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 SUBMISSIONS

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.au
Ref: Randall Gibbens

PART I: CERTIFICATION

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

PART II: STATEMENT OF ISSUES

2. The *Reproductive Health (Access to Terminations) Act 2013* (Tas) (**the Act**) purports to prohibit protests on a topic of great political interest (abortions) at the place at which those protests are most effective (near the premises at which abortions are provided). It does so irrespective of whether any person sees or hears the protest, and irrespective of whether any harm will or even might occur. The question raised by this appeal is whether it is within the power of the Tasmanian Parliament directly and intentionally to quell political protest in this manner. That question should be answered no. The appeal should be allowed. Costs should also be ordered.

PART III: SECTION 78B

3. Notice has been given under s 78B of the *Judiciary Act 1903* (Cth).

PART IV: JUDGMENT BELOW

4. The judgment below is unreported, but has the following medium neutral citation: *Police v Preston and Stallard* [2016] TASMC. It appears at pages 26-48 of the Core Appeal Book (**CAB**).

PART V: BACKGROUND

Statutory background

5. Section 9(2) of the Act states:

> A person must not engage in prohibited behavior within an access zone.
>
> Penalty: Fine not exceeding 75 penalty units or imprisonment for a term not exceeding twelve months, or both.

6. An "access zone" is "an area within a radius of 150 metres from premises at which terminations are provide": s 9(1).

7. "Prohibited behaviour" is defined in s 9(1). The kind of "prohibited behavior" relevant to this appeal is that identified in paragraph (b) of the definition, namely:

> ***prohibited behavior*** means –
>
> ...
>
> (b) a protest in relation to terminations that is able to be seen or heard by a person accessing, or attempting to access, premises at which terminations are provided ...

8. These submissions refer to s 9(2) in its operation with paragraph (b) of the definition of "prohibited behaviour" as **the Protest Prohibition**.

9. "Terminate" is defined in s 3(1) of the Act as follows:

> ***terminate*** means to discontinue a pregnancy so that it does not progress to birth by –
>
> (a) using an instrument or a combination of instruments; or
> (b) using a drug or a combination of drugs; or
> (c) any other means –
>
> but does not include
>
> (d) the supply or procurement of any thing for the purpose of discontinuing a pregnancy; or
> (e) the administration of a drug or a combination of drugs for the purpose of discontinuing a pregnancy by a nurse or midwife acting under the direction of a medical practitioner.

10. The definition of termination covers the discontinuance of pregnancy whether or not caused by a health professional or with or without the consent of the woman.

11. The Act contains no objects clause.

Extrinsic materials

12. In the Second Reading Speech on the *Reproductive Health (Access to Terminations) Bill 2013* (**the 2013 Bill**), the Minister made the following observations on the Protest Prohibition.[1]

> The other type of prohibited behaviour in an access zone is protesting in relation to terminations. This has drawn some attention and I would like to provide some examples of the types of behaviour this will and will not capture. It will not stop a religious sermon against terminations in churches that fall within an access zone, unless of course they broadcast it over a loudspeaker in a public manner. It will not stop an exchange of personal views between mates at a restaurant or pub that falls within an access zone, unless of course they do the same thing. It will, however, stop a person from standing in an access zone holding up a placard or handing out pamphlets denouncing terminations. It will stop a person from engaging in vocal anti-choice protest and it will stop the silent protests outside termination clinics that purport to be a vigil of sorts or a peaceful protest but which, by their very location, are undoubtedly an expression of disapproval.
>
> As one submitter to the consultation framed it, there is nothing peaceful about shaming complete strangers about private decisions made about their bodies. I respect that each of us are entitled to our views. What I do not respect is the manner in which some people choose to express them, and standing on the street outside a medical facility with the express purpose of dissuading or delaying a woman from

---

[1] Parliament of Tasmania, Legislative Assembly, *Hansard* (16 April 2013) 49-50.

accessing a legitimate reproductive health service is, to my mind, quite unacceptable.

13. In the course of the Second Reading Speech, the Minister referred to a study in relation to Melbourne's Fertility Control Clinic which had "indicated that patients experience considerable distress, shame and anxiety in response to protestors".

14. A number of observations may be made about the Minister's remarks.

(a) The Minister's remarks make it clear that the law was intended to prevent protests that were both *silent* and *peaceful*.

(b) The Minister did not explain why the offence could not capture a sermon in a church or a discussion at a pub. The Minister appears to have been of the erroneous view that the offence could be established only where the protest can be seen or heard in a public place.

(c) The Minister's remarks suggest that Parliament had in contemplation that the law was intended to target "anti-choice protest" – that is, that it was intended to target one side of the abortion debate.

(d) The Minister referred to an "express purpose of dissuading or delaying a woman". However, proof of purpose is no part of the Protest Prohibition.

(e) The Minister referred to "shaming". However, proof of an actual or likely or even potential effect of the protest is not an element of the Protest Prohibition.

(f) The Minister appears to have been of the view that the Protest Prohibition only applied near premises where lawful (ie legitimate) terminations were provided. That view is inconsistent with the construction given to the Protest Prohibition by the Magistrate.

(g) Nothing in the Second Reading Speech suggests that the Minister had turned her mind to alternative measures less restrictive of the freedom of political communication. For example, there is no reference to the potential to criminalise only conduct where it was proven that it was apt to have an adverse effect.

(h) The Minister did not refer to any evidence about the effect of protests in Tasmania.

15. Save for expressing a view that protests of the proscribed kind were in her view "unacceptable", the Minister did not identify the purpose of the Protest Prohibition.

16. The 2013 Bill was preceded by a public consultation process conducted by the Tasmanian Department of Health and Human Services. In the Information Paper prepared as part of that consultation process,[2] the Department said the following of the Bill:

---

[2] See Department of Health and Human Services, *Information Paper relating to the Draft Reproductive Health (Access to Terminations) Bill* (March 2013).

> The purpose of access zones is to ensure women may access and doctors may provide terminations without fear of intimidation, harassment, obstruction or similar.

17. That purpose was not referred to in the Second Reading Speech. Nor does it appear in the Act. The purpose seems more apt to describe the prohibition in paragraph (a) of the definition of "prohibited behaviour" in s 9(1) of the Act, namely, "besetting, harassing, intimidating, interfering with, threatening, hindering, obstructing or impending [a] person".

10

Factual background

18. The events the subject of these proceedings occurred on 5 September 2014, 8 September 2014 and 14 April 2015 within 150m of the Specialist Gynaecology Centre situated at 1A Victoria Street. Hobart (**the Gynaecology Centre**).

19. On those days, the appellant was on the footpath of Macquarie Street near the corner of Victoria Street: CAB 26 [2]. It was an agreed fact below that "on each occasion [the appellant] was engaging in a protest in relation to the terminations of pregnancies and
20 that his protest could be seen or heard by persons accessing or attempting to access" the Gynaecology Centre: CAB 26 [2], 27 [7], 31 [23]. The protest involved holding signs and placards: CAB 26 [5], 27 [7]. The appellant also had leaflets in his hand: CAB 26 [5], 27 [7], [9]. On at least 14 April 2015, the appellant was also carrying a media release: CAB 27 [9].[3] There was some evidence as to the appellant's intention (CAB 36 [38]), but the Magistrate made no findings as to that evidence.

20. The placards included statements to the following effect: "**EVERY ONE HAS THE RIGHT TO LIFE**, Article 3, Universal Declaration of Human Rights" and "**EVERY CHILD HAS THE RIGHT TO LIFE**, Article 6, UN Convention on the Rights of the
30 Child".

21. The appellant was charged with three breaches of the Protest Prohibition: CAB 5, 7. The charges are in a similar form, with one exception. The charge in respect of 14 April 2015 relevantly reads (CAB 7):

> PARTICULARS: You are charged with on the 14th April, 2015 at Hobart in Tasmania, by being within an access zone and engaging in prohibited behaviour by protesting in relation to terminations, that was able to be seen or heard by a person, accessing or attempting to access premises at which terminations are provided,
40 located at 1A Victoria Street.

22. The charges in respect of 5 September 2014 and 8 September 2014 contained words after the word "person", namely "Sarah Guinevere Heald". The two earlier charges appear to have been drafted in the view – ultimately incorrect in light of the Magistrate's reasoning which is described below – that it was relevant to identify a particular person who could see or hear the protest.

---

3 Amongst other things, the media release stated "Does the Premier, Will Hodgman, along with this Liberal Government support the Universal Declaration of Human Rights and the Convention on the Rights of the Child or not?"

23. It can be noted that the charges identify the premises as being "located at 1A Victoria Street", but do not specify the Gynaecology Centre itself (which is located on the first floor of the building at 1A Victoria Street and not at the entrance to the building: see CAB 31 [23]).

24. The Magistrate referred to evidence that the appellant was between 4 and 15 metres from the entrance to 1A Victoria Street: CAB 27 [6], [8]. The Magistrate did not make a finding as to the distance between the appellant and the actual entrance to the Gynaecology Centre.

25. In respect of the charged offence on 8 September 2014, the Magistrate referred to evidence from a Ms Heald that she "felt quite intimidated [and] uncomfortable" when she observed the appellant.: CAB 26 [5]. The Magistrate did not refer to any similar evidence in respect of the charged offences on 5 September 2014 (which was a day on which the appellant was seen by Ms Heald) and 14 April 2015. The Magistrate did not make any finding that Ms Heald was in fact intimidated or uncomfortable. The Magistrate did not refer to any evidence bearing on whether Ms Heald was seeking to enter the Gynaecology Centre for the purposes of an abortion. The prosecution did not establish that Ms Heald was in fact intending to enter the premises on 5 September 2014: CAB 33 [28].

26. The Magistrate was of the view that the "premises at which terminations are provided" referred to in the Protest Prohibition need not be premises at which terminations are *lawfully* provided: CAB 32-3 [26].

27. The Magistrate was of the view that the "premises" referred to in the Protest Prohibition were not "the actual rooms or suites at which the terminations are provided": CAB 32 [25]. The premises extended to at least the entrance from a public street to the building at which those rooms or suites were located: CAB 32 [25].

28. The Magistrate appeared to be of the view that a person is not a person "accessing, or attempting to access" premises until the person is *just* about to enter the premises. That appears from the reasoning at CAB 33 [27], where the following was said:

> The prosecution submits that "accessing or attempting to access the premises means exactly that. It does not mean that a person who travels in the access zone in order to access the premises is someone that the legislators intended to capture by s 9(2). A person could be driving up Harrington Street, turn right into Victoria Street with the intention of accessing the premises. That person the prosecution submits would not be considered attempting to access the premises whilst they are driving on those streets. The defence submit that the use of the word 'attempting to access' broadens the scope of the offence. I do not agree with that submission. In my view the person should not be regarded as accessing or attempting to access the premises until they are doing just that, going into the premises or attempting to enter the premises and then consideration is given to at which point if any whilst doing that if the person can see or hear the protest.

29. The Magistrate was of the view that the protest need not in fact be seen or heard by any person: CAB 33 [28].

30. The prosecution did not lead evidence "as to areas of the State in which the access zone would relate": CAB 35 [35]. The Magistrate observed that the Court "does not know how many premises at which terminations are provided operate in Tasmania": CAB 35 [35]. While the Magistrate expressed the view that there was unlikely to be more than 9 or 10 abortion clinics in Tasmania (CAB 35-36 [36]), the Magistrate expressed no view as to the likely number of "premises at which terminations are provided" in Tasmania.

31. In one place in her reasons, the Magistrate found that the "primary purpose" of s 9(2) was "to protect persons accessing or attempting to access premises at which abortions are provided from being confronted with a protest in relation to terminations": CAB 36 [37]. It can be noted that the purpose so found was to prevent a person from being exposed to protests simpliciter. It was no part of that purpose to protect a person against distress or any other kind of harm.

32. Elsewhere in her reasons, the Magistrate found that the purpose of s 9(2) was "to regulate the termination of pregnancies by medical practitioners in Tasmania": CAB 37 [41]. The Magistrate did not identify any process of construction by which that could be said to be the object of the Protest Prohibition.

33. The Magistrate did not identify a definition of "protest" in her reasons. She appeared to consider that a protest involving "no more than silently praying ... not holding any placards" was not covered by the Protest Prohibition, but did not clearly articulate why: CAB 37 [42]. The Magistrate appeared to be of the (erroneous) view that the Minister had indicated in the Second Reading Speech that silent protest was excluded (see CAB 37 [42]). The Minister had expressed the opposite view.

34. The Magistrate made no findings as to whether the appellant had any *mens rea*. No *mens rea* was identified in the particulars of the charge. Reading her reasons fairly, the Magistrate must have been of the view that the Protest Prohibition did not involve a *mens rea* element. For example, the Magistrate made no finding as to whether the appellant knew or suspected he was in an "access zone".

35. The Magistrate made no finding that the appellant's protest was not a political communication. Nor was it any part of the prosecutor's case that the protest was not political. Any submission to that effect would have been unsustainable given the facially political character of the placards, which referred to international treaties and to inherently political propositions concerning an (asserted) right to life.

Procedural history

36. The appellant was convicted both of the three counts against s 9(2) of the Act and a further count in relation to failing to comply with a direction of a police officer. The appellant was sentenced to a single fine of $3,000 in respect of all four offences: CAB 49.

37. The appellant argued before the Magistrate that the Protest Prohibition was invalid, in part on the ground that it conflicted with the implied freedom. The Magistrate referred

to the prosecution's concession that the Protest Prohibition effectively burdened the freedom (CAB 35 [34]), but found that the prohibition survived compatibility testing.

38. The appellant sought review in the Supreme Court of Tasmania: CAB 51-55. On 23 March 2018, Gordon J removed grounds 1 to 6 of that review into this Court: CAB 59 [3]. Those grounds concerned the validity of the Protest Prohibition in light of the implied freedom. Gordon J gave the appellant leave to file an amended notice of appeal in the High Court (CAB 59 [4.1]), which he did (CAB 61-67). While the amended notice of appeal raises 7 grounds ((a) to (f)), the upshot of those grounds is that the appellant contends that the Protest Prohibition is invalid by reason of the implied freedom. The appellant seeks an order setting aside his convictions and dismissing the charges in respect of breach of the Protest Prohibition (CAB 66, 3(b)(i)). Those orders should follow if the Protest Prohibition is invalid. The appellant also seeks an order remitting to the Court of Petty Sessions in Hobart the issue of sentencing in respect of his conviction on the charge of failing to comply with a police direction. The need for that order arises because the appellant was given a single, undifferentiated sentence in respect of all four charges.

PART VI: ARGUMENT

Introduction

39. This appeal raises a number of issues similar to those raised by the proceedings in *Clubb v Edwards* (M46/2018). The appellant generally adopts the submissions advanced by Mrs Clubb in that matter. There are nevertheless some differences between the Protest Prohibition and applicable constitutional facts here and the Communication Prohibition and applicable constitutional facts involved in the *Clubb* matter.

The legal operation of the Protest Prohibition

40. The Protest Prohibition is a criminal prohibition. It is enforceable by up to one year's imprisonment.

41. Before identifying the legal operation of the Protest Prohibition, it is necessary to address two constructional issues.

42. The first constructional issue is the meaning of the term "protest" in s 9(1). That term is not defined in the Act. In its ordinary meaning, a protest is "a formal expression or declaration of objection or disapproval, often in opposition to something which one is powerless to prevent or avoid"[4] and encompasses "a demonstration or meeting of people protesting against something". [5] So read, when used in the phrase "protest in relation to terminations", the term refers to a protest expressing a message that is *in opposition to* terminations. To read "protest" in that way is consistent with the Second Reading Speech and the observation made above in paragraph 14(c).

---

4 *Macquarie Dictionary* (available at <http://www.macquariedictionary.com.au>), definition of "protest" (meaning 1).

5 *Macquarie Dictionary* (available at <http://www.macquariedictionary.com.au>), definition of "protest" (meaning 2).

43. The second constructional issue is the meaning of the phrase "person accessing, or attempting to access, premises". As indicated above, the Magistrate was of the view that a person does not meet that description until the person is just about to enter the premises. That construction should not be accepted. The phrase encompasses the hypothetical person who is intending to enter the premises and takes a step immediately connected to such an entry, such as walking towards the premises within the access zone. The Magistrate's construction should be rejected for the following reasons.

10

(a) The Magistrate's construction renders superfluous or largely superfluous the extended concept of "attempting to access".

(b) The appellant's construction is consistent with the ordinary legal conception of attempt, which involves an intention to bring about a result and a step immediately connected with that result: see *Trade Practices Commission v Tubemakers of Australia Ltd* (1983) 47 ALJR 719 at 736 (Toohey J).

(c) The Magistrate's construction does not sit well with the fact that Parliament
20 intended the access zone to extend outwards for 150m from the premises. Parliament must have intended the offence to apply to protests at the 149m mark, and protests of that kind would almost never be able to be seen or heard by a person in fact entering the premises, especially so when as here, the premises are in the middle of a city.

44. The Court can notice the following features of the Protest Prohibition.

(a) The prohibition is in terms directed to *protest*. Protest is a characteristic mode of political communication.

30

(b) If the submission at paragraph 42 is accepted, the prohibition is addressed *solely* to protests which express an opinion opposed to abortions. That is, the prohibition is addressed solely to one side of the debate.

(c) The protest need not be in relation to a *particular* termination; it is sufficient (indeed necessary) that it be in relation to *terminations* plural. The protest covered by the prohibition is therefore inherently protest extending beyond the termination of a particular foetus.

40 (d) The protest is prohibited even if it is carried on with the consent of the person who provides the terminations at the premises.

(e) The protest is prohibited even if it is carried on by someone who has a proprietary right to be on the premises. For example, here the Gynaecology Centre was in a premises with a number of separate offices. A tenant on the ground floor who placed a protest sign on their front door visible to persons accessing the premises would commit the offence.

(f) The prohibition applies whether or not any harm, anxiety or distress is in fact
50 caused.

(g) The prohibition applies whether or not any harm, anxiety or distress is likely or reasonably likely or even reasonably possible.

(h) The prohibition applies whether or not any harm, anxiety or distress is in fact intended.

(i) The prohibition applies outside business hours.

(j) The prohibition applies to protests against *unlawful* abortions.

(k) The prohibition applies even if the speech contained in the protest is *true* and not *misleading*. It therefore prohibits speech which is calculated to induce a person to do that which it is proper to do.

(l) The prohibition applies even where the protest is not *at* the termination premises. For example, a moving street protest which happened to travel within eyesight of a termination premises would be covered.

(m) The prohibition applies to protests against the Act itself.

45. Further, as with the Communication Prohibition in *Clubb*:

(a) the protest need not be on the topic of terminations. It is sufficient if the protest be *in relation to* terminations;

(b) the prohibition applies whether or not the protest is in fact seen or heard (and whether or not the protest is reasonably likely to be seen or heard). It is sufficient if it is "able to" be seen or heard. This can be seen on the facts of this case: there was no evidence that the protest was in fact seen or heard by a relevant person on two of the three charged occasions;

(c) the prohibition applies to protests which can be seen even if not heard. It is clear from the text of s 9(2), as well as the Second Reading Speech, that silent protest was intended to be captured;

(d) the prohibition applies in public places and not just on private land;

(e) the prohibition applies in places where the protestor has a freedom to be. The prohibition applies on private land that the protestor has a right or freedom to be on;

(f) the prohibition applies to places where terminations are administered by way of a drug, and there may be many such premises;

(g) as confirmed by the Magistrate in this case, the premises need not be premises at which abortions are lawfully provided;

(h) there is no a prior limit to the number of places in Tasmania which can be an "access zone";

(i) the prohibition applies over a minimum area of 70,650m²;

(j) the prohibition does not carve out political communications; it applies to communications by Members of Parliament; it applies during election periods and referendums;

(k) the prohibition is in terms at least a *content* prohibition and a *place* regulation. It stands in distinction to the provisions in *Brown v Tasmania* (2017) 91 ALJR 1089 which were directed to the conduct of the protestors and not, as here, to the content of the opinion sought to be expressed.[6]

46. Further, as in *Clubb*, it is tolerably clear that, on the Magistrate's construction, the offence has no significant *mens rea* elements.

47. In its legal operation, the Protest Prohibition inflicts a more direct burden on political communication than the Communication Prohibition at issue in *Clubb*. That is because the sole focus of the Protest Prohibition is on protest.

The practical operation of the Protest Prohibition

48. The appellant adopts the submissions of Mrs Clubb at paragraphs [32]-[44] in relation to the practical effect of the Protest Prohibition and supplements them in one respect. That one respect is that, unlike *Clubb*, the viewpoint discrimination inflicted by the Protest Prohibition arises from the legal operation of the provision even before one comes to its practical operation: see paragraph 42 above.

The Protest Prohibition effectively burdens the freedom

49. It was conceded below that the Protest Prohibition effectively burdens the freedom. That concession was properly made. The appellant adopts the submissions advanced by the appellant in *Clubb* at paragraphs [46]-[64]. For the reasons there advanced, the burden is intense and, in the present case, even more direct and discriminatory because it is directed at anti-abortion protest.

The object of the Protest Prohibition

50. There are a number of candidates for the "object" of the Protest Prohibition.

51. One candidate is that referred to by the Minister in the Second Reading Speech, namely, to deter speech which has the purpose of dissuading or delaying persons from accessing abortions. If that is the object of the Protest Prohibition, it is not legitimate. That is a purpose of deterring speech calculated to persuade another person to change their mind – in this case, on a subject of great political importance, abortions. The very point of political speech is to change people's minds. The Constitution does not permit the polities to prohibit speech merely because it has the purpose of rousing action in another.

---

6 See *Brown* at [122].

52. Another candidate for the object of the prohibition is that referred to by the Minister in the Second Reading Speech, namely, to deter speech which the Minister considered to be "unacceptable". That object is antithetical to the constitutionally-prescribed systems. Perceived repugnance – or even actual repugnance – of speech is not a legitimate end: *Monis v R* (2013) 249 CLR 92 at [104] (Hayne J). The notion that it is impermissible for the State to quell speech merely because it does not like it is something on which foreign courts have spoken with one voice: see, e.g., *Brown v Entertainment Merchants Association*, 564 US 786 (2011) (Scalia J, for the Court) ("disgust is not a valid basis for restricting expression"); *Saskatchewan Human Rights Commission v Whatcott* 2013 SCC 11 at [90] (Rothstein J, for the Court) ("offensive ideas are not sufficient to ground a justification for infringing on freedom of expression").

53. A third candidate for the object of the prohibition is that implicit in the Second Reading Speech and the construction identified in paragraph 42 above, namely, to handicap one side of the abortion debate. "The end of ... handicapping political opposition" is not a legitimate end: *Tajjour v State of New South Wales* (2014) 254 CLR 508 at [148] (Gageler J).

54. A fourth candidate is that identified by the Magistrate at CAB 36 [37], namely, protecting certain persons from "being confronted with a protest in relation to terminations". The object of protecting people from "protest" is facially incompatible with the freedom of political communication. Under Australia's constitutionally-prescribed systems, protest is not something to be protected from; it is something to be encouraged.

55. A fifth candidate is that identified by the Magistrate at CAB 37 [41], namely, "to regulate the termination of pregnancies by medical practitioners in Tasmania". An object stated at that level of generality might very well be compatible with the constitutionally-prescribed, but it is not in fact the object of the Protest Prohibition. The Protest Prohibition is not a regulation of abortion. It does not permit or prohibit abortions. It does not regulate the manner in which abortions are provided. Nor is the Protest Prohibition a regulation of medical practitioners. It applies to premises irrespective of whether any medical practitioner is (or ever will be) present.

56. A sixth candidate is that referred to by the Minister in the Second Reading Speech, namely, deterring speech which causes "shame" to a person. That object is also not legitimate. It is inherent to political speech that it is apt to cause shame. Shame is the precursor to a change in political opinion. One need only consider speech about Australia's treatment of indigenous Australians to perceive that. Indeed, shame is often the expressly intended result of political speech. A search of Senate, House and Committee Hansard in the Commonwealth Parliament brings up hundreds of occasions on which parliamentarians have used the phrase "you should be ashamed of yourself" or similar phrases. In the Convention Debates, Mr Symon suggested that the delegates "ought to hide [their] heads in shame" if the High Court was as slow to hear appeals as the Privy Council,[7] Mr Barton said to his colleagues that it would be "a shame on us" if they did not attempt to create a truly federal Constitution[8] and Sir John Forrest urged

---

7 Convention Debates, 11 March 1898, 2301.

8 Convention Debates, 31 March 1897, 377.

"Shame!" on Mr Reid when he criticised South Australia's treatment of New South Wales wheat.[9]

57. A seventh candidate is that articulated in the Information Paper referred to in paragraph 16 above, namely, to ensure that women may access and doctors may provide terminations without fear of intimidation, harassment, obstruction or similar. The difficulty with this is that it does not fit with the text and legal operation of the Protest Prohibition. The prohibition is not directed to conduct which intimidates, harasses or obstructs – that is left to the discrete prohibition brought about by category (a) of the definition of "prohibited behavior". The Protest Prohibition applies irrespective of whether the conduct in fact causes (or is apt to cause or even *can* cause) intimidation, harassment or obstruction. The Minister did not suggest that the purpose of the Protest Prohibition was that identified in the Information Paper. This is not the object of the provision.

58. An eighth and final candidate derives from the study referred to in the Second Reading Speech which had suggested that patients in Victoria had suffered "distress, shame and anxiety" in response to protestors. The relevant object would be deterring conduct which causes those effects. It may, in the first instance, be doubted that this is in fact the object of the Protest Prohibition. If it were the object, one would expect the prohibition to apply only where the conduct is in fact reasonably likely to cause one or more of those responses (like the prohibition at issue in *Clubb*). In any event, any such end would be illegitimate. The purpose of preventing shame has been addressed above. Further, for the reasons given in paragraphs [72]-[77] of the appellant's submissions in *Clubb*, an end of deterring speech which may cause distress or anxiety is not compatible with the constitutionally-prescribed systems.

Proportionality – suitability

59. There are obvious difficulties in applying a suitability analysis where the government has not yet committed itself to a particular "end".

60. The appellant will therefore necessarily need to advance further submissions on the issue of suitability in reply.

61. For present, however, the following can be noted.

    (a) From the universe of conduct, the Protest Prohibition singles out a particular kind – protest. The prohibition therefore targets a category largely or wholly comprised of political communications while leaving untouched the vast majority of conduct.

    (b) The Protest Prohibition also singles out a particular viewpoint – opposition to abortions.

    (c) The elements of the Protest Prohibition are not tailored to any kind of asserted harm – for example, there is no requirement to establish that shame is reasonably likely and there is no requirement that any person in fact see or hear the protest.

---

9 Convention Debates, 23 February 1898, 1362.

Proportionality - necessity

62. In any event, the Protest Prohibition is not necessary in the requisite sense.

63. There are equally practicable, less burdensome alternatives.

64. As in *Clubb*, those equally practicable, less burdensome alternatives appear within the Act itself.

65. Paragraph (a) of the definition of "prohibited behavior" in s 9(1) extends the proscribed behavior in the following way:

> in relation to a person, besetting, harassing, intimidating, interfering with, threatening, hindering, obstructing or impeding that person.

66. This prohibition is closely tailored to the object identified in the Information Paper which preceded the 2013 Bill.

67. A further alternative would be to incorporate a circumstance element of the offence which tailored the offence to its asserted end. For example, the offence could read as follows:

> a protest in relation to terminations that is able to be seen or heard by a person accessing, or attempting to access, premises at which terminations are provided *and is reasonably likely to cause shame to such a person.*

68. This would more closely tether the offence to its purpose thus rendering it *better* at effecting that purpose, while being less burdensome of political communication.

69. Many other practicable, less burdensome alternatives are possible. For example:

(a) the law could contain a defence if the defendant establishes that the protest in fact had no relevant adverse effect;

(b) the law could contain a defence if the protest is engaged in with the consent of any person able to see or hear the protest;

(c) the law could carve out political communications;

(d) the law could carve out communications in or near the Tasmanian Parliament, as the *Public Health Amendment (Safe Access to Reproductive Health Clinics) Act 2018* (NSW) (**the NSW Act**) does (see s 98F(1)(b));

(e) the law could carve out communications by or with the authority of a candidate during an election or referendum, as the NSW Act does (see s 98F(1)(c));

(f) the law could carve out protests made with the consent of the landowner.

70. In assessing necessity, it can be noted that nothing in the Second Reading Speech suggests that Parliament's attention was directed to the efficacy of less burdensome

alternatives. This is not a case where Parliament considered, but rejected, alternatives to the Protest Prohibition.

Proportionality – adequacy in balance

71. Further, the Protest Prohibition is not adequate in its balance.

72. The prohibition is targeted at a characteristic form of political communication: protest. The burden it inflicts is direct.

10

73. The prohibition is also targeted – in law or fact – at those who hold particular views on abortion. It therefore distorts debate. It discriminates.

74. As with the Communication Prohibition in *Clubb*, the law strikes at the time that protest on or against abortions is most likely to be effective. Further, the vagueness of the law means that it will necessarily have a penumbral deterrent effect on political speech over and above that intended by its legal operation. That penumbral effect is particularly significant once the Protest Prohibition is applied in conjunction with police powers – exercisable where an officer has a reasonable belief – such as those
20 involved in the proceedings below.

75. The ends it might conceivably pursue are not of grave importance in the context of the constitutionally-prescribed systems. Preventing feelings – such as shame – which might cause a person to change their behavior is not a high constitutional purpose. To the contrary, for the reasons set out above, the arousing of feelings which cause a change in behaviour is a necessary incident of the constitutional systems.

76. In any event, the law is not tailored to achieving any of its ends. Whatever its object, it is over-inclusive in targeting all protest irrespective of actual, likely or potential effect.

30

77. Further, overall, the law is not calibrated to its end or ends, particularly once regard is had to the intense and direct burden it inflicts on political communications.

PART VII: APPLICABLE PROVISIONS

78. See Annexure.

PART VIII: ORDERS SOUGHT

40 79. The appellant seeks the orders set out in the Amended Notice of Appeal.

PART IX: ORAL ARGUMENT

80. The appellant estimates he will need 2 hours for oral argument.

Dated: 6 July 2018

Randall Gibbens for

.....

G O'L Reynolds
Telephone: (02) 9232 5016
Fax: (02) 9233 3902
Email: guyreynolds@sixthfloor.com.au

.....

FC Brohier
Telephone: (08) 8223 7900
Fax: (08) 8223 7001
Email: fcbrohier@elizabethmews.com.au

10

.....

D P Hume
Telephone: (02) 8915 2694
Fax: (02) 9232 1069
Email: dhume@sixthfloor.com.au

20

ANNEXURE – APPLICABLE PROVISIONS

9. Access zones

(1) In this section –

access zone means an area within a radius of 150 metres from premises at which terminations are provided;

distribute includes –

(a) communicate, exhibit, send, supply or transmit to someone, whether to a particular person or not; and

(b) make available for access by someone, whether by a particular person or not; and

(c) enter into an agreement or arrangement to do anything mentioned in paragraph (a) or (b) ; and

(d) attempt to distribute;

prohibited behaviour means –

(a) in relation to a person, besetting, harassing, intimidating, interfering with, threatening, hindering, obstructing or impeding that person; or

(b) a protest in relation to terminations that is able to be seen or heard by a person accessing, or attempting to access, premises at which terminations are provided; or

(c) footpath interference in relation to terminations; or

(d) intentionally recording, by any means, a person accessing or attempting to access premises at which terminations are provided without that person's consent; or

(e) any other prescribed behaviour.

(2) A person must not engage in prohibited behaviour within an access zone.

Penalty: Fine not exceeding 75 penalty units or imprisonment for a term not exceeding 12 months, or both.

(3) A person is not guilty of engaging in prohibited behaviour within an access zone by intentionally recording, by any means, a person accessing or attempting to access premises at which terminations are provided without that person's consent if, at the time of making the recording –

(a) the first-mentioned person is a law enforcement officer acting in the course of his or her duties as such an officer; and

(b) his or her conduct is reasonable in the circumstances for the performance of those duties.

(4) A person must not publish or distribute a recording of another person accessing or attempting to access premises at which terminations are provided without that other person's consent.

Penalty: Fine not exceeding 75 penalty units or imprisonment for a term not exceeding 12 months, or both.

(5) If a police officer reasonably believes a person is committing or has committed an offence –

(a) under subsection (2) that involves recording, by any means, a person accessing or attempting to access premises at which terminations are provided, without that person's consent; or

(b) under subsection (4) –

the police officer may –

(c) detain and search that person; and

(d) seize and retain the recording and any equipment used to produce, publish or distribute the recording found in the possession of that person.

(6) If a person is convicted or found guilty of an offence under subsection (2) or (4) any item seized under subsection (5) is forfeited to the Crown and is to be destroyed or disposed of in a manner approved by the Minister administering the Police Service Act 2003

(7) If a police officer reasonably believes a person is committing or has committed an offence under subsection (2) or (4), the police officer may require that person to state his or her name and the address of his or her place of abode.

(8) A person must not fail or refuse to comply with a requirement under subsection (7) or, in response to such a requirement, state a name or address that is false.

Penalty: Fine not exceeding 2 penalty units.

(9) A police officer making a requirement under subsection (7) may arrest, without warrant, a person who fails or refuses to comply with that requirement or who, in response to the requirement, gives a name or address that the police officer reasonably believes is false.

10. Proceedings

(1) Proceedings for an offence against this Part may only be instituted by –

(a) a police officer; or

(b) the Secretary of the Department or a person authorised in writing to institute proceedings by the Secretary of the Department.

(2) Proceedings for an offence under this Part must be instituted within 24 months after the date on which an offence is alleged to have been committed.

11. Infringement notices

(1) In this section –

infringement offence means an offence against this Part that is prescribed by the regulations made under this Act to be an infringement offence.

(2) A person referred to in section 10(1) may issue and serve an infringement notice on a person if he or she reasonably believes that the person has committed an infringement offence.

(3) An infringement notice may not be served on an individual who has not attained the age of 16 years.

(4) An infringement notice is to be in accordance with section 14 of the Monetary Penalties Enforcement Act 2005 .

(5) The regulations made under this Part –

(a) may prescribe, for infringement offences, the penalties payable under infringement notices; and

(b) may prescribe different penalties for bodies corporate and individuals.

12. Regulations

10 (1) The Governor may make regulations for the purposes of this Part.

(2) The regulations may be made so as to apply differently according to matters, limitations or restrictions, whether as to time, circumstance or otherwise, specified in the regulations.

(3) The regulations may authorise any matter to be from time to time determined, applied or regulated by any person or body specified in the regulations.