CLUBB v EDWARDS & ANOR (M46/2018)

Court from which cause removed: Supreme Court of Victoria

Date cause removed: 23 March 2018

The question that arises in this appeal is whether s 185D of the *Public Health and Wellbeing Act 2008* (Vic) ("the Act") impermissibly burdens the implied freedom of political communication.

This appeal raises a number of issues similar to those raised by the appeal in *Preston v Avery & Anor* (H2/2018).

The appellant was charged with an offence under s 185D on 4 August 2016. It was alleged that she approached a couple at the entrance of the East Melbourne Fertility Control Clinic, spoke to them and handed them a pamphlet. In proceedings before the Magistrates Court, the appellant challenged the validity of the s185D on the ground that it infringed the implied freedom of political communication in the Commonwealth Constitution. The Magistrate rejected the appellant's constitutional challenge and found the charge was proven. The appellant appealed to the Supreme Court of Victoria. That appeal was removed to the High Court by order of Gordon J on 23 March 2018.

Section 185D of the Act states: "[a] *person must not engage in prohibited behaviour within a safe access zone*". Section 185B(1) defines a "*safe access zone*" as "*an area within a radius of 150 metres from premises at which abortions are provided*", and "*prohibited behaviour*" as: "*communicating by any means in relation to abortions in a manner that is able to be seen or heard by a person accessing, attempting to access, or leaving premises at which abortions are provided and is likely to cause distress or anxiety*".

The appellant contends that the legal and practical operation of the communication prohibition in s 185D is extremely wide: it purports to proscribe many communications which would be characterised as political, such as, whether the Commonwealth government should encourage or discourage abortions, and whether federal laws should be changed to restrict or facilitate abortions. The appellant also contends that s 185D does not pursue an end that is compatible with constitutional systems. While the objects clause in the Act refers to safety, well-being and privacy, the appellant contends that the communication prohibition in s 185D in fact deters communications which are apt to cause discomfort, an end which is not compatible with constitutionally prescribed systems. The appellant submits that in its present operation s 185D burdens one side of the abortion debate more than the other and so it discriminates and it distorts political communication. The appellant further submits that the prohibition is not necessary as there are equally practicable, less burdensome alternatives.

The grounds of the appeal include:

The learned Magistrate wrongly held:

(i) that communications in relation to abortion are not, as a matter of law, political communications; and

(ii) that s 185D of the *Public Health and Wellbeing Act* 2008 (Vic) so far as it prohibited communications about abortion in a safe access zone in a manner that was able to be seen or heard by persons accessing or attempting to access or leaving premises at which abortions are provided that is reasonably likely to cause anxiety or distress does not impermissibly burden the implied freedom of political communication implied by the Commonwealth Constitution and was valid.

The Attorneys-General of South Australia, Western Australia, Queensland, New South Wales, and the Commonwealth have filed Notices of Intervention.

A number of organisations have been granted leave to appear as amicus curiae, limited to their written submissions, namely the Castan Centre for Human Rights Law, the Fertility Control Clinic and the Human Rights Law Centre. The Access Zone Action Group was refused leave to appear as amicus curiae.

This matter is listed to be heard together with *Preston v Avery & Anor* (H2/2018).