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

APPELLANT'S REPLY

DL Legal
Suite 2, Karingal Chambers
35 Bell Street Mall
Toowoomba Qld 4350

Telephone: 0412 715 937
Fax: N/A
Email: randall.gibbens@dllegal.com.ay
Ref: Randall Gibbens

PART I: CERTIFICATION

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

PART II: SUBMISSIONS IN REPLY

Construction and legal operation

2. The Respondents submit that the Protest Prohibition does not have a "greater operation" than s 9(1)(b) of the *Public Health and Wellbeing Act 2008* (Vic) (***PHA***), which is addressed to communications that are "reasonably likely to cause distress or anxiety": RS[1] [40(1)] and [41]. That is plainly wrong. "Protest" is not a synonym for "communications reasonably likely to cause distress or anxiety". There are many protests which are not apt to cause distress or anxiety. Equally, there are many communications which are apt to cause distress or anxiety which are not protests.

3. The Respondents submit that the only function served by the word "attempting" in the Protest Prohibition is to ensure that the offence applies to persons who wish to, but cannot, enter premises: RS [20]-[22]. That does not fit with the text of the Act. Parliament did not refer to persons "*unsuccessfully* attempting to access" premises. Nor does it fit with the contention that a person is attempting to access premises if the person is acting with the purpose of bringing about access (see RS [21]). That construction is not materially different from the Appellant's construction (AS[2] [43]) and encompasses persons who are "on their way" to the relevant premises.[3]

4. The Respondents submit that the Protest Prohibition "does not necessarily operate to 150 metres": RS [71]; see also RS [97]. That is wrong, having regard to the terms of s 9(2) which proscribe "prohibited behaviour within an access zone". If, to the contrary, the Respondents are correct, it indicates that the law is vague and also undermines the submission of others that the prohibition operates in a spatially precise area: CS[4] [13].

The purpose of the Protest Prohibition

5. In his submissions, the Appellant invited Tasmania to specify the objects of the Protest Prohibition (AS [59]-[60]). The Respondents did not do so. The RS refer to a smorgasbord of objects, often without reference to any accepted principle of statutory construction (cf *Unions NSW v State of New South Wales* (2013) 252 CLR 530 at [50]). A law may have multiple objects. But that does not mean that it is open to polities to assert infinite post hoc rationalisations. Any such approach is inconsistent with the implied freedom and its constitutional basis: if government wishes to burden political speech, it should do so by reference to a clearly-identified object or clearly-identified objects. As has been said in the related area of the principle of legality, if Parliament wishes to burden speech it "must squarely confront what it is doing and accept the political cost": *R v Home Secretary; Ex parte Simms* [2000] AC 115 at 131 (Lord Hoffmann); *Attorney-General for South Australia v Adelaide City Corporation* (2012) 249 CLR 1 at [148]. So too, if government wishes to burden political communication, it should squarely identify *why* it is so doing. The difficulty the Respondents have had in settling on one legislative object (or a small number of them) casts doubt on any suggestion that Parliament enacted this law in careful pursuit of an identified legislative object. The interveners proffer further legislative objects (CS [11], [20] (suggesting that the purpose is to facilitate access) and

---

1 Respondents' Submissions dated 3 August 2018.

2 Appellant's Submissions in Chief.

3 Accordingly, the submission at RS [75] regarding the protester who cannot see the entrance to the building is wrong.

4 Submissions of the Attorney-General of the Commonwealth (intervening).

VS [9]-[10] (suggesting that the purpose is the protection of persons accessing premises at which terminations are provided)). There is some difficulty in one polity proposing that a law bears a different object to the polity that enacted it. In any event, none of the proposed objects explain why, of all conduct capable of causing mischief, Tasmania singled out *protests* simpliciter.

6. The Respondents first state that the object of the Protest Prohibition is "to enable persons to access premises where terminations are provided unobstructed, uninjured and unharried": RS [23]; see also RS [32]. That *may* be the object of paragraphs (a) and (c) of the definition of "prohibited behaviour" (which are directed to hindering, obstructing or impeding access and "footpath interference"), but it is not the object of the Protest Prohibition (para (b)) which applies irrespective of whether a person is (or is apt to be) obstructed, injured or harried.

7. The Respondents then state that the law is "directed [to] the provision of safe, legal and accessible reproductive health services to women": RS [28]. The Respondents make no attempt to link that object to the text and operation of the Protest Prohibition.

8. The Respondents also state that the "intention" of the law was "to reform criminal provisions rooted in Regency era religious and social sensibilities": RS [28]; see also RS [46] (to similar effect). There is no plausible reasoning which suggests that this was the object of the Protest Prohibition (as distinct from other provisions in the Act which decriminalise abortion).

9. The Respondents also submit that the purpose of the Protest Prohibition is that "women are entitled to access termination services in a confidential manner without the threat of harassment": RS [33]. This is not the object of the Protest Prohibition. It is not directed to maintaining confidentiality – it does not, for example, prohibit a person from observing access to abortion premises. Nor is it directed to harassment – that function is achieved by paragraph (a) of the definition of "prohibited behaviour".

10. The Respondents also submit that the purpose of the law is to protect the "safety, wellbeing, privacy and dignity of persons accessing premises where terminations are provided": RS [47(2)], [84]; see also VS [16].[5] That submission appears to be based on the assumption that what is true of the Victorian PHA is ipso facto true of the Act. That submission is problematic. The words "safety, wellbeing, privacy and dignity" appear nowhere in the Act, let alone the Protest Prohibition itself. The submission is also contradicted by the Victorian Attorney-General who goes to some lengths to point out the differences between the two schemes: VS [6].

11. The Respondents also submit that the purpose of the prohibition is to "kee[p] protesters at an appropriate distance from patients and medical staff" accessing or attempting to access abortion premises: RS [62]. Save for the question-begging reference to "appropriate", that is no more than a statement of the immediate legal operation of the provision. It does not furnish an explanation for the law which can be used to assess its object's legitimacy.[6]

12. The Respondents also submit that the purpose of the prohibition is "human safety": RS [68]; see also RS [99] ("protecting women and staff accessing premises where terminations are provided"). No principle of construction supports that submission.

13. The Respondents also submit that the purpose of the Protest Prohibition is to prevent stigmatisation or ridicule of women: RS [71]; see also RS [85]. The prohibition makes no

---

5 Submissions of the Victorian Attorney-General (intervening).

6 Equally unhelpful, for the same reason, is the suggestion at RS [89] that the purpose of the law is to maintain "a confined area in which women are not subjected to prohibited conduct".

reference to those concepts. Whether it is consistent with the Constitution to seek to prevent shame is addressed at AS [56].

14. Nowhere do the Respondents deal with the fact that the best evidence of legislative purpose is legislative text. Here, the Act is expressly directed to protest. Its purpose, on its face, is to quell protests in relation to the identified subject matter (ie abortions).

15. The RS are replete with emotive language hostile to anti-abortion speech and anti-abortion viewpoints: RS [57], [59], [75]. Sloganeering is unhelpful in the objective task of assessing validity. If anything, the hostility manifested in the State's submission establishes one of the very points agitated by the Appellant: a purpose of this law was to quell the message espoused by anti-abortion protestors. That is not a purpose which the State can pursue consistently with the constitutionally-prescribed systems.

Political communications and effective burden

16. The Respondents make a large number of submissions by reference to the particular protest engaged in by the Appellant (and his asserted purpose): RS [48]-[52]. The Respondents appear to suggest that the Appellant's motive in holding the placards could affect the validity of the Protest Prohibition (RS [54]). These submissions are misguided.[7] The Protest Prohibition was either valid or invalid before the Appellant did anything; his conduct could hardly change the true constitutional position. One does not assess validity under the implied freedom by looking at the activities of a particular individual: see *Wotton v Queensland* (2012) 246 CLR 1 at [80]; *APLA Limited v Legal Services Commissioner* (2005) 224 CLR 322 at [381] (***APLA***); *Monis v R* (2013) 249 CLR 92 at [62]; *Unions NSW v New South Wales* (2013) 252 CLR 530 at [30], [112]; *McCloy v State of New South Wales* (2015) 257 CLR 178 at [248]; *Tajjour v State of New South Wales* (2014) 254 CLR 508 at [104]. That is because the implied freedom is a systemic freedom, not an individual right: *Unions NSW* at [30]; *Tajjour* at [104]. The relevant constitutional fact is the effect on the freedom generally, not the effect on a particular individual or particular communications. The effect of a law in a particular case may be some (albeit limited) evidence of the law's general effect, but generally only where the particular case is shown to be an appropriate "surrogate or representative of a particular class or activity": *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217 at [43]; see also [73] and [113]. The Respondents do not attempt to establish that here.[8]

17. The precise character of the Appellant's communications could be relevant if it were said that the Protest Prohibition should be read down so as not to apply to political communications, but the Respondents eschew that result (RS [92]-[94]. Further, if the Protest Prohibition *were* read down in that way, the trial would have miscarried because the Court below did not approach the offence as if it carved out political communications. In any event, the Respondents' submission rises no higher than the suggestion that a communication cannot be political if it has an ethical or religious motive: RS [55], [58], [61], [66]; see also CS [8]-[9] and VS [13].[9] That submission has no support in authority. It is also contrary to principle: the freedom is not an individual right, so the motive of the individual speaker cannot determine whether the communication is political. The criterion is no higher than whether the communication "might be pertinent to"[10] the

---

7 For the same reasons, so are the submissions relating to the police officer marking out an area in this case: see RS [63].

8 The matters at RS [56] are unsupported speculation which cannot establish any constitutional fact.

9 It should be noted that the anti-abortion viewpoint has a long lineage: see the Hippocratic Oath at <https://www.nlm.nih.gov/hmd/greek/greek_oath.html> ("I will not give a woman a pessary to cause an abortion").

10 See *Unions NSW* at [155].

political choices contemplated by ss 7, 24, 61 and 128 of the Constitution. Communications by the Christian Democratic Party do not lose their political character merely because they are motivated by religious beliefs, just as communications by a representative of any political party do not lose their political character if they are motivated by personal ethics or self-interest. A communication may be political because of its practical effect; the motive of the speaker is not determinative: see *APLA* at [381]; *McCloy* at [248]; *Unions NSW* at [111], [119]. Further, Tasmania's characterisation of the effect of the Appellant's evidence is incorrect. The Appellant had at least a dual purpose, which included a purpose of engaging in facially political communication.[11]

18. The Respondents adduce no evidence (and make no submission) to suggest that there are only a small number of "premises at which abortions are provided". The Court would not draw any favourable inference in Tasmania's favour in that respect. It can be noted that those premises may include hospitals, medical clinics, private homes (including homes where abortion drugs are taken) and pharmacies (if an abortion drug is taken at the pharmacy). The Court could properly find that the geographical scope of the Protest Prohibition is substantial and uncertain.

Compatibility testing

19. The Respondents and Interveners make a number of submissions of fact based on a thesis written by a student candidate for a Masters degree: RS [37]-[39], [40(2)]; see also NS[12] [8], [10]. Those include a submission that it is "reasonably clear" that protests outside reproductive health clinics are likely to heighten psychological stress: RS [39], [40(2)]. In forming a view as to constitutional facts, the Court only acts on material that is "sufficiently convincing": *Thomas v Mowbray* (2007) 233 CLR 307 at [639]. It is also desirable that the sources be "authoritative": *Maloney v R* (2013) 250 CLR 441 at [353]. It is respectfully submitted that one student thesis does not provide a convincing, authoritative basis to make the findings of fact sought by the Respondents. That is particularly so when published research suggests to the contrary that "protestors do not cause women to have negative feelings about their abortions" even if, for a minority, there is an initial negative effective on emotions.[13] In any event, it is not helpful to refer to studies of protesting without distinguishing between protests that involve besetment, harassment, intimidation or interference (which is covered by paragraph (a) of the definition of "prohibited behaviour") and those which do not. It is only the latter kind of protest which gives the Protest Prohibition its distinct operation. Further, the Humphries paper has methodological limitations: there was no control group; only one clinic was studied; and the author worked at the relevant clinic and was not an independent expert. Moreover, the Humphries paper did not find that women were in fact deterred by protests from obtaining abortions. It was also not adduced at trial.

20. The Respondents submit that the burden inflicted by the law is "indirect": RS [47(1)], [53]. The relevant distinction is between laws which "incidentally restrict political communication, and laws which prohibit or regulate communications which are inherently political or a necessary ingredient of political communication": *Wotton v Queensland* (2012) 246 CLR 1 at [30]. It is properly said of a law the sole operation of which is to proscribe protests on a politically-controversial topic that it regulates communications which are inherently political. The Respondents' submission that the Protest Prohibition

---

11 FM 180-181, T 175-176, FM 195-202 FM 190-197; see also FM 211 T 206 –RS [57] misstates this evidence.

12 Submissions of the NSW Attorney-General (intervening).

13 Foster et al, "Effect of Abortion Protesters on Women's Emotional Response to Abortion" (2013) 87 *Contraception* 81, 87.

does not discriminate as to content (see RS [47(1)(c)] is plainly wrong: the Protest Prohibition prohibits only communications with a particular content (ie in relation to terminations). The Protest Prohibition is an example of the class of case contemplated by Mason CJ in *ACTV v The Commonwealth* (1992) 177 CLR 106 at 143 ie a "restrictio[n] on communication which target[s] ideas or information". The law does not cease to target political ideas merely because in a small number of its operations it will apply to non-political ideas: cf CS[14] [8]. Laws of that kind require "compelling justification": cf RS [53]. The Protest Prohibition is not just a "place" regulation: cf RS [53].[15] It targets the content of communications and (as the Respondents appear to accept: RS [64]) discriminates as to viewpoint. And it does so over areas that Tasmania has not identified (and apparently cannot identify).

21. In various places, the Respondents submit that a purpose or effect of the Protest Prohibition is to make it less likely that the harassment (etc) prohibition (in (a)) will be contravened: RS [71], [85]. This submission assumes that a provision can be valid, not because it is appropriate and adapted to a legitimate end, but because it is in some way connected to the better enforcement of an adjacent statutory provision. This kind of penumbral validity by accretion is inconsistent with the constitutional imperatives: it would enable the freedom of political communication to be undermined by creeping legislative intrusions: cf *Monis* at [120] (Hayne J). In any event, the Protest Prohibition is not adapted to enforcing the harassment prohibition: many (perhaps most) protests are not precursors to harassment etc.

22. Many of the Respondents' responses to the Appellant's proposed legislative alternatives turn on the assumption that the Protest Prohibition has some purpose or purposes which, on a fair construction of the Act, it does not have: RS [84]-[86], [89]-[91]; cf the submissions as to object above and in the AS.

23. The Respondents criticise the Appellant for proposing a defence if it is proven that the conduct did not have a relevant adverse effect: RS [87]-[88]. That criticism is misplaced in circumstances where paragraphs (a) and (c) of the definition of "prohibited behaviour" all involve reference to adverse effects and paragraph (d) involves reference to the consent of the person. The Appellant cannot be criticised for proposing as an alternative law a more limited version of that which the Tasmanian Parliament has otherwise already chosen. The Respondents also criticise the Appellant for proposing legislative alternatives which are said not to be relevant to the facts of this case: RS [95]. That criticism springs from the misconception that the facts of this case are in some way relevant to the validity of the prohibition.

G O'L Reynolds
T: (02) 9232 5016
F: (02) 9233 3902

FC Brohier
T: (08) 8223 7900
F: (08) 8223 7001

DP Hume
T: (02) 89215 2694
F: (02) 9232 1069

Dated: 17 August 2018

---

14 Submissions of the Commonwealth Attorney-General (intervening).

15 It is significantly different from the provision in *Levy* which prohibited entry into the particular area. Here any protestor in relation to abortions could move freely in the access zone. The Protest Prohibition is only attracted if there is a protest.