IN THE HIGH COURT OF AUSTRALIA
TASMANIAN REGISTRY

No H2 of 2018

BETWEEN:

JOHN GRAHAM PRESTON
Appellant

and

ELIZABETH AVERY
First Respondent

SCOTT WILKIE
Second Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR VICTORIA (INTERVENING)

PART I: CERTIFICATION

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

PART II: BASIS FOR INTERVENTION

2. The Attorney-General for the State of Victoria intervenes in these proceedings pursuant to s 78A of the *Judiciary Act* 1903 (Cth) in support of the respondents.

PART III: REASON WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV: ARGUMENT

A. INTRODUCTION: DIFFERENCES BETWEEN THE TASMANIAN LEGISLATION AND THE VICTORIAN LEGISLATION

4. The legislation in issue in this appeal is s 9 of the *Reproductive Health (Access to Terminations) Act 2013* (Tas) (the **Tasmanian Act**). Although the language of the

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prohibition in s 9 is somewhat different from the prohibition in issue in *Clubb v Edwards*,[1] the Attorney-General contends that those differences do not compel a different outcome.

5. First, it may be noted that, broadly speaking, the terms and structure of s 9 of the Tasmanian Act are the same as ss 185B and 185D of the *Public Health and Wellbeing Act 2008* (Vic) (the **Victorian Act**). Each Act prohibits certain behaviours in an area within a radius of 150 metres from premises at which abortions are provided.[2] The lists of "prohibited behaviours" in the respective Acts are similar, but not identical.

6. Relevantly, the following differences between the provisions should be noted:

   (1) Unlike the Victorian Act, the Tasmanian Act does not expressly state the object of the access zones provisions or of the Act more generally.

   (2) Paragraph (b) of the definition of "prohibited behaviour" in s 9(1) of the Tasmanian Act expressly applies to "protest", while the equivalent provision in s 185B of the Victorian Act regulates the act of "communicating".

   (3) The Tasmanian provision does not require the protest to be of a kind that is reasonably likely to cause distress or anxiety, whereas the Victorian provision requires the communication in question to be of that kind.

7. Despite these differences, the challenges to the validity of the two provisions are substantially the same, as are the reasons why each provision should be found to be valid. The protest prohibition has a minimal impact on political communication. To the extent that it does impact on political speech, the prohibition has been introduced for a legitimate and compelling purpose.

8. In light of the above, for the purposes of this proceeding the Attorney-General adopts his submissions in *Clubb* dated 11 May 2018, and adds the following further submissions.

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1 Matter No M46 of 2018.

2 The Victorian Act uses the term "abortions", whereas the Tasmanian Act uses the term "terminations". The definition of "abortion" for the purposes of the Victorian Act (found in s 3 of the *Abortion Law Reform Act 2008* (Vic)) is slightly different from the definition of "terminate" in s 3(1) of the Tasmanian Act, but nothing turns on this for the purposes of the constitutional argument.

B. PURPOSE OF THE TASMANIAN ACCESS ZONE PROVISIONS

9. As noted above, the Tasmanian Act does not expressly state the object of the access zones provisions. However, the Attorney-General agrees with the Respondents' Submissions at [41] that the object of the Tasmanian provisions, ascertained from the text and context of those provisions and their history and extrinsic materials, is substantively the same as that of the Victorian scheme — namely, the protection of women, staff and others accessing premises at which terminations are provided by the creation of access zones. That protection is not limited to the physical safety of persons accessing such premises, but extends to the protection of their mental and emotional wellbeing.

10. Generally, the Attorney-General adopts the Respondents' Submissions at [29]-[46] in relation to the purpose of the protest prohibition. Specifically, the Attorney-General notes that the Minister referred to a study (being the same study referred to in the second reading speech for the Victorian Bill) which "indicated that patients experience considerable distress, shame and anxiety in response to protestors".[3] Similarly, as the Respondents note at [34], the Information Paper for the Bill explained that the behaviour targeted by the Bill — including protest activity — "jeopardises the safety and wellbeing of the woman, her friends, partners, families, and other support persons, as well as health service providers".[4]

11. Importantly, as with the Victorian law, the legislative object is not limited to preventing "traditional" forms of harassment and intimidation, which are targeted by paragraph (a) of the definition of "prohibited behaviour" in s 9(1). More subtle forms of intrusive conduct — including so-called "peaceful protest" — may also cause harm. As the Minister observed, "there is nothing peaceful about shaming complete strangers about private decisions made about their bodies".[5]

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3 Tasmania, Legislative Assembly, *Parliamentary Debates*, 16 April 2013 (**Second Reading Speech**) at 49-50.

4 Tasmania, Department of Health and Human Services, *Information Paper relating to the Draft Reproductive Health (Access to Terminations) Bill* (March 2013) at 14.

5 Second Reading Speech at 50.

C. CONSTITUTIONAL ANALYSIS

Step 1: Does the law burden the freedom?

12. Legislation directed at "protest" naturally raises the question of the implied freedom. But each case requires careful analysis.[6] The term "protest" covers a range of activities. The regulation of protest activity may, in truth, impose a minimal burden on the freedom. That is so here.

13. *First*, although protest about abortion may amount to political speech, a protest that seeks to do nothing more than influence the decision-making of individual women in relation to a specific medical decision (to terminate a pregnancy) will not. Thus, while the legislation uses the word "protest", it cannot be assumed that all such protests in this context will amount to political speech.

14. *Second*, protest is still permitted; just not within an access zone and in sight and/or sound of relevant premises. Indeed, activity aimed at deterring women from choosing to terminate a pregnancy is also unaffected provided it occurs outside an access zone. What is denied is the ability to target women at the time they are seeking to access a lawful medical service. That does not affect the ability of a protester to communicate his or her message to the world at large — as long as the protester is out of sight or hearing of the clinic or outside the access zone. Nor is there any impact on the ability of voters to freely choose their elected representatives.[7]

15. *Third*, the Attorney-General adopts the submissions of the Respondents at [64]-[66] that the language of the protest prohibition is viewpoint neutral (cf the Appellant's Submissions at [42]).

Step 2: Is the purpose of the law legitimate?

16. As the Respondents contend in their Submissions at [68], the purpose of the law is to protect the privacy, wellbeing and dignity of persons, particularly women, entering and leaving premises at which terminations are provided. That is a legitimate end, for the reasons given by the Attorney-General in his submissions in *Clubb* at [38]-[45].

17. In the Appellant's Submissions at [51]-[58] he identifies a series of what he says are possible objects of the law. However, those postulated "objects" pay no real attention to the text and context of the law, nor to the extrinsic materials (other than to take out

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6 *Brown v Tasmania* (2017) 91 ALJR 1089 at 1106 [61] (Kiefel CJ, Bell and Keane JJ).

7 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560 (the Court).

of context certain statements found in the extrinsic materials or the Magistrate's reasons). Those postulated "objects" ought to be rejected by the Court. However, one of them requires further attention.

18. In the Appellant's Submissions at [56] he contends that deterring shame is not a legitimate end. That submission is based on discerning the purpose of the law from the second reading speech, where the Minister referred to "protecting women from being exposed to those who seek to shame and stigmatise them".[8] Putting to one side the irrelevant examples of the use of the word "shame" in Parliament or at the constitutional conventions in the 1890s, two responses may be made to this submission:

(1) *First*, the harm caused by anti-abortion protesters is not confined to, and the purpose of the law is not confined to preventing, the shaming of women who seek abortions. Rather, as noted above, the purpose of the law is to protect the privacy, wellbeing and dignity of persons, particularly women, entering and leaving premises at which terminations are provided.

(2) *Second*, to the extent that the Tasmanian Act has as (one of) its purposes the prohibition of behaviour that shames and stigmatises women within an access zone, the end is legitimate. The infliction of shame and stigmatisation on a woman seeking an abortion causes harm: it may lead to a delay in seeking access to services, can cause adverse health effects, and intrudes into a private medical decision: see Attorney-General's Submissions in *Clubb* at [41].

Step 3: Is the law justified?

19. Consistently with his submissions in *Clubb* at [47]-[51], and with the Respondents' Submissions at [76], the Attorney-General submits that it is not necessary to undertake three-part proportionality testing in this case, because any burden on the implied freedom is minimal and the burden is imposed to further a compelling purpose.

20. Alternatively, if a structured proportionality analysis is applied, the same conclusion is reached, for the reasons given in the Respondents' Submissions at [80]-[99] and in the Attorney-General's Submissions in *Clubb* at [53]-[63].

21. That the Tasmanian provision does not impose on the prosecution the obligation to establish that the proscribed conduct was "reasonably likely to cause distress or

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[8] Second Reading Speech at 51.

anxiety" does not affect this conclusion. It is true that in form the prosecution in Victoria faces an additional hurdle. However, in substance the conduct proscribed by the protest prohibition would cause, or risk causing, the kinds of harm identified in paragraph 16 above. That is, the premise underlying the protest prohibition is that abortion-related protest activity that takes place within sight or hearing of (and within 150 metres of) abortion clinics causes, or presents a real risk of, harm to women seeking to access abortion services. That premise is justified.

Comparative jurisprudence

22. Finally, the Attorney-General notes that in *R v Spratt*,[9] the British Columbia Court of Appeal upheld the validity of s 2(1) of the *Access to Abortion Services Act* (RSBC 1996 c 1). Like s 9 of the Tasmanian Act, that section prohibited (among other conduct) "protest" within an access zone. The Court of Appeal held that the legislation violated s 2 of the *Canadian Charter of Rights and Freedoms* (the free speech protection), but held that it was "demonstrably justified in a free and democratic society" and so was a justified limitation on the right to freedom of expression permitted under s 1 of the *Canadian Charter*. In reaching that conclusion the Court applied a structured proportionality analysis similar to that outlined by the plurality in *McCloy v New South Wales*[10] and developed in *Brown v Tasmania*.[11]

PART V: TIME ESTIMATE

23. The Attorney-General estimates that he will require 10 minutes for oral argument.

Dated: 10 August 2018

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9 (2008) 298 DLR (4th) 317.

10 (2015) 257 CLR 178 at 194-195 [2] (French CJ, Kiefel, Bell and Keane JJ).

11 (2017) 91 ALJR 1089 at 1112 [104] (Kiefel CJ, Bell and Keane JJ).