IN THE HIGH COURT OF AUSTRALIA

No H2 of 2018

HOBART REGISTRY

BETWEEN:

JOHN GRAHAM PRESTON

Appellant

And

ELIZABETH AVERY

First Respondent

SCOTT WILKIE

Second Respondent

SUBMISSIONS OF

THE ATTORNEY-GENERAL OF THE NORTHERN TERRITORY

(INTERVENING)

Filed on behalf of the Attorney-General of the Northern Territory (intervening)

Dated: 10 August 2018

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PART I CERTIFICATION

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

PART II INTERVENTION

2. The Attorney-General of the Northern Territory (**Territory**) intervenes under s78A of the *Judiciary Act 1903* (Cth) in support of the respondents and the validity of the *Reproductive Health (Access to Terminations) Act 2013* (Tas) (**Reproductive Health Act**).

PART III SUBMISSIONS

Introduction

3. Section 9(2) of the Reproductive Health Act, read with the definitions of "access zone" and "prohibited behaviour" in s9(1), prohibits within a radius of 150 meters from premises at which terminations are provided, certain categories of behaviour including: "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" (**protest behaviour**). The question raised by the appellant is whether s9(2) of the Reproductive Health Act impermissibly burdens the implied constitutional freedom of political communication to the extent that it prohibits protest behaviour not falling within another category of prohibited behaviour.
4. The principles governing that question and the analytic framework for their application as stated in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520[1] and explained in *McCloy v New South Wales* (2015) 257 CLR 178[2] are examined in some detail in the submissions of the Attorney-General of the Commonwealth in the related proceedings.[3] The Territory adopts, generally, that exposition of the governing principles.
5. The appellant does not challenge the validity, generally, of legislation regulating or prohibiting conduct in proximity to premises at which terminations are provided (**access zone laws**) or of paragraphs (a), (c)-(e) of the definition of prohibited behaviour in s9(1) of the Reproductive Health Act in particular. The exclusive focus of the

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[1] See esp, at 561-562.

[2] See esp, at [2] as qualified in *Brown v Tasmania* (2017) 91 ALJR 1089 at [104].

[3] *Clubb v Edwards* M46 of 2018.

appellant's challenge is the prohibition against protesting in relation to terminations (appellant's submissions (**AS**) [2], [7]-[8]).

6. These submissions develop a single line of argument in support of the prohibition against protest behaviour. We identify the critical role of a comprehensive analysis of legislative context at all levels of the analytic framework. In summary:
   (a) The object and purpose of the prohibition cannot be properly examined without regard to legislative context. The objects of the law are clear and unmistakable when considered in context (cf AS [50]).
   (b) The practical operation of the prohibition and the nature and extent of any burden on the freedom are also illuminated by context. Once context is considered, there is no room for an argument that the burden is direct or intense (cf AS [49]).
   (c) Necessity testing of the prohibition cannot proceed without regard to context. That context shows why the appellant's alternative laws are not equally practicable or less burdensome on the constitutional freedom (cf AS [63]).
7. Legislative context is considered in some detail in the submissions of the respondents (**RS**) (at [27]-[46]). The Territory adopts and supplements the respondents' analysis. We identify inattention to legislative context as the primary failing in the appellant's case.
8. The Territory adopts the submissions of the respondents, generally, and in particular on the issues of construction arising under the Reproductive Health Act (at RS [21], [65]).

Legislative context

9. Legal analysis of the Reproductive Health Act should begin with the context in which it was introduced on 12 February 2014. The practical operation of a law, its purpose, and constitutional validity are informed by legislative context and history.[4] As McHugh J said in *Theophanous v Herald Weekly Times Ltd* (1994) 182 CLR 104 at 196:

> The true meaning of a legal text almost always depends on a background of concepts, principles, practices, facts, rights and duties which the authors of the text took for granted or understood, without conscious advertence, by reason of their common language or culture.

10. Those comments are particularly apposite in the context of the Reproductive Health Act, the subject-matter of which has a long and controversial history of regulation.

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[4] *McCloy v State of New South Wales* (2015) 257 CLR 178 at [51] per French CJ, Kiefel, Bell and Keane JJ, [173]-[176] per Gageler J; *Brown v State of Tasmania* (2017) 91 ALJR 1089 at [143] per Kiefel CJ, Bell and Keane JJ, [191] per Gageler J, [240], [244]-[247] per Nettle J, [321] per Gordon J.

11. Historically, abortion has been a crime in Australia generally and Tasmania in particular.[5] A criminal regulatory model was inherited from the United Kingdom and goes back at least as far as the *Malicious Shooting or Stabbing Act 1803* (UK) 43 Geo 3 c 58. Criminal laws in all jurisdictions in Australia were substantially modelled on, or similar to, ss58 and 59 of the *Offences Against the Person Act 1861* (UK) which prohibited women from procuring abortions and others from providing assistance. Only limited exception on the grounds of medical necessity was afforded under this historic criminalisation regulatory model.[6]

12. More recently, there has been a legislative and judicial trend towards greater recognition of circumstances in which medical terminations may be procured lawfully.[7] There has also been a legislative movement in Australia towards regulating abortion outside of the criminal law.[8]

13. Tasmania reflects these national trends. Historically, abortion was criminalised under ss134-135 and 165 of the *Criminal Code Act 1924* (Tas) with only limited exception allowed on grounds of medical necessity.[9]

14. In 2001 the *Criminal Code Amendment Act (No 2) 2001* (Tas) was passed which introduced a statutory defence of legal justification for an offence under ss134-135 or 165 in prescribed circumstances on medical grounds.[10] The prescribed circumstances required that two medical practitioners certify in writing that the continuation of the pregnancy would involve greater risk of injury to the physical or mental health of the pregnant woman than if the pregnancy were terminated. That position remained the

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[5] See M Rankin, "The Disappearing Crime of Abortion and the Recognition of a Woman's Right to Abortion: Discerning a Trend in Australian Abortion Law?" (2011) 13 *Flinders Law Journal* 1. See also Victorian Law Reform Commission, *Law of Abortion: Final Report* (2008) (**VLRC Report**), Ch 2.

[6] See, eg, *R v Bourne* [1939] 1 KB 687 at 694; *R v Davidson* [1969] VR 667 at 671-672 per Menhennitt J; *R v Wald* (1971) 3 DCR (NSW) 25 at 29 per Levine J; *Veivers v Connolly* [1995] 2 Qd R 326; *Criminal Law Consolidation Act 1935* (SA) s 82A;

[7] See, eg, *Criminal Law Consolidation Act 1935* (SA) s 82A; *Medical Services Act* (NT) s 11; *Health Act 1911* (WA) s 334; *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47 at 65 per Kirby ACJ; *Veivers v Connolly* (1995) 2 Qd R 326 at 329. See M Rankin, "The Disappearing Crime of Abortion and the Recognition of a Woman's Right to Abortion: Discerning a Trend in Australian Abortion Law?" (2011) 13 *Flinders Law Journal* 1.

[8] See,eg, *Crimes (Abolition of the Offence of Abortion) Act 2002* (ACT); *Health Act 1993* (ACT) Div 6.1; *Medical Services Act* (NT) s11; *Health Act 1911* (WA) s334.

[9] As to the offence under s165 of the *Criminal Code Act 1924* (Tas), see s165(2). As to ss134-135, see fn 6.

[10] *Criminal Code Act 1924* (Tas) s164 (as in force from 24 December 2001 to 11 February 2014).

law in Tasmania until the Reproductive Health Act came into force on 12 February 2014.

15. The Reproductive Health Act repealed the offence provisions under ss134-135 and 165 of the *Criminal Code Act* along with the exception under s165. It replaced them with the scheme described by the respondent at [10]-[26] of the respondents' submissions which summary the Territory adopts.

16. When enacting the Reproductive Health Act the Minister for Health referred in her Second Reading Speech to this history of regulation in Tasmania[11] and to the experience of other jurisdictions.[12] Legislative change in Tasmania has been introduced in a context informed by the experience in other States and Territories.

17. Legislative change in Tasmania, and elsewhere, reflects developments in medical practices and technology which have improved the accessibility and safety of medical terminations, as well as changing social values or prioritisation of social values relating to female autonomy and competency to make medical decisions affecting their health and wellbeing.[13]

18. The change has not been universally accepted or welcomed in Tasmania. The politics and ethics of abortion remain divisive. It is a controversial subject-matter for regulation with many different views held by segments of the community.[14] Protests and demonstrations outside abortion clinics in Tasmania, elsewhere in Australia, and internationally are notorious.[15]

19. Despite empirical data showing that medical terminations are a common gynaecological experience,[16] abortion remains the subject of considerable stigma and taboo. Women having abortions commonly do not feel comfortable disclosing or publicising that they have done so. Empirical data also shows that the vast majority of women accessing abortions (almost 80% of study participants) report that abortion is

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[11] Tasmania, Parliamentary Debates, House of Assembly, 16 April 2013 (**Second Reading Speech**), pp44-45.

[12] See, eg, Second Reading Speech, pp46-47.

[13] Second Reading Speech, pp44-45; Department of Health and Human Services, Information Paper Relating to the Draft Reproductive Health (Access to Terminations) Bill (March 2013) (**Information Paper**), pp4, 9.

[14] VLRC Report, p148.

[15] See the discussion at VLRC Report, pp138-139. See also Submissions of the Attorney-General for the State of Victoria in the related proceedings at [18].

[16] A Humphries, 'Stigma, Secrecy and Anxiety in Women Attending for an Early Abortion' (Clinical Masters Thesis, University of Melbourne, 2011) (**Humphries Thesis**), p2.

very much stigmatised by protesters with more than 70% reporting that laws allowing protesting outside abortion clinics greatly stigmatise abortion.[17] Stigma is associated with pre- and post-abortion anxiety and mental illness. The deleterious impact on women seeking an abortion caused by the presence of protesters outside clinics is more closely related to the subjective emotional response of the women rather than the particular nature of the protesters' behaviour.[18] This means that the anxiety and mental health consequences in women seeking abortion is not directly proportionate to the degree of assertiveness or aggressiveness of the conduct of protesters (such as harassing or obstructing access).

20. This empirical data was expressly recognised as informing the passage of the Reproductive Health Act.[19]

21. Further, it is in the nature of abortion decision-making that it is deeply personal and often complex. Women attending clinics to discuss, prepare for or procure medical terminations do so at a time of vulnerability and heightened susceptibility to anxiety and adverse mental health consequences.[20]

22. From the above, the following matters of context should be accepted:
    (a) Decriminalisation of medical terminations is a relatively recent legislative development. Until recently abortion has been a serious criminal offence.
    (b) Social stigma, taboo, shame and anxiety surround medical terminations.
    (c) Most women are not comfortable disclosing or publishing that they have considered or procured a medical termination.
    (d) The vast majority of women accessing medical terminations are adversely affected by the presence of protesters outside abortion clinics regardless of the conduct or actions of those protesters.

Object and purpose of the prohibition

23. Legislative context informs the purpose of s9(2) of the Reproductive Health Act. Examined against the above context, the objects of prohibiting certain kinds of

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[17] Humphries Thesis, p35.

[18] Humphries Thesis, p36 referring to Cozarelli et al, 'Women's experience of and reactions to antiabortion picketing' (2000) 22 *Basic and Applied Social Psychology* 265.

[19] Second Reading Speech, pp50.

[20] This is accepted by the appellant: AS [48] referring to [38] of the appellant's submissions in the related proceedings.

behaviours in proximity to places where medical terminations are provided are clear and unmistakable.

24. The main object is to protect the safety and wellbeing, including the emotional safety and emotional wellbeing, of persons accessing and leaving abortion clinics and to ensure that women may access and doctors may provide terminations without exposure to or fear of intimidation, harassment, obstruction or anxiety. Allied to that main objective is the aim of protecting the privacy, dignity and autonomy of persons accessing clinic services and persons providing those services. A complete understanding of this statement of purpose is informed by the contextual factors referred to above from which it arises.

25. The law is not reducible to a single purpose; a point which is hardly surprising given the competing views and interests involved in the subject-matter with which it deals.[21]

26. The above statement of purpose finds express reference in the Second Reading Speech[22] and the Information Paper[23] prepared as part of the consultation process preceding enactment of the Reproductive Health Act. It is consistent with the expressly stated objects of analogous laws in Victoria[24] and New South Wales.[25]

27. The appellant's apparent inability to discern the object of the law (AS [50]) by the ordinary processes of statutory construction[26] stems from the appellant's failure to consider the legislative context described above. The various purposive characterisations of the law suggested by the appellant as being a law for the purpose of deterring certain kinds of speech (AS [51], [52], [56]), or handicapping or inhibiting one side of the abortion debate (AS [53]), conflate the practical application of the law (what it (potentially) does in fact) with its object (why it has been enacted). The

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[21] See *CFMEU v Mammoet Australia Pty Ltd* (2013) 248 CLR 619 at [40]-[41] per the Court.

[22] Second Reading Speech, pp50-51.

[23] Information Paper, p14.

[24] *Public Health and Wellbeing Act 2008* (Vic) s185A: 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 people accessing the services provided at those premises and employees and other persons who need to access those premises in the course of their duties and responsibilities.

[25] *Public Health Act 2010* (NSW) s98B(b): to ensure that people are able to enter and leave reproductive health clinics at which abortions are provided without interference, and in a manner that protects their safety and well-being and respects their privacy and dignity, including employees and others who need to access such clinics in the course of their duties and responsibilities.

[26] *Unions NSW v New South Wales* (2013) 252 CLR 530 at [50] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.

concepts are related – what the law does may illuminate its purpose[27] – but necessarily discrete. The very nature of proportionality testing as to the suitability of the law assumes the prospect of divergence between the two.[28] The appellant's challenge that the protest prohibition fails suitability testing cannot be maintained once the law's purpose is understood in context.

Practical operation of the access zone laws – effective burden

28. Legislative context similarly informs an analysis of the practical operation of s9(2) going to the question whether the law effectively burdens the freedom of political communication and, if so, the nature and extent of the burden.

29. The appellant characterises the burden on political communication as "intense" and "direct" (AS [49]). The submission as to directness proceeds from the appellant's erroneous conflation of the object of the law with its practical application and has been answered above. For that reason, any burden is better characterised as incidental to the protective purposes of the law as identified at paragraph 24 above.

30. The submission as to intensity proceeds from bare assertion in the related proceeding that:[29] (1) the expression of views regarding abortion at or near premises where abortions are provided is a characteristic feature of the abortion debate; (2) political communication at or near such premises is most effective because stakeholders are present and focussed on the issue; and (3) it would be reasonable to conclude that a significant proportion of protesters believe that political communication at or near such premises is the best way to influence public opinion.

31. The submission is answered in reply by the Attorney-General for Victoria in the related proceedings (at [8]-[10]) which the Territory adopts here. Further, the merit of the appellant's submissions can be tested against *Brown v Tasmania* (2017) 91 ALJR 1089 (***Brown***).

32. In *Brown*, this Court recognised the "long history of political protests in Australia … concerning environmental issues … on Crown land".[30] Evidence was adduced and accepted that onsite protesting and broadcasting of images was the *primary means* of

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[27] *Leask v Commonwealth* (1996) 187 CLR 579 at 591, 602-603.

[28] *Brown v Tasmania* (2017) 91 ALJR 1089 (***Brown***) at [135]-[136] per Kiefel CJ, Bell and Keane JJ.

[29] AS [48] referring to [35]-[40] of the appellant's submissions in the related proceedings.

[30] *Brown* at [32] per Kiefel CJ, Bell and Keane JJ. See also [106] per Kiefel CJ, Bell and Keane JJ, [191] per Gageler J, [240], [270] per Nettle J.

bringing environmental issues to the attention of the public.[31] It was agreed that historically onsite protesting had been used to bring about political and legislative change on environmental issues and as a catalyst for location-specific environmental protection.[32]

33. The politics of abortion do not share those same features. In the first place, decriminalisation is recent and onsite protesting against abortions in Tasmania does not have a long history, successful or otherwise. More importantly, the suggested reason for onsite protesting (proximity to stakeholders) supports an argument for the importance of being able to protest outside Parliament and polling booths where the relevant stakeholders are to be found. The appellant conflates communication of the politics of abortion (which the freedom protects) with communication directed at individual abortion decision-making (which the freedom does not protect). The link between place and politics in *Brown* was the importance of onsite visual images. They are not a critical component of the abortion debate. Indeed, the appellant does not even challenge those aspects of the access zone law relating to the prohibition against the recording of images.[33] Further, site-specific protesting is not necessary to bring attention to the issue in the same way as in the environmental context where particular issues are site-specific and may be unknown in the wider community. The politics of abortion are the same everywhere. Accordingly, the submission that an attack on abortion protesting within an access zone is an attack on abortion protesting at its most effective is without merit and lacks evidential foundation. The contrast between the legislative contexts in *Brown* and the present case denies force to the appellant's reliance on the reasoning in *Brown*.

Equally practicable less burdensome alternatives – necessity

34. Legislative context is relevant to the question whether necessity testing is appropriate and, if it is, to an examination whether there are obvious and compelling alternative measures of significantly lesser burden.[34]

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[31] *Brown* at [32] per Kiefel CJ, Bell and Keane JJ. See also [117] per Gageler J, [240] per Nettle J.

[32] *Brown* at [33] per Kiefel CJ, Bell and Keane JJ, [192]-[193] per Gageler J,

[33] *Reproductive Health Act*, s9(1) (definition of "prohibited behaviour" par (d)).

[34] *Brown* at [282] per Nettle J.

35. The context set out above shows why (cf AS [65]) a prohibition in terms of paragraph (a) of the definition of prohibited behaviour in s9(1) of the Reproductive Health Act is insufficient for the law's purposes. First, a prohibition in those terms alone would not protect women already vulnerable to mental harm in these circumstances from exposure to conduct of the kind identified by the Minister in the Second Reading Speech (vocal anti-choice protesting or silent 'vigil' protests)[35] which conduct stigmatises abortion, resulting in increased anxiety, shame, distress and other mental harm. The empirical foundation on which the law is based denies the appellant's underlying premise that peaceful protesting or protesting which does not harass, intimidate, or threaten etc is objectively less harmful. Secondly, by allowing certain protesting behaviour to occur outside clinics, the law would be seen to stigmatise abortions. The effect of maintaining the stigma around abortions preserves a social environment in which women are anxious about or unwilling to access medical terminations. The policy shift in the law away from criminalisation would be frustrated if the law did not afford conditions under which women can feel safe while accessing medical termination services and that their autonomy is being respected. Finally, the practicality of a prosecution under paragraph (a) should be considered. Proof beyond reasonable doubt would expose already vulnerable women to cross examination about their subjective experience of the protester's conduct with a view to showing that their subjective experience of harm was invalid measured against an objective standard of harassment or intimidation etc. Giving evidence in this manner would require a derogation from their right to privacy around a sensitive and controversial issue like abortion. It is entirely likely that the unwillingness of women to expose themselves in such a way would in many cases impede the proper enforcement of the prohibition.

36. Legislative context similarly demonstrates why further conditioning of the prohibition against protest behaviour to require that the protest "is reasonably likely to cause shame to such a person" in the manner submitted by the appellant (AS [67]) is not a real alternative. The empirical foundation on which the law is based supports a legislative (rather than a curial) determination that all protest behaviour to which women accessing abortion clinics are exposed is reasonably likely (almost 80% of the research sample) to cause them shame and anxiety. As with drug offences, the law acts upon and

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[35] Second Reading Speech, p50. See also the submissions of the Attorney-General for the State of Victoria in the related proceedings at [56]-[58].

criminalises a statistical likelihood of harm. If (which is denied) there is any room for a curial determination that a particular protest was not reasonably likely to cause shame, the result is to introduce a layer of enforcement uncertainty[36] to the offence which, as the appellant in the related proceedings argues (at [44](a)), imposes a greater burden than one which is certain.

37. The remaining proposed alternatives are sufficiently addressed in respondents' submissions (at [81]-[97]) which responses the Territory adopts. The range of those alternatives highlight that what the appellant is really doing is "inviting the Court to undertake an hypothetical exercise of improved legislative design".[37] The invitation should be rejected. None of the alternatives are obvious and compelling alternative measures of significantly lesser burden which achieve or recognise the complex purposes of the access zone laws.

PART V TIME ESTIMATE

38. Ten minutes will be required for the presentation of the intervener's oral argument.

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[36] See, by analogy, *Brown* at [79], [86]-[87].

[37] *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027 at [39] per French CJ and Bell J. See also *Brown* at [282] per Nettle J.