

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

No. M46 of 2018

BETWEEN:



KATHLEEN CLUBB
Appellant

and

ALYCE EDWARDS
First Respondent

ATTORNEY-GENERAL FOR VICTORIA
Second Respondent

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**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

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**OUTLINE OF ORAL ARGUMENT OF THE ATTORNEY-GENERAL
FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)**

Part I: Certification: This outline is in a form suitable for publication on the internet.

Part II – Outline of Propositions:

1. If it is to be taken that any effective burden on the implied freedom must be justified (*Brown* at [127]), the requirement of transparency identified by the plurality in *Brown* in application of the third limb of the proportionality analysis (adequacy of balance) focuses attention on how to weigh the incommensurable concepts of importance of purpose and extent of burden on the freedom. (Written Submissions in *Clubb (CWS)* [19]-[21]).
2. A methodical analysis of each has the capacity to reduce the instance of hard cases where the weighing of incommensurables is truly problematic.
- 10 3. Characterisation of the legislative purpose (which occurs at the stage of compatibility testing) must occur at a high level of abstraction, akin to discerning the mischief or mischiefs to which the law is directed (CWS [26.1]-[26.3]).
4. Expressed at the appropriate level of abstraction, the purposes of the impugned legislation in both cases are to protect the safety and wellbeing of people accessing, providing and otherwise associated with lawful medical services and to support their privacy and dignity (CWS [27]; Written Submissions in *Preston (PWS)* [14]). To identify as candidates for purpose as being to “deter speech” or “handicap...debate” is to fail to engage in the inquiry at the appropriate level of abstraction, and conflates purpose with one (only) potential, and even then incidental, effect of the legislation. (PWS [16]).
- 20 5. Those broadly described legislative purposes can be given further descriptive manifestations. For example, it falls entirely within the broad description of purpose in each case, identified above, to say that it is a purpose of each enactment to target circumstances where women are attending the premises in a vulnerable state so as to protect their safety (including health) by ensuring that they are not deterred from receiving the advice and treatment they may require.
6. It is not correct to say that that descriptive manifestation of the purpose is not supported by the text or context of s 9(2) of the Tasmanian Act. The words in s 9(1)(b) “able to be seen or heard by a person accessing, or attempting to access, premises” mandate this inference. The legislation is not directed at “protest simpliciter” (T40.1690). The same can
30 be said of paragraph (b) of the definition in s 185B of the Victorian Act; in that case, s 185C further reinforces that conclusion.

7. To ascribe importance to that broadly described purpose requires resolving the competing imperatives of:

7.1. the need to deploy value judgments that best characterise those that informed the legislative act and avoid subjective impressions of the particular judge; and

7.2. the need to avoid deference and ensure that Parliament does not recite itself into power (CWS [25]).

8. The exercise is informed by a factual inquiry but without complete access to the political considerations that contributed to the enactment. The starting point is any express or implied statement of objects in the Act or in any Parliamentary Declaration. The Second Reading Speech or Explanatory Memorandum may be deployed and may reference a report to Parliament. Parliament's view, being by definition representative, is an important integer of the Court's assessment. That is not deference. (CWS [26.4]-[26.7])

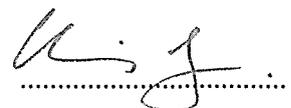
9. The importance of the identified purpose may also be apparent from a long history of legislative and common law regulation, or it may be notorious. Evidence procured by the executive relevant to the social or economic scale, scope and impact of the targeted mischief may in some circumstances assist the inquiry. (CWS [26.8]-[26.9])

10. The purposes of the legislation in both cases are of evident importance and reflect a long history of protective regulation in multiple spheres (CWS [27]-[28]). This includes legislative intervention with the purpose of protecting the dignity of classes of people at some disadvantage. Examples are s 105.33 of the *Commonwealth Criminal Code* (humane treatment of a person being detained under a preventative detention order), s 58 of the *Disability Act 2006* (Vic) and s 5(4)(d) of the *Supported Accommodation Assistance Act 1994* (Cth). Impairing dignity is not a necessary integer of political communication.

11. As to the extent of the burden in each case, careful assessment of both its positive and negative integers has the capacity to reduce the instance of truly hard cases when it comes to the comparison of the incommensurable considerations. (CWS [30]-[35])

12. Examination of the integers of the prohibitions in both cases lead to the conclusion that the extent of the burden on the freedom is slight. The purposes of the prohibition are of evident public importance. The justification for the burden on the freedom in each case is established. (CWS [41])

Dated: 11 October 2018



CD Bleby SC