXCLUSION ZONES IN AUSTRALIA**

Discussing the various arguments in relation to the issue of abortion is beyond the scope of this paper. It is sufficient to note that in Australia after several Court judgments liberalising the

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<sup>32</sup> Ibid.

<sup>33</sup> Human Rights Committee, *Communication No 1873/2009*, 109<sup>th</sup> sess, UN Doc CCCPR C/109/D/1873/2009 (5 November 2013) [9.6] (*Alekseev v Russian Federation*).

<sup>34</sup> Human Rights Committee, *Communication No 2190/2012*, 122<sup>nd</sup> sess, UN Doc CCPR/C/122/D/2190/2012 (4 April 2018) [8.5] (*Sudalenko and Poplavny v Belarus*).

operation of then criminal proscriptions on abortion to permit lawful abortions in a range of circumstances, there has been a trend towards de-criminalisation of the procedure. This has now taken place in every state and territory except New South Wales and South Australia where abortion is widely available and illegal only in certain prescribed circumstances.<sup>35</sup> There is significant pressure for de-criminalisation in those two states. Requiring these reforms, if necessary through use of the grants power, is a campaign promise of the Australian Labor Party in the 2019 Federal elections.<sup>36</sup> Whilst some consider abortion to be a ‘simple and safe medical procedure, forming an essential part of reproductive health care services’<sup>37</sup> and that embryos and fetuses are ‘parasitic to a woman’s body’<sup>38</sup> not everyone shares these views. As then Chief Justice Kirby of the New South Wales’ Court of Appeal observed in 1995:

Some, for reasons of religious instruction or personal conscience, could not conceive of *any* circumstances where termination would be necessary or proportionate.<sup>39</sup>

Explaining the theological grounding of such religious views in any detail is similarly beyond the scope of this paper. Mr Graham Preston and Mrs Penny Stallard were successfully prosecuted for breaching the exclusion zone in Hobart. The *Tasmanian Constitution* contains protections for religious freedom.<sup>40</sup> This is unique in an Australian context and meant that the

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<sup>35</sup> Tasmania, Victoria, Western Australia. Queensland, the Australian Capital Territory and the Northern Territory have all decriminalised abortion.

<sup>36</sup> Amy Greenbank, ‘Labor promises free abortions, pushes to decriminalise procedure in federal election pitch’, *ABC News* (Web Page, 6 March 2019) < <https://www.abc.net.au/news/2019-03-06/labor-promises-free-abortions-if-it-wins-government-at-election/10873612>>.

<sup>37</sup> Louise Anne Keogh et al, ‘Conscientious objection to abortion, the law and its implementation in Victoria, Australia: perspectives of abortion service providers’ (2019) 20 *BMC Medical Ethics* 11, 1; see also Angela J Dawson et al, ‘Medical termination of pregnancy in general practice in Australia: a descriptive-interpretive qualitative study’ (2017) 14 *Reproductive Health* 39; Anuradha Kumar et al, ‘Conceptualising abortion stigma’ (2009) 11(6) *Culture Health Sexuality* 625, 633; Alexandra Humphries, ‘Abortion, Stigma & Anxiety’ LLM Thesis, The University of Melbourne, 2011) 2.

<sup>38</sup> Michele Goodwin, ‘If Embryos and Fetus Have Rights’ (2017) 11(2) *Law and Ethics of Human Rights* 189.

<sup>39</sup> *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47, 66.

<sup>40</sup> *Constitution Act 1934* (Tas) s 46(1) ‘Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen. (2) No person shall be subject to any disability, or be required to take any oath on account of his religion or religious belief and no religious test shall be imposed in respect of the appointment to or holding of any public office.’

religious motivations of Mr Preston and his co-accused were relevant in the case. The Magistrate's findings about their Christian beliefs provide two examples of Christian views which will suffice for present purposes:

[Mr Preston] has been a Christian since he was 14 and he believes that human life has been created in the image of God uniquely and that human life is of absolute importance as referred to in the Scriptures. That God knows us even when we are growing in our mother's womb and in particular he believes in the incarnation of Jesus as God coming into the world born in his mother's womb and that that validates human life at every stage.<sup>41</sup>

Essentially as I understood Mrs Stallard's evidence she regards herself as a practicing Christian, and as part of her Christian beliefs she believes that every life is sacred.<sup>42</sup>

### III. AUSTRALIAN EXCLUSION ZONES AND ARTICLES 18, 19 AND 21

Whilst there are differences in the language used in exclusion zone legislation each shares the common objectives of ensuring that respect is given to 'the entitlement of people to access' such services.<sup>43</sup> The objects are also to ensure that employees and others coming or going from such premises, can do so 'without interference, and in a manner that protects their safety and well-being and respects their privacy and dignity.'<sup>44</sup> Prohibited activities include actions which, in most places, would have been illegal under other general legislation such as harassment, intimidation, besetting, threatening, hindering or obstructing persons attempting to access such places.<sup>45</sup> There have been successful prosecutions for breach of exclusion zones

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<sup>41</sup> *Police v Preston and Stallard* [2016] TASMC (27 July 2016) [58].

<sup>42</sup> *Ibid* [65].

<sup>43</sup> *Safe Access Act* (n 7) s 98B.

<sup>44</sup> *Ibid* s 98B; Queensland Law Reform Commission, 'Review of Termination of Pregnancy Laws Consultation Paper' (Consultation Paper, No 76, December 2017) [248] ('*Queensland Law Reform Commission*').

<sup>45</sup> For example *Safe Access Act* (n 7) s 98C(1). The relevant offences for such behaviour extant prior to the introduction of this Act are discussed by Alister Henskens, New South Wales, *Parliamentary Debates*, Legislative Assembly, 7 June 2017 (Alister Henskens); see also Queensland Law Reform Commission (n 53) [248]. See also the 2017 prosecution of an anti-abortion protester for displaying an offensive image *Fraser v County Court of Victoria* [2017] VSC 83 (21 March 2017) contrary to s 17(1)(b) of the *Summary Offences Act 1966* (Vic).

in Tasmania,<sup>46</sup> Victoria<sup>47</sup> and Queensland<sup>48</sup> and an unsuccessful prosecution under the ACT legislation.<sup>49</sup> Each involved peaceful, non-violent behaviour. All those prosecuted have been Christians motivated to act as they did by their religious faith.<sup>50</sup> For example, the Magistrate summed up the religious motivations of Mr Preston and Mrs Stallard in this way:

Mr Preston explained that the Bible teaches people to care for one another and in particular to help those who are most vulnerable or defenceless. He considers that a child in the womb would be probably the most vulnerable category of human beings and that they are completely defenceless. He believes that it is right and necessary that people come to the aid of those who are vulnerable and defenceless which includes unborn children.<sup>51</sup>

[Mrs Stallard believes] that an unborn life does not have a voice, and that as part of her Christian beliefs she needs to stand up for people without a voice which led her to protest with Mr Preston.<sup>52</sup>

No cases have involved harassment, intimidation, besetting, threatening, hindering, obstructing or filming persons attempting to access abortion clinics.<sup>53</sup> This paper is not concerned with such acts and it does not argue that restrictions on them would be impermissible under Articles 18.3 19.3 or 21.<sup>54</sup> Whilst there are some variations in the language used everywhere such legislation has been passed, it criminalises certain communications and imposes substantial

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<sup>46</sup> Edith Bevin 'Anti-abortion campaigner Graeme Preston arrested again for protesting outside clinic' *ABC News* (Web Page, 14 April 2015) <<http://www.abc.net.au/news/2015-04-14/anti-abortion-campaigner-graeme-preston-arrested/6392214>>.

<sup>47</sup> *Alyce Edwards v Kathleen Clubb* (2017) MCV (23 December 2017).

<sup>48</sup> Lydia Lynch, "'The law itself is a crime': Abortion protesters refuse to plead guilty" (Web Page, 28 December 2018) *Brisbane Times* <<https://www.brisbanetimes.com.au/national/queensland/the-law-itself-is-a-crime-abortion-protesters-refuse-to-plead-guilty-20181228-p500o8.html>>; Nicole Pierre, 'Magistrate chides serial anti-abortion protester' *Courier Mail* (14 March 2019).

<sup>49</sup> *Bluett v Popplewell* [2018] ACTMC 2 (9 March 2018) ('*Bluett v Popplewell*').

<sup>50</sup> *Police v Preston and Stallard* [2016] TASMC (27 July 2016) [58]; Tom Minear, 'Mother of 13 arrested in East Melbourne clinic protest' *Herald Sun* (Web Page, 4 August 2016) <<https://www.heraldsun.com.au/news/law-order/mother-of-13-arrested-in-east-melbourne-clinic-protest/newsstory/a90d71765491cd1189348579a4f98a0b>>; Pierre (n 48).

<sup>51</sup> *Police v Preston and Stallard* [2016] TASMC (27 July 2016) [58] ('*Police v Preston*').

<sup>52</sup> *Ibid* [65].

<sup>53</sup> *Ibid* [5]. Note though that Ms Heald gave evidence that 'she felt quite intimidated, uncomfortable and reconsidered entering the [relevant clinic]' seeing Mr Preston holding a placard with a picture of a foetus at 8 weeks and holding some leaflets but instead confronted him.

<sup>54</sup> For example *Safe Access Act* (n 7) s 98E. *i*

penalties for breach.<sup>55</sup> For example, in New South Wales a first offence attracts a maximum penalty of a \$5500 fine or 6 months imprisonment and a second or subsequent offence twice that maximum penalty.<sup>56</sup> These penalties arise if a person, other than an employee or service provider to the relevant clinic, communicates in relation to abortion within the designated zone by any means which can be seen or heard by anyone coming or going from the premises if that communication ‘is reasonably likely to cause distress or anxiety to any such person.’<sup>57</sup> Virtually any communication or protest about abortion is likely to have this effect.<sup>58</sup> The designated zone in most jurisdictions is the same as that in Tasmania. It covers 70,000m<sup>2</sup> around every clinic in that jurisdiction.<sup>59</sup> It is clear from the parliamentary discussions that, among other things, these provisions were intended to prevent public prayer and to prevent people, sometimes described as ‘sidewalk counsellors’ providing information about alternatives to abortion within the designated zone.<sup>60</sup> For example in the second reading speech, in support of the exclusion zone legislation in Tasmania, Minister Michelle O’Byrne observed that

[I]t will stop the silent protests outside termination clinics that purport to be a vigil of sorts or a peaceful protest but which, by their very location, are undoubtedly an expression of disapproval.<sup>61</sup>In the second reading debate of the New South Wales’ legislation the Member for Maitland, Jenny Aitchison said:

I understand that there are people in this place of all faiths. I grew up in the Catholic Church. However, if someone approached me and told *me* that they were praying for me in a way that suggested I was doing the wrong thing and in an attempt to persuade me to change my mind, I would see it as an appalling affront

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<sup>55</sup> Ibid s 98D.

<sup>56</sup> Ibid s 98D(2).

<sup>57</sup> Ibid s 98D; Under the Northern Territory legislation any intentional act that could be seen or heard in the vicinity of an abortion clinic ‘that may result’ in deterring a person from having or performing a termination is prohibited: *Pregnancy Law Reform Act 2017* (NT) s 14.

<sup>58</sup> *Clubb v Edwards* (n 2) [303].

<sup>59</sup> Ibid [508].

<sup>60</sup> Ibid [164], [171], [475].

<sup>61</sup> Greg Walsh, ‘The Constitutionality of Communication Prohibitions Around Abortion Clinics’ (2018) 9 *The Western Australian Jurist* 84, quoting Tasmania, *Parliamentary Debates*, House of Assembly, 16 April 2013 (Michelle O’Byrne).

and assault. It is not physical, sexual or emotional assault: it is an assault on my faith. And it is completely wrong.<sup>62</sup>

The fact that the ACT case against three Christians engaged in silent and individual praying including one praying the Catholic rosary using ritual formulae and rosary beads was unsuccessful does not alter the intention of such legislation to prohibit public prayer. These prosecutions failed because each of the Christians who were praying did so in a manner which attracted no attention and so was found not to amount to a communication. The judgment leaves open the possibility that praying in a manner sufficiently visible to others might offend the legislation.<sup>63</sup> The intention to prohibit sidewalk counselling is also clear from the reading speeches. For example in the second reading speech of the New South Wales' legislation the Member for Port Macquarie, Leslie Williams said:

I understand that the self-appointed sidewalk counsellors referred to may engage in this activity with the best intentions, believing that they are providing advice in the best interests of the woman. However they are untrained and they are unqualified and are clearly providing counsel with a predetermined outcome – that is stopping women having an abortion. They are ignorant of the woman's circumstances and background and indiscriminate when it comes to who they target with their views and their intimidating behaviour. Their behaviour is abhorrent, it is unacceptable and for those women who endure it highly distressing. Today we can put an end to this behaviour.<sup>64</sup>

In the same parliamentary sitting the Member of Riverstone, Kevin Connolly who was critical of the Bill, made this observation:

Clearly there are standards of acceptable behaviour in the community which should be enforced and which the existing law is there to enforce. But why should silent prayer, a silent protest with a single sign, the offer of conversation or help if somebody wants it be criminal? Yet that is what this bill quite explicitly proposes.<sup>65</sup>

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<sup>62</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 7 June 2018, 3 (Jenny Aitchison) ('*Parliamentary Debates*, Jenny Aitchison').

<sup>63</sup> *Bluett v Popplewell* (n 58) [80]-[82], [84]-[86]. See also discussion in *Clubb v Edwards* (n 7) [164], [171], [475].

<sup>64</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 7 June 2018, 1 (Leslie Williams) ('*Parliamentary Debates*, Leslie Williams').

<sup>65</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 7 June 2018, 39 (Kevin Connolly) ('*Parliamentary Debates*, Kevin Connolly').

As noted in I above, the Special Rapporteur has stressed the importance of empirical evidence to support restrictions on religious freedom in reliance on Article 18.3.<sup>66</sup> The parliamentary debates which took place in relation to the introduction of exclusion zones in Australia contain very little reference to empirical evidence. Much of the material relied upon is anecdotal or hearsay. Some parliamentarians referred to what they or other parliamentarians had been told by people accessing clinics and by workers in clinics.<sup>67</sup> Some refer to submissions from organisations and individuals.<sup>68</sup> The only study about the impact of protesters outside abortion clinics referred to in any Australian parliament which has passed such legislation is an unpublished study. It has been challenged by Turner et al on a range of grounds.<sup>69</sup> It was conducted at the Fertility Control Clinic by a worker at that Clinic for a Masters' degree (the Humphries Study).<sup>70</sup> In this study 158 women who, on the same day as their initial consultation, had their pregnancies terminated at less than 12 weeks at that clinic completed a questionnaire immediately before their procedure and just before they left the clinic after the procedure.<sup>71</sup> Rather than using non-judgmental language the questionnaire asked questions about being 'confronted by anti-abortion protesters.'<sup>72</sup> The terminology used may have skewed the

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<sup>66</sup> Bielefeldt (n 18) [31].

<sup>67</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 17 May 2018, 12 (Penny Sharpe); *Parliamentary Debates*, Jenny Aitchison, (n 72); New South Wales, *Parliamentary Debates*, Legislative Assembly, 7 June 2018, 1 (*Jenny Leong*).

<sup>68</sup> *Parliamentary Debates*, Leslie Williams (n 73); New South Wales, *Parliamentary Debates*, Legislative Assembly, 7 June 2018, 16 (*Felicity Wilson*); New South Wales, *Parliamentary Debates*, Legislative Assembly, 7 June 2018, 20 (Damien Tudehope); *Parliamentary Debates*, Kevin Connolly (n 74) 39; New South Wales, *Parliamentary Debates*, Legislative Assembly, 7 June 2018, 28 (Yasmin Catley); New South Wales, *Parliamentary Debates*, Legislative Council, 16 April 2013, 28-29 (O'Connor).

<sup>69</sup> Joseph Turner, Debbie Garrett and Simon McCaffrey, 'The High Court, Abortion Clinic Speech restrictions and the Assessment of Harm', *The Western Australian Legal Theory Association* (Web Page, 1 October 2018) <<https://walta.net.au/2018/10/01/the-high-court-abortion-clinic-speech-restrictions-and-the-assessment-of-harm/>>.

<sup>70</sup> See Tasmania, *Parliamentary Debates*, Legislative Council 16 April 2013, 1 (Michelle O'Bryne) and Queensland Law reform Commission (n 55) [247], referring to Alexandra Humphries, 'Stigma, Secrecy and Anxiety in Women Attending For An Early Abortion', (The University of Melbourne unpublished Masters Thesis, 2011).

<sup>71</sup> Humphries (n 37) 20-21.

<sup>72</sup> *Ibid* Appendix A.

results.<sup>73</sup> According to the Humphries Study 135 of the 158 participants ‘were exposed’ to ‘the picketers.’<sup>74</sup> Whilst this small study conducted at one clinic in Melbourne cannot be generalised to other Australian clinics, its claims that its findings support initiatives to ensure that ‘women are not exposed to picketers when accessing abortion’<sup>75</sup> are themselves questionable. Whilst 78% of participants reported that abortion was ‘very much’ stigmatized by ‘the picketers’ and 71% reported that ‘allowing anti-abortion picketers to protest outside the front of the clinic stigmatizes abortion ‘very much’<sup>76</sup> there was only a small correlation between more exposure to ‘anti-abortion picketers’ entering the clinic and higher levels of anxiety pre-abortion. As a result, in this study, exposure to picketers was found not to be a significant predictor of pre-abortion anxiety.<sup>77</sup>

Whilst proponents and parliamentary supporters of exclusion zones refer to them being about protecting women’s choice, empirical evidence of the reaction of women who see or meet people within the vicinity of abortion clinics is not uniform. Cozzarelli and Major’s study of 291 women who underwent first-trimester abortions at a large, private abortion clinic in Buffalo, New York in 1990 found that 66% of women who encountered what they term ‘antiabortion demonstrators’ were upset to some degree but that more than a third (34%) were not upset at all by their interaction.<sup>78</sup> In a study published in 1994 Cozzarelli and Major compared post-abortion depression of women who had undergone a first trimester abortion within thirty minutes and then three weeks after their abortion.<sup>79</sup> This study found that exposure to demonstrations outside the clinic had no significant impact on depression levels three weeks

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<sup>73</sup> Turner, Garrett and McCaffrey (n 69).

<sup>74</sup> Humphries (n 37) 21.

<sup>75</sup> Ibid 45.

<sup>76</sup> Ibid 35.

<sup>77</sup> Ibid 34-35.

<sup>78</sup> Catherine Cozzarelli and Brenda Major, ‘The Impact of Antiabortion Activities on Women Seeking Abortions’ in L J Beckman and S M Harvey, (eds) *Psychology of women book series The new civil war: The psychology of abortion* (American Psychological Association, 1998) 81, 90.

<sup>79</sup> Catherine Cozzarelli and Brenda Major, ‘The Effects of Anti-Abortion Demonstrators And Pro-Choice Escorts on Women’s Psychological responses to Abortion’ (1994) 13(4) *Journal of Social and Clinical Psychology* 404.



after the abortion.<sup>80</sup> Foster et al's study across 30 clinics in 21 US states in which 956 women seeking abortions were interviewed between 2008 and 2010 found even more varied responses by women who saw, heard or were stopped by protesters.<sup>81</sup> Almost half of the women (48%) in this study were not upset at all by the protesters, a quarter were a little upset, 12% moderately upset, 9% quite upset and 7% extremely upset.<sup>82</sup> Women in this study were interviewed again after a week of their abortion with the study concluding that whilst interacting with protesters can be upsetting for some it does not cause negative feelings for women who have an abortion.<sup>83</sup>

Among the 717 women in the study who received an abortion and replied to both the emotions and protester questions, we found no association between emotions about the abortion – regret, relief, guilt, happiness, sadness or anger – and the level of exposure to protesters. Compared to women who had exposure to protesters women who reported seeing, hearing or being stopped by protesters did not have higher or lower odds of feeling any of these six emotions. Instead difficulty deciding to have the abortion is significantly positively associated with experiencing the negative emotions (regret, guilt, sadness and anger) and significantly negatively associated with feeling the positive emotions (happiness and relief).<sup>84</sup>

In a study published in 2000 Cozzarelli et al reported on a study of 442 women having first-trimester abortions at one of three abortions clinics in Buffalo, New York in 1993.<sup>85</sup> Whilst 66% of women in this study agreed or strongly agreed that what it terms 'prolife picketers' caused psychological harm and 69% agreed or strongly agreed that the picketing should be banned, 21% of other participants had a very different view:

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<sup>80</sup> Ibid 421.

<sup>81</sup> Diane Greene Foster et al, 'Effect of abortion protesters on women's emotional response to abortion' (2013) 87 *Contraception* 81, 85.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid 87.

<sup>84</sup> Ibid 85-86.

<sup>85</sup> Catherine Cozzarelli et al, 'Women's Experiences of and Reactions to Antiabortion Picketing' (2000) 22(4) *Basic and Applied Social Psychology* 265.

Twenty-one percent of women agreed or strongly agreed that the picketers help women by making them think twice about abortion and 8% of women agreed or strongly agreed that the picketers were doing a good thing by trying to discourage abortion.<sup>86</sup>

This study found that seeing picketers and being spoken to them was not related to immediate or long term post abortion depression.<sup>87</sup> Being blocked by picketers did have a small indirect effect on immediate post-abortion depression.<sup>88</sup> This long-term empirical study looked at the effects on women of interacting with people near abortion clinics when entering a clinic and was conducted within an hour of an abortion and again after two years. It concluded that:

[E]ncountering antiabortion picketers on one's way into an abortion clinic does not appear to pose a significant long-term mental health risk to women who have abortions.<sup>89</sup>

As Walsh has argued in relation to the Victorian provisions:

While banning protesters and sidewalk counsellors outside clinics eliminates any risk of causing anxiety or distress to people seeking to enter or leave them, the weakness of the provisions is the lack of empirical evidence that protesting activities outside Victorian abortion clinics create a serious risk to public health, that justifies the restrictions it places on other people's rights and freedoms and that is a proportionate intervention.<sup>90</sup>

Her point applies equally to all Australian jurisdictions with such zones.

Whilst the Humphries Study refers to 'anti-abortion protesters' and to 'picketers' and Cozzarellia and Major to 'anti abortion demonstrators' as noted above, the actions of prayer groups and sidewalk counsellors are also now likely to be illegal in Australian exclusion zones. Christian prayer is a form of popular piety and it is clearly a manifestation of religion.<sup>91</sup> As is evident from the tradition of pilgrimage and of prayer at sites of tragedy or of historic

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<sup>86</sup> Ibid (material in parentheses omitted).

<sup>87</sup> Catherine Cozzarelli et al (n 85) 270, 274.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

<sup>90</sup> Anna Walsh, 'Freedom of Expression, belief and Assembly: The Banning of Protests Outside of Abortion Clinics in Australia' (2018) 25 *Journal of Law and Medicine* 1119, 1125.

<sup>91</sup> In the context of the Catholic tradition see *Catechism of the Catholic Church* (St Pauls, 1994) [2742]-[2745], [2692], [1674]-[1679].

significance, place can be very important to prayer.<sup>92</sup> Exclusion zones impact on the religious practices of those religious persons whose ability to pray in proximity to abortion clinic is made criminal.

Many of the politicians who voted for exclusion zones and many academics writing in relation to abortion claim that women visiting abortion clinics have already made up their mind to terminate their pregnancies after carefully considering all of the alternatives; but as Cozzarelli and Major observe:

It is possible that antiabortion activities may persuade some women not to have an abortion. This is certainly the hope and in many cases the claim of individuals who are actively opposed to abortion...It is also possible that some women change their minds about obtaining an abortion after confronting demonstrators outside an abortion clinic.<sup>93</sup>

Like the Humphries Study and much of the academic writing in this area, these authors use judgmental language to characterise the actions of those outside clinics as ‘confronting’ ‘antiabortion activities.’ Chief Justice Roberts, delivering the opinion of the United States Supreme Court in the *McCullen* case, and finding that a 35 foot exclusion zone was unconstitutional, described very different behaviours:

[Petitioners] attempt to engage women approaching the clinics in what they call “sidewalk counselling,” which involves offering information and alternatives to abortion and help pursuing these options. Petitioner Eleanor McCullen, for instance, will typically initiate a conversation this way: “Good morning, may I give you my literature? Is there anything I can do for you? I’m available if you have any questions.” If the woman seems receptive, McCullen will provide additional information. McCullen and the other petitioners consider it essential to maintain a caring demeanour, a calm tone of voice and direct eye contact during these exchanges. Such interactions, petitioners believe are a much more effective means of dissuading women from having abortions than confrontational methods such as shouting or brandishing signs, which in petitioners’ view tend only to antagonize their intended audience. In unrefuted testimony, petitioners say that they have collectively persuaded hundreds of women to forego abortions.<sup>94</sup>

Whilst in that case one of the petitioners claimed to have persuaded about 80 women not to terminate their pregnancies, after the introduction of the exclusion zone she said that she

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<sup>92</sup> Ibid.

<sup>93</sup> Catherine Cozzarelli and Brenda Major (n 78) 88.

<sup>94</sup> *McCullen v Coakley*, 573 US 4-5 (2014).

reached ‘far fewer people’ than she had reached before the zone was introduced.<sup>95</sup> Another petitioner estimated that 100 women had decided to continue their pregnancies after talking with her before the exclusion zone was introduced, but none had done so since she had been kept 35 feet away from the clinics.<sup>96</sup> In an Australian context, again there is no empirical evidence of the number of women who have opted to continue their pregnancies after discussion with those standing outside a clinic. In a case involving a claim against a Council for allegedly failing to curtail the actions of a group called ‘Helpers of God’s Precious Infants’ the Court received evidence that the group had assisted 300 women who had opted against abortion after interacting with their members outside the Fertility Control Clinic in Melbourne.<sup>97</sup>

Although not uniformly accepted in the literature, it appears that the distress for most women associated with a decision to terminate a pregnancy peaks before and diminishes after the procedure.<sup>98</sup> Some women experience psychological distress as a consequence of the procedure.<sup>99</sup> There are recognised risks of such an outcome including being ambivalent about the procedure.<sup>100</sup> Some women who are undergoing what Medeira describes as a consented but unwanted abortion may be assisted by offers of support to instead continue their pregnancy when accessing a clinic:

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<sup>95</sup> Ibid 20.

<sup>96</sup> Ibid.

<sup>97</sup> *Fertility Control Clinic v Melbourne City Council* (2015) 47 VR 368 [34]. See discussion in Walsh (n 90) 1124.

<sup>98</sup> Humphries (n 37) 34; Yona Teichman et al, ‘Emotional Distress in Israeli Women Before and After Abortion’ (1993) 63(2) *American Journal of Orthopsychiatry* 277. For a contrary view see Priscilla K Coleman et al, ‘Women Who Suffered Emotionally from Abortion: A Qualitative Synthesis of Their Experiences’ (2017) 22(4) *Journal of American Physicians and Surgeons* 113; David M Ferguson et al, ‘Does abortion reduce the mental health risks of unwanted or unintended pregnancy? A re-appraisal of the evidence’ (2013) 47(9) *Australian and New Zealand Journal of Psychiatry* 819.

<sup>99</sup> Coleman et al (n 98) 113.

<sup>100</sup> Catherine Cozzarelli et al (n 85) 267; Catherine Cozzarelli, ‘Personality and Self-Efficacy as Predictors of Coping With Abortion’ (1993) 65(6) *Journal of Personality and Social Psychology* 1224.

Women who agree to a consented but unwanted abortion might choose differently if circumstances were other than what they are – if they had a healthy fetus, more economic resources, greater flexibility with employment or education, or stronger social supports to make parenthood a viable option.<sup>101</sup>

As Turner et al observe, not all interactions with people outside an abortion clinic are unwanted or damaging:

Individuals who attend *outside abortion premises* may respectfully offer aid or alternatives to women who may be considering an abortion for reasons such as limited finances, insecure accommodation and lack of social support.

The provision of such support may allow some women to continue their pregnancy and potentially avoid suffering significant emotional harm from undergoing an abortion due to lack of resources. This has particularly been the experience of one of the authors of this article, [Obstetrician and Gynecologist] Dr McCaffrey, who has had referred to him more than 20 women who encountered individuals outside abortion premises and accepted their offers of assistance.

In Dr McCaffrey's experience, these women were very grateful for the assistance provided to them by the individuals outside the abortion premises. His patients have said words to him to the following effect "But for the man we spoke with outside the clinic, we would not have our child!", "We view the people outside the clinic as having given our child life" and "We continue to keep in contact with that group, and have sent them pictures of our child to encourage them to keep doing their good work. We are so grateful to them."<sup>102</sup>

#### **IV: THE NEED FOR MORE AND BETTER EVIDENCE**

All Australian exclusion zones have been introduced in the absence of relevant evidence. Evidence of the number and location of premises around which the zones would operate was not available. Empirical evidence of the full range of impacts on Australian women of the behaviour of persons in the vicinity of even a small sample of such premises in Australia was not obtained. Empirical evidence of the behaviours of persons in the vicinity of even a small sample of such premises in Australia was not obtained. Empirical evidence of the number of women who decide to continue their pregnancy after interactions with people outside clinics

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<sup>101</sup> Coleman et al (n 98) quoting, J L Medeira, 'Abortion emotions regret, relationality and regulation' (2014) 21 *Michigan Journal of Gender and Law* 52.

<sup>102</sup> Turner, Garrett and McCaffrey (n 69) 105.

and of the outcomes for them and the children born as a result was not obtained. Empirical evidence of the impact of such legislation on those prevented from carrying out what they consider to be their religious duties to pray or to offer sidewalk counseling was not obtained. Evidence of the potential of harm to be caused to those women who might proceed with a termination but who would have benefitted from interactions with sidewalk counsellors was not obtained. Such research should occur in South Australia and Western Australia where exclusion zones have not yet been introduced, to enable consideration of the contemporary position. Unless the existing laws are repealed in other states and territories, research there will be limited to investigation of the historic position. These zones have been introduced despite the empirical evidence collected in the United States discussed above and without Australian evidence examining whether those results would also obtain here. The evidence suggests that whilst most women do find encounters with people outside clinics to be unpleasant at the time, a substantial proportion of women are not upset at all by these behaviours even at the time. It also shows that some women report positive emotions to seeing ‘antiabortion picketers’ and that women seem not to suffer serious, long term negative psychological effects from seeing or interacting with people outside clinics.

To recognise the potential adverse impacts of exclusion zones is not to diminish the distress that some women do experience in seeing or hearing people outside clinics. It is also not to diminish the desirability of securing respect, privacy and dignity for clients and staff of such clinics which are less empirically measurable objectives of exclusion zones. However, these objectives need to be weighed against the impact of such zones on the manifestation of religious belief, freedom of speech and association of those prohibited from praying or from providing sidewalk counselling in the zones. They must also be weighed against the adverse impact such zones may have on those women whose right to access acutely relevant information is diminished, in particular of the alternatives available to them. Particularly concerning is the effect on those women experiencing uncertainties and other indicators of potential future psychological distress should they undergo a consented but regretted termination. The fact that some women – and it may be a very small minority - have decided to continue their pregnancy and feel that decision was the right one after having access to sidewalk counsellors, suggests that exclusion zones may operate harmfully to others, to deprive them of information about other options and assistance available. This would appear to be so unless those working within

the clinics are aware of and offer to their clients the range of medical and financial assistance to which sidewalk counsellors have access.<sup>103</sup> As Turner et al observe:

Any comprehensive assessment of the impact of any conduct needs to take into account both the potential harm and benefit in order for an informed decision to be reached.<sup>104</sup>

Whilst some emotional impact can be expected from any protest or sensitive issue the empirical evidence does not establish impacts greater than might be expected from any protest or discussion of other controversial social issues.<sup>105</sup>

## V. CONCLUSION

It may be argued that the exclusion zones which have now been introduced in most states and territories of Australia go well beyond the range of restriction permitted under Articles 18, 20 and 21 of the *ICCPR*. They clearly impinge on freedom of expression and the right of peaceful assembly. They also impinge on the right of access to highly relevant information by the women who might choose not to proceed with the termination and might benefit from that choice. In each applicable jurisdiction these zones prohibit a wide range of behaviours over a substantial territory around every clinic based on very limited Australian empirical evidence. Given the clear intention of the legislatures to criminalise prayer as part of the prohibited behaviour and the fact that only Christians have been prosecuted to date, despite the language used in the legislation which is neutral and general on its face, it seems clear that the laws have a disproportionate impact on Christians. It is arguable that, at least in their application to prayers, these laws were imposed for discriminatory purposes or that they are discriminatory in their effect.<sup>106</sup>

The state of the empirical evidence is such that it is at least arguable that no Australian parliament has established that exclusion zone legislation operating over a 70,000m<sup>2</sup> area around every clinic in that territory is ‘necessary to protect public safety, order, health, or

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<sup>103</sup> Walsh (n 99) 1124.

<sup>104</sup> Turner, Garrett and McCaffrey (n 69).

<sup>105</sup> Ibid.

<sup>106</sup> Office of the High Commissioner For Human Rights, *General Comment No.22: The right to freedom of thought, conscience and religion (Art 18)*, 48<sup>th</sup> sess, UN Doc CCPR/C/Rev.1/Add.4 (30 July 1993) [8].

morals or the fundamental rights and freedoms of others' and that it therefore falls outside the exception permitted by Articles 18.3 of the *ICCPR* and (in similar terms) Article 21. It is similarly arguable that these laws pay inadequate regard to the impact that they have on those seeking to act in accordance with their religious faith and on the freedom of expression and the right of peaceful assembly. Any claim to 'necessity' is therefore speculative.