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

RESPONDENTS' SUPPLEMENTARY SUBMISSIONS

Filed and served on behalf of the **Respondents**

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PART I: CERTIFICATION

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

PART VI: ARGUMENT

2. The Appellant's contention that s 9(1)(c) of the *Reproductive Health (Access to Terminations) Act 2013* (Tas) (**the Tasmanian Act**), which concerns 'footpath interference in relation to terminations' within an access zone, is to be construed with binding reference to s 2(1) of the *Access to Abortion Services Act*, RSBC 1996, c 1 (**the Canadian Act**) is misconceived.

3. Whilst it is submitted there can be no doubt that the Canadian Act and relevant case law from that jurisdiction informed the wider legislative context of the Tasmanian Act, to adopt the Appellant's construction of s 9(1)(c) would be to ignore the particular legislative context of the Act, and the language the legislature in fact employed to achieve its purposes of providing unobstructed, un-harried and safe access to premises where terminations are provided.[1]

4. 'Footpath interference' is not defined in the Tasmanian Act. But, having regard to sub-s (2), a plain reading of those words makes clear that it describes the conduct of causing an interference with the use of a footpath within an access zone. The words 'in relation to terminations' make equally plain that the impetus for the impugned interference must be the topic of terminations.

5. There are indications in the parliamentary debates that footpath interference may include, for example, passively standing in the path of a person with an offensive t-shirt about abortions[2] (which may not necessarily amount to a 'protest' or 'intimidation').[3] However, given the meaning of the word 'interference' – which, in the context of the provision, describes a state of affairs[4] – it should also be accepted that 'footpath

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1 Tasmania, *Parliamentary Debates*, Legislative Council, 20 November 2013, 82 – 138 (Craig Farrell) 103.

2 Tasmania, *Parliamentary Debates*, Legislative Council, 20 November 2013, 82 – 138 (Tony Mulder) 105.

3 Tasmania, *Parliamentary Debates*, Legislative Council, 20 November 2013, 82 – 138 (Mike Gaffney) 104; see also Tasmania, *Parliamentary Debates*, Legislative Council, 20 November 2013, 82 – 138 (Ruth Forrest) 104.

4 *Macquarie Dictionary*.

interference' would include conduct such as: burdening persons passing on a footpath within an access zone with literature about terminations; or pestering them with offers of 'counselling', 'advice' or 'information' relating to terminations.[5]

6. This may be distinguished from the kind of conduct captured in paras (a) and (b) as 'footpath interference' does not comprehend conduct that is actively directed at 'besetting', 'harassing', 'intimidating', 'interfering with', or 'threatening' a person; or else 'protesting' for or against terminations. Rather it captures more subtle conduct than the kind in para (a) that would 'hinder', 'obstruct' or 'impede' a person from using a footpath in an access zone: that is, conduct adopting the guise of something else such as counselling, advice or information 'in relation to terminations'.

7. Contrary to the Appellant's submissions, it is submitted that there is no warrant to read 'footpath interference' as meaning 'behaviour that tends to cause a person to refrain from accessing a termination.'[6] The Appellant's submission lifts directly from the definition of 'sidewalk interference' in the Canadian Act: 'advising or persuading, or attempting to advise or persuade a person to refrain from making use of abortion services.'[7]

8. Just as the Tasmanian Act does not define 'protest' as the Canadian Act does to mean: 'any act of disapproval or attempted act of disapproval, with respect to issues related to abortion services, by any means…', it also does not define footpath interference.[8] It is submitted that the irresistible inference is that the Tasmanian legislature deliberately chose not to define those terms and single out any particular view point.[9] The words 'in relation to terminations' that accompany 'footpath interference' in s 9(1)(c) undoubtedly cast the subject matter of that term generally.

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5 Cf *R v Spratt* (2008) 298 DLR (4th) 317, 333 [59] – [60], 338 [77] (Ryan JA); *R v Lewis* (1996) 139 DLR (4th) 480, 490 – 491 [27] (Saunders J).

6 Appellants' Supplementary Submissions, 1[6].

7 *Access to Abortion Services Act*, RSBC 1996, c 1 ss 1 and 2(1)(a).

8 *Access to Abortion Services Act*, RSBC 1996, c 1 ss 1 and 2(1)(b); cf *M Collins & Sons Pty Ltd v Bankstown Municipal Council* (1958) 3 LGRA 216, 220 (Sugerman J); D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th Ed, 2014), 129 – 130 [3.38].

9 See also Respondents' Submissions, 13[64].

9. It follows that the mental and external elements of the prohibited conduct of footpath interference under s 9(2) of the Tasmanian Act comprise:

   (1) a voluntary and intentional act;

   (2) which is done in relation to the topic of terminations; and

   (3) which interferes with passing and repassing on a footpath within an access zone.

10. The defence of honest and reasonable mistake of fact applies to this offence. A defendant is availed of that defence where she or he is honestly and reasonably mistaken about being within an access zone.

11. Applied to the present case, Mr Preston was engaged in a protest. He could not have been charged with footpath interference because there was no evidence that he stood in anyone's path or attempted to counsel persons passing on the footpath about the topic of terminations.[10] There is, however, evidence that Mr Preston was in possession of pamphlets and leaflets relating to, among other things, a 'biblical perspective' on terminations.[11] Had he sought to distribute those to persons on the footpath within the access zone, we submit that he would have been caught by the operation of s 9(1)(c) and (2) of the Tasmanian Act.

12. Consistently, if Ms Clubb had engaged in Tasmania in the conduct in which she engaged in Victoria, she too would likely have been caught by the operation of s 9(1)(c) and (2).

Dated 24 October 2018

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Sarah Kay
Assistant Solicitor-General

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[10] Respondents' Book of Further Materials, 187

[11] Respondents' Book of Further Materials, 74 – 77, 219 – 228.