

PRESTON v AVERY & ANOR (H2/2018)

Court from which cause removed: Supreme Court of Tasmania

Date cause removed: 23 March 2018

The question that arises in this proceeding is whether s 9(2) of the *Reproductive Health (Access to Terminations) Act 2013* (Tas) ("the Act") impermissibly burdens the implied freedom of political communication to the extent that it prohibits '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'.

The appellant was charged on three separate occasions, 5 and 8 September 2014 and 14 April 2015, with offences under s 9(2) of the Act. The first charge related to the appellant holding placards and handing out leaflets near the entrance to the Specialist Gynaecology Centre in Hobart. The second charge related to the same conduct, and included a conversation between the appellant and a woman wishing to access the Centre. The third charge involved the appellant and two other people holding placards outside the Centre and included the appellant failing to comply with a police officer's direction to leave the immediate area.

In proceedings before the Magistrates Court, the appellant challenged the validity of the protesting prohibition on the ground, inter alia, that it infringed the implied freedom of political communication in the Commonwealth Constitution. The Magistrate rejected the appellant's constitutional challenge and found all three of the charges proved. The appellant appealed to the Supreme Court of Tasmania. That appeal was removed to the High Court by order of Gordon J on 23 March 2018.

Section 9(2) of the Act states: "*A person must not engage in prohibited behaviour within an access zone*". Section 9(2) defines an "access zone" as "*an area within a radius of 150 metres from premises at which terminations are provided*". "*Prohibited behaviour*" is relevantly defined in s 9(1)(b) as: "*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*".

This appeal raises a number of issues similar to those raised by the appeal in *Clubb v Edwards & Anor* (M46/2018). The appellant generally adopts the submissions advanced by the appellant in that matter, but makes further submissions. The appellant identifies eight possible objects of the legislation, for example, to deter speech which has the purpose of dissuading or delaying persons from accessing abortions. He submits that each of these objects is constitutionally impermissible. He further submits that the prohibition in s 9(1) is not necessary as there are equally practicable, less burdensome alternatives. The appellant also argues that the prohibition in s 9(1) is not adequate in its balance because it is targeted at a characteristic form of political communication: protest. The burden it inflicts is direct. The prohibition is also targeted, in law or fact, at those who hold particular views on abortion. It therefore distorts debate and is discriminatory.

The grounds of the appeal include:

- The learned Magistrate erred in law in that she found that the effect of s 9(2) of the *Reproductive Health (Access to Terminations) Act 2013* (Tas) was that “[a] 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” and hence found that an offence could only be committed under s 9(2) if a protest could be seen and heard by a person going into the premises (in the sense of actually entering the premises) or attempting to access the premises (in the sense of being closely proximate to the entrance of the premises and intending to go into the premises).

The Attorneys-General of Victoria, South Australia, Western Australia, Queensland, New South Wales, the Northern Territory, Victoria and the Commonwealth have filed Notices of Intervention. LibertyWorks has been granted leave to appear as *amicus curiae*, limited to its written submissions.

This matter is listed to be heard together with *Clubb v Edwards & Anor* (M46/2018).