

**IN THE HIGH COURT OF AUSTRALIA  
HOBART REGISTRY**

**No. H2 of 2018**

**BETWEEN**

**JOHN GRAHAM PRESTON**  
Appellant

**ELIZABETH AVERY**  
First Respondent

**SCOTT WILKIE**  
Second Respondent



10

20

**OUTLINE OF ORAL ARGUMENT FOR THE RESPONDENTS**

## PART I: CERTIFICATION

This outline of oral argument is in a form suitable for publication on the internet.

## PART II: OUTLINE OF ORAL ARGUMENT

### Construction of the Act

- 10 1. Contrary to the appellant's submission, the respondents identify as the legislative purpose the protection of safety and well-being, privacy and dignity of persons accessing premises where terminations are provided [cf.,RS [17], [47(2)] **Clubb R2S** [34]; adopted by **RS** [67])
2. The appellant's apparent inability to identify a purpose (beyond preventing 'discomfort') for the protest prohibition is surprising. A conventional search for legislative purpose may be understood, by text and context, including the statutory scheme and its history **RS** [28]. That admits questions of abstraction **NSW** [6-8] and whether the protest provision pursues only one purpose **RS** [48]
- 20 3. The protest prohibition is to be construed in the context of the *Reproductive Health (Access to Terminations) Act 2013* (Tas) ('the Act'), including the history of law of abortion, law reform and the mischief to which the prohibition was directed. Relevant contextual factors include the:
  - a. scheme of the Act, including decriminalisation, provision of termination services (including conscientious objections);
  - b. history of the debate about abortion, including protesters targeting areas adjacent to clinics; [**RS**34-40] **Clubb R2S** 14, 15.
  - c. advances in medical knowledge and changes in societal attitudes to abortion and women's reproductive health; **RS** [42]
  - 30 d. decriminalisation of abortion; **RS** [44]
  - e. lack of adequate laws to protect women seeking to access terminations; **HRLC** [29ff].
4. Mens rea was not the subject of a ground of appeal and was not an issue before the court below. The elements of the offence and mens rea will be addressed cf., **AS** 35, 37
5. It is certain that it is not a purpose of the protest prohibition to stifle political communication.
- 40 **Breadth of 'protest'**
6. Protest is but one part of the conduct that s 9 seeks to prevent. Protest involves 'more subtle' conduct than besetting, harassing etc: the Act s 9(1)(a); **Clubb R2S** [9-11]. It captures what the Appellant contends are silent and peaceful protests; **RS** [40(2), 56, 59] *Brown v Louisiana* (1966) 383 US 131, 142 - and operates before any harm might potentially occur.

7. The protest prohibition is also limited to those parts of the 150m zone in which the activity can reasonably be seen or heard by a person accessing or attempting to access a termination clinic. The magistrate was right to find that it applied to a hypothetical person 'doing just that' **CAB** 32.19. The common law of 'attempts' does not assist construction. cf., **AS** 43, **RS** 20-23; *TPC v Tubemakers* (1983) 47 ALR 719, 737.

### **Constitutional Facts**

- 10 8. The facts of the present case are insufficient to permit the Court to conclude that the Appellant was making a political communication or at least one that is capable of protection by the implied freedom. To the contrary, the appellant was intent on delaying, or dissuading would be entrants to the clinic from a termination procedure. **RS** [48-50].
9. The facts do not raise the communication above general communication. They do not disclose someone willing to listen, or a matter that was likely to affect the free choice of electors. **RS** [49]; **FM** 196-7; 201-2.

### **Burden**

- 20 10. If there is a burden on the implied freedom, it should be identified and calibrated at the beginning of the inquiry: **Cth** [5], *Clubb*: **Cth** [22ff] **R2S** 6.5; **SA** 9ff.  
[
11. Contrary to the appellant's submissions, **AS** [42, 44(b), 48] the protest prohibition is not discriminatory: **RS** [64-66], textually, or in its practical effect.
12. The protest prohibition is incremental in respect of other conduct that may not lawfully take place within the 150m zone: *Brown v Tasmania* [2017] 91 ALJR 1089, [188], [397-398, 410-411, 419-420]. Because a protest must be capable of being seen or heard the prohibition will respond to the circumstances, including the physical environment. It captures subtle conduct that may affect potential entrants to a clinic: [**RS** 61, 62].
- 30 13. It is tailored to achieve the purpose of keeping protesters at a sufficient distance to prevent them from being seen or heard by entrants to a clinic. A protest targeted at changing abortion law and policy can just as easily and effectively be conducted outside the spatial ranges permitted by the Act, without the effects that the Act seeks to prevent: **RS** [55, 62].

### **Justification**

- 40 14. The purposes of the protest prohibition are legitimate in the interests of an ordered society: **RS** [68ff]. By formulating the purpose merely to deter 'discomfort' the appellant elides a consideration of the true purpose to which there must be a connection cf., **AS** [78, 94]. The true purpose reveals a rational target for the protest prohibition. By this means, protesters are unable to construct an environment in which they are able to deter or to cause distress to potential patients as well as clinic staff: **RS** [71]; *R v Lewis* (1996) 139 DLR (4<sup>th</sup>) 480, 497-8 [51]-[52]; *R v Spratt* (2008) 298 DLR (4<sup>th</sup>) 317, 335-336 [68]

15. There are no obvious or compelling alternatives to the protest prohibition, particularly in its incremental application to so-called peaceful or silent protests. The alternatives addressed by the appellants are unpersuasive [RS 81ff].

16. The protest prohibition is adequate in balance in that:

- a. its effect on the implied freedom is indirect and slight
- b. it is spatially limited,
- c. it has a marginal incremental operation,
- d. its social objective and consequences are desirable from the perspective of an ordered society, with a duty to protect its citizens.

10

17. Any erosion of the medical choices secured by the Act is to permit the stigmatisation of abortions and to dissuade and deter women from a distinctly personal and legitimate choice, [cf., NT 35] which are matters well within the competence of the Parliament.

Dated: 10 October 2018

20

  
**Michael O'Farrell SC**  
Solicitor-General of Tasmania  
T: (03) 6165 3614  
F: (03) 6233 2510  
E: [solicitor.general@justice.tas.gov.au](mailto:solicitor.general@justice.tas.gov.au)

  
**Sarah Kay**  
T: (03) 6165 3614  
F: (03) 6233 2510  
E: [sarah.kay@justice.tas.gov.au](mailto:sarah.kay@justice.tas.gov.au)