IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

No. H2 of 2018

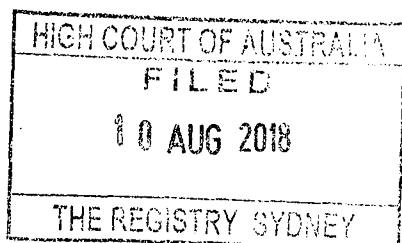
BETWEEN:

JOHN GRAHAM PRESTON
Appellant

and

ELIZABETH AVERY
First Respondent

SCOTT WILKIE
Second Respondent



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ANNOTATED SUBMISSIONS OF THE ATTORNEY GENERAL FOR NEW SOUTH WALES, INTERVENING

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Part I Certification

1. These submissions are in a form suitable for publication on the internet.

Part II Basis of intervention

2. The Attorney General for New South Wales ("NSW Attorney") intervenes in these proceedings pursuant to s 78A of the Judiciary Act 1903 (Cth) in support of the respondents.

Part III Argument

3. The Appellant challenges the validity of s 9(2) of the Reproductive Health (Access to Terminations) Act 2013 (Tas) (the "Act") to the extent that it proscribes "a protest in relation to terminations that is able to be seen or heard by a person accessing, or attempting to access, premises at which terminations are provided" (the "protest prohibition").

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4. The NSW Attorney adopts the principles set out in his submissions in *Clubb v Edwards* (M46 of 2018) ("Clubb Submissions") at [3]-[5], [9], [16]-[19], [22]-[23].

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In the present proceedings, the NSW Attorney addresses the following issues only and, in summary, submits:

a. Compatibility of purpose: Although the Act does not expressly state the objects of the protest prohibition, the text and context reveal that they are the same as those of s 185D of the Public Health and Wellbeing Act 2008 (Vic) (the "Victorian Act"). Those objects are compatible with the system of representative and responsible government.

b. Necessity: The alternative measures identified at [62]-[70] of the Appellant's Submissions ("AS") are either as burdensome as the protest prohibition or are less effective in achieving the objects of the protest prohibition. Section 9(2) of the Act and the suggested alternatives are within the same "domain of selections": McCloy v New South Wales (2015) 257 CLR 178 at [82] per French CJ, Kiefel, Bell and Keane JJ.

c. Adequate in its balance: Any burden on political communication effected by the protest prohibition is slight and is justified in the light of its objects.

Compatibility of purpose

5. Unlike the Victorian Act, the Act does not contain an express statement of the objects of the protest prohibition. Those objects emerge from a consideration of its text and context: see Clubb Submissions at [9]. For the reasons that follow, they are the same as those of s 185D of the Victorian Act, namely:

    a. a "narrow" purpose – protecting clients and employees from the emotional and psychological harm that might arise as a direct result of the prohibited communications; and

    b. a "broader" purpose – ensuring that clients are not deterred or delayed by the prohibited communications from accessing medical services.

6. Relevantly for present purposes, the offence under s 9(2) contains the following elements:

    a. a protest;

    b. in relation to terminations;

c. occurring within an "access zone", meaning "an area within a radius of 150 metres from premises at which terminations are provided";

d. that is able to be seen or heard by a person accessing, or attempting to access, premises at which terminations are provided.

7. The element at paragraph d supports the "narrow" purpose. If the aim of the provision were merely to stifle anti-abortion protests (as suggested at AS [53]), then there would be no need for the requirement that the protest be "able to be seen or heard" at all. Moreover, the requirement is that the protest be able to be seen or heard "by a person accessing, or attempting to access" the relevant premises. Such persons will predominantly be clients or employees of the service. They are vulnerable to such protests emotionally (in that it is their conduct that is the subject of the protest) and physically (in that they have to confront such protests to access the service or their workplace). The inclusion of the element at paragraph d reveals that the legislature's purpose was to protect such persons from the consequences of the protest.

8. Unlike the Victorian Act, the Act does not expressly indicate the consequences sought to be avoided – it is not an element of the offence that the protest be reasonably likely to cause "distress or anxiety". But the consequences sought to be avoided are made clear by the Second Reading Speech. There, the Minister referred to a study suggesting that patients experience "considerable distress, shame and anxiety in response to protestors" and "77.8 per cent of the patients interviewed felt stigmatised by the protests, even where they had received significant support from family, friends and partners in respect of their decision to terminate a pregnancy": Second Reading Speech, p 50. The study is described in more detail in the Respondents' Submissions ("RS") at [36]-[40].

9. The Second Reading Speech also confirms the "broader" purpose. The Minister referred to protestors who have the purpose of "dissuading or delaying a woman from accessing a legitimate reproductive health service": Second Reading Speech, p 51. The concern was not just that the protests might cause distress or anxiety, but that as a result clients might be dissuaded or delayed from accessing health services.

10. This broader purpose is also reflected in the fact that the protest prohibition was introduced as part of a suite of measures designed to ensure "access to terminations"

(as the title to Part 2 of the Act suggests: see Acts Interpretation Act 1931 (Tas) s 6(2)). Those measures are explained at RS [10]-[26], and included decriminalising terminations performed in certain circumstances (ss 8, 14). Speaking about the Act generally, the Minister noted that "without the provision of a full range of safe, legal and accessible reproductive health services, women experience poorer health outcomes" (Second Reading Speech, p 44) and that "[i]mproving access to terminations for women in Tasmania is part of a broader strategy to improve the sexual and reproductive health of all Tasmanians, especially vulnerable populations" (p 51).

10 11. The fact that s 9 uses the word "protest" does not support the proposition that its real purpose was to prohibit political communication, and particularly those that are anti-abortion. First, the protest prohibition is capable of applying to pro-abortion protests. Contrary to AS [42], even if the ordinary meaning of "protest" applies, a protest may be pro-abortion (eg a placard stating "My Body, My Choice") but still be a protest "in relation to terminations" as s 9 requires. Secondly, although in practice the burden of the protest prohibition is more likely to fall on anti-abortion rather than pro-abortion protests, that is consistent with the objects described above. An anti-abortion protest is more likely than a pro-abortion protest to cause emotional or psychological harm to clients and employees, and deter or delay clients from accessing termination services.
20 Like the provisions in Brown v Tasmania (2017) 91 ALJR 1089, s 9 prohibits "protests" not because they are considered to be undesirable per se but because they "are seen as the potential source of such harm" (at [99] per Kiefel CJ, Bell and Keane JJ).

Necessity

12. At AS [62]-[70] the Appellant describes a number of alternatives that are said to be "equally practicable, less burdensome". It must be demonstrated that these alternatives would be equally effective in achieving the objects of the protest prohibition: see Clubb Submissions at [18]. Further, the alternatives must be "obvious and compelling" – the Court is not concerned to substitute its own judgment
30 for that of the legislature: Clubb Submissions at [19].

13. The first alternative raised at AS [65] is the prohibition, found in the Act itself, on "besetting, harassing, intimidating, interfering with, threatening, hindering,

obstructing or impeding" a person ("the harassment prohibition"). That alternative might be less burdensome, because it proscribes a narrower category of communications. But it would not be as effective in achieving the objects described above, for the reasons given by the Attorney General for Victoria in *Clubb* at [55]-[58]. An additional reason is that the harassment prohibition (at least arguably) requires proof that a particular person was actually harassed, intimidated (etc): see, in relation to a different "intimidation" offence, Director of Public Prosecutions (NSW) v Best [2016] NSWSC 261 at [31]-[33], [50] (concerning s 60(1) of the Crimes Act 1900 (NSW)). By contrast, the protest prohibition does not require proof that the
10 protest had an adverse effect on a particular person, or even that the protest was witnessed by a particular person – it need only be "able to be seen or heard". That aspect of the protest prohibition is important in addressing the relevant harm. It targets the harmful behaviour before the harm actually arises. It also means that, even where the protest has been witnessed by a person accessing/attempting to access the premises, the harm to that person is not exacerbated by them having to give evidence in any prosecution.

14. The second alternative raised at AS [67] is that the protest prohibition be redrafted to require that the protest be "reasonably likely to cause shame to such a person". Another alternative, of course, is the requirement in the Victorian Act that the
20 communication be "reasonably likely to cause distress or anxiety". However, it is not "obvious" that such a requirement would render the protest prohibition less burdensome: see Clubb Submissions at [19]. Most, if not all, "protest[s] in relation to terminations" would be reasonably likely to cause distress or anxiety to those accessing/attempting to access the relevant premises, especially having regard to the vulnerable state of persons in that position. The Appellant accepts as much at AS [48] (adopting Ms Clubb's submission at [38]) in submitting: "many, perhaps most, communications about abortions seen or heard by [persons entering or leaving premises at which abortions are provided] are apt to cause that person distress or anxiety". This was also the view adopted by the Magistrate at CAB 39 [48].

30 15. The third alternative raised at AS [69(a)] is a defence that the protest "in fact had no relevant adverse effect". Apart from the problems identified at RS [87], this would render the protest prohibition less effective in achieving the objects described above. In practice this would mean that prosecutions could only be brought where a person

accessing/attempting to access the premises was actually distressed as a result of the protest. In those circumstances, the harm sought to be avoided is already done. As submitted at [13] above, the protest prohibition is aimed at addressing the harm before it arises; not simply punishing the perpetrator once the harm has occurred.

16. The fourth alternative raised at AS [69(b)] is a defence that the protest was engaged in "with the consent of any person able to see or hear the protest". This is unlikely to be less burdensome. It is difficult to imagine circumstances in which a person accessing/attempting to access the relevant premises would consent to a protest in relation to terminations. It is also difficult to imagine how a protestor could obtain the fully informed consent of anyone accessing/attempting to access the premises without engaging in the very conduct that is prohibited (eg by explaining the content of the placard or the leaflet) and thereby inflicting the very harm sought to be avoided.

17. The fifth alternative raised at AS [69(c)] is to carve out "political communications". This would obviously render the protest prohibition less effective in achieving its objects. A protest in relation to terminations may be "political" (in the sense described in the Clubb Submissions at [5]) but still be reasonably likely to cause the harm described above.

18. The sixth alternative raised at AS [69(d)] is to carve out communications in or near the Tasmanian Parliament, as s 98F(1)(b) of the Public Health Act 2010 (NSW) (the "NSW Act") does in relation to Parliament House on Macquarie Street in Sydney. However, in the present case there is no evidence that there are any access zones within close proximity to the Tasmanian Parliament. The access zone at issue here was at least a block away from Parliament House: Respondents' Further Materials ("RFM"), p 233. By contrast, the parliamentary debates on the Public Health Amendment (Safe Access to Reproductive Health Clinics) Bill 2018 (NSW) record that there are two abortion clinics on Macquarie Street: Parliament of NSW, Legislative Assembly, *Hansard* (7 June 2018), p 10.

19. The seventh alternative raised at AS [69(e)] is to carve out communications by or with the authority of a candidate during an election or referendum, as s 98F(1)(c) of the NSW Act does. A decision to adopt or not adopt such an exclusion falls within the range of available policy choices, about which different legislatures may reasonably adopt different views. As submitted in the Clubb Submissions at [19], the "necessity"

assessment "does not involve a free-ranging enquiry as to whether the legislature should have made different policy choices": Brown at [139] per Kiefel CJ, Bell and Keane JJ.

20. The last alternative raised at AS [69(f)] is a carve out for protests made "with the consent of the landowner". Of course, the land on which the relevant premises are situated may be owned by a party other than the one providing the termination services. The landowner may well take a different view from the provider about the scope of appropriate protest. The issuing of consent by the landowner would not necessarily alleviate the harm caused to clients and employees. Again, a provision in
10 these terms would be less effective in achieving the objects described above.

Adequacy of the balance

21. As in *Clubb*, any burden on political communication (as defined at [5] of the Clubb Submissions) effected by the protest prohibition is slight.

22. First, the protest prohibition is more likely to affect non-political rather than political communications: see Clubb Submissions at [7]. The communications caught by the protest prohibition are more likely to be aimed at affecting a personal and private medical choice, rather than at encouraging "fellow citizens and voters" to vote or lobby against abortion. This is illustrated by the Appellant's evidence about his own motive, which was to challenge and inform women entering the clinic for the
20 purposes of having a termination and to prevent the termination from occurring (RFM 197, 201-202).

23. The Appellant asserts that a person who is dissuaded from having an abortion will likely change their views on the legality of abortion (AS [48], adopting Ms Clubb's submissions at [34]). Obviously, those who decide abortion is not right for them will not necessarily wish to preclude others from accessing such a service. In this context, a personal choice has no necessary connection with a political view. The Appellant's submission that political communications about abortion are "most effective" at abortion clinics is based upon mere assertion (AS [48], adopting Ms Clubb's submissions at [37]). There is no evidence that abortion clinics in Tasmania
30 historically have been used for *political* communication. This is to be contrasted with the circumstances in Brown, where there was a "history of on-site political protests on Crown land in Tasmania, directed to bringing about legislative or regulatory change

on environmental issues" (at [191] per Gageler J), and evidence that such protests had succeeded in that regard (at [33] per Kiefel CJ, Bell and Keane JJ, [240] per Nettle J).

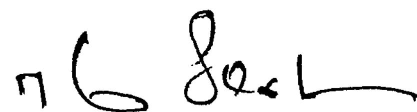
24. Secondly, to the extent that the protest prohibition does affect political communications, it only regulates the manner and place of such communications. Like the Victorian Act, it prohibits the making of those communications in access zones, but not in any other public place. Even where a communication takes place within an access zone, such a communication is not prohibited unless it is able to be seen or heard by persons accessing or attempting to access the relevant premises. Like the Victorian Act, the protest prohibition would not prohibit a sermon about abortions conducted inside a church within an access zone, or friends discussing the issue at a restaurant or pub within an access zone, provided those communications could not be heard outside the building: Second Reading Speech, p 50.

25. As in *Clubb*, this slight burden is justified in the light of the objects described above: Clubb Submissions at [25].

Part IV Estimate of time

26. The NSW Attorney estimates that 15 minutes will be required for the making of oral submissions on his behalf.

Date: 10 August 2018



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