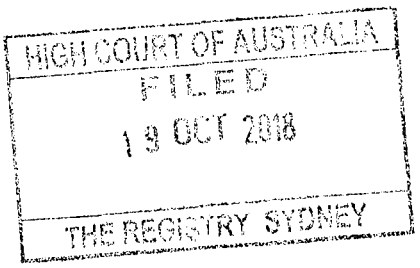
IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY **No. H2 of 2018**

BETWEEN: **JOHN GRAHAM PRESTON**
Appellant

and

10 **ELIZABETH AVERY**
First Respondent

SCOTT WILKIE
Second Respondent



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APPELLANT'S SUPPLEMENTARY SUBMISSIONS

PART I: CERTIFICATION

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

PART II: SUBMISSIONS

2. These submissions are filed pursuant to the directions of the Registrar communicated on 12 October 2018. In accordance with those directions, the issue addressed in the submissions is the content of the expression "footpath interference in relation to terminations" and the elements of the offence created by s 9(2) of the *Reproductive Health (Access to Terminations) Act 2013* (Tas) (**the Tasmanian Act**), read with paragraph (c).

3. The extrinsic materials – relevantly, the Second Reading Speech,[1] the Information Paper and the Final Consultation Report[2] – do not provide any direct assistance on the present issue of construction. However, they do provide indirect assistance.

4. The Information Paper refers to a concept of "sidewalk interference", but does not define that concept: at 14. That concept must have been derived from the safe access zone law in British Columbia, the *Access to Abortion Services Act 1995* (BC) (**AAS Act**).[3]

5. The AAS Act prohibits a person engaging in "sidewalk interference"[4] in an access zone. In a case predating the Tasmanian Act – *R v Lewis* [1996] 139 FLR (4th) 480 – the Supreme Court of British Columbia observed that "sidewalk interference" corresponded with "sidewalk counselling": at [108].

6. In the appellant's submission, it is this kind of conduct – sidewalk counselling – which paragraph (c) was intended to capture. What is meant by "sidewalk counselling" in relation to terminations is behaviour that tends to cause a person to refrain from accessing a termination. The primary operation of the prohibition is on that which could properly be described as private health communications.

7. This construction reflects the obvious statutory ancestor of paragraph (c), namely, the AAS Act. This construction also ensures that paragraph (c) has a materially distinct operation to paragraph (b). Paragraph (c) is directed to private health communications properly described as "footpath counselling". On the other hand, paragraph (b) is directed to the form of public communication known as protest.

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1 Department of Health and Human Services, *Information Paper relating to the Draft Reproductive Health (Access to Terminations) Bill: Revised Pregnancy Termination Laws proposed for Tasmania* (March 2013).

2 Department of Health and Human Services, *Final Consultation Report relating to consultation on the Draft Reproductive Health (Access to Terminations) Bill containing revised pregnancy termination laws proposed for Tasmania* (6 June 2013).

3 The Information Paper drew heavily on the Victorian Law Reform Commission report, *Law of Abortion: Final Report* (2008) (**VLRC Report**). In turn, the VLRC Report referred to the AAS Act and, in particular, to the prohibition on "sidewalk interference": at [8.267].

4 That term is defined in s 1 of the AAS Act to mean "(a) advising or persuading, or attempting to advise or persuade, a person to refrain from making use of abortion services, or (b) informing or attempting to inform a person concerning issues related to abortion services, by any means, including, without limitation, graphic, verbal or written means."

8. The Canadian courts have held that the offence of sidewalk interference (like the offence of protest) is one of strict liability: *R v Von Dehn* [2013] BCCA 187 at [12];[5] *R v Spratt* [2011] BCSC 1747 at [24]-[37].

9. With these observations in mind, the appellant submits that the "footpath interference" prohibition contains the following elements.[6]

10. There is a **conduct** element, namely, that the person must engage in conduct.

11. There is a **circumstance** element, namely, that the conduct must tend to cause a person from accessing a termination.

12. There is a further **circumstance** element, namely, that the conduct must occur "within an access zone": s 9(2).

13. The offence is one of **strict liability**. The Tasmanian Parliament may be assumed to have intended to pick up the established Canadian caselaw on mens rea. Further, the reasoning in the Canadian caselaw is persuasive: the offence is a public welfare offence and so presumptively does not attract mens rea; and there is no textual reference to mens rea.

Dated: 19 October 2018

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[5] "In my opinion, the sections of the Act involved here should be viewed as classic public welfare legislation and I agree with Madam Justice Fisher in her summary conviction appeal reasons that the particular offences charged against these appellants should be construed to be strict liability offences."

[6] Using the terminology of conduct, circumstance and result as used by Brennan J in *He Kaw Teh v R* (1985) 157 CLR 523 at 565.