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Do safe access zones protect health practitioners and patients at the cost of constitutional freedoms? — Clubb v Edwards; Preston v Avery

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Abstract

The High Court of Australia has recently handed down a decision regarding the constitutional validity of legislation in Victoria and Tasmania governing safe access zones to abortion providers.

Introduction

The High Court of Australia in the recent decision of *Clubb v Edwards; Preston v Avery*[1] (*Clubb v Edwards*) has dismissed two appeals that challenged the constitutional validity of "safe access zones" provided under s 185D of Victoria's Health and Wellbeing Act 2008 (Vic) (Public Health Act) and s 9(2) of Tasmania's Reproductive Health (Access to Terminations) Act 2013 (Tas) (Reproductive Health Act) on the basis that they burden the implied freedom of political communication under the Constitution (implied freedom).[2]

Background

On 10 April 2019, the court handed down its judgment in an appeal of the judgment of Magistrate Bazzani by Mrs Clubb (the Clubb appeal) and Mr Preston (the Preston appeal) respectively following two separate alleged breaches of safe access zones.

The legislative provisions breached under each appeal concerned a "safe access zone", defined as an area within a radius of 150 m from premises at which terminations are provided.[3] Both appeals also concerned a restriction confined to communications about such terminations that "are able to be seen or heard by a person seeking access to such premises."[4] This overlap of issues led the court to firstly "deal comprehensively with those issues in the Clubb appeal" before addressing the distinctive aspects of those issues raised in the Preston appeal.[5]

The Clubb appeal

The Clubb Appeal involved the applicant, Mrs Kathleen Clubb, who was seen by police standing approximately 5 m from the East Melbourne Fertility Control Clinic entrance on 4 August 2016.[6] Mrs Clubb approached a young couple entering the facility and handed them a pamphlet, which "offered counselling and assistance to enable pregnancy to proceed to birth."[7] She was charged and convicted for these acts under the Public Health Act for breaching the safe access zone.[8] Mrs Clubb appealed this decision to the Supreme Court of Victoria and onto the High Court, submitting that s 185D of the Public Health Act, read together with the definition of "prohibited behaviour" under s 185B(1), "impermissibly burdens the implied freedom and is therefore invalid, so that the charge against her should have been dismissed."[9]

The Preston appeal

In the Preston appeal, Mr John Preston had been found on two occasions to be standing within 150 m of the Specialist Gynaecology Centre in Hobart, holding leaflets, media releases and placards that included statements such as "EVERY ONE HAS THE RIGHT TO LIFE" and images of an 8-week old foetus, amongst other representations.[10] He was subsequently charged with breaching s 9(2) of the Reproductive Health Act for engaging in prohibited behaviour within a safe access zone.

Mr Preston brought an appeal against this decision to the High Court. He referred to para (b) of the definition of "prohibited behaviour" under s 9(1), which 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". Mr Preston submitted that this provision, read with s 9(2) of the Reproductive Health Act, which prohibits such behaviour, "impermissibly burdens the implied freedom."[11]

Statutory framework

The following statutory provisions were considered by the court in their impact on the exercise of the Constitutional right to the implied freedom.

Public Health Act

Part 9A of the Public Health Act governs safe access zones to abortion facilities. This Part was introduced for the purpose of firstly, providing safe access zones around premises at which abortions are provided "so as to protect the safety and wellbeing and respect the privacy and dignity" of both patients and employees accessing the services provided at those premises; and secondly, to "prohibit publication and distribution of certain recordings."[12]

This Part of the Public Health Act creates an offence for any person engaging in prohibited behaviour within a safe access zone.[13] Prohibited behaviour is defined 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 reasonably likely to cause distress or anxiety[,][14]

and safe access zones refer to "an area within a radius of 150 metres from premises at which abortions are provided."[15]

It may also include engaging in harassing, obstructive and threatening behaviour towards persons accessing or leaving the premises where abortions are provided (the premises); impeding a footpath, road or vehicle accessing or leaving the premises; and recording persons accessing or leaving the premises. The penalty for being charged with this office may leave to either a fine or a prison term of up to 12 months.[16]

The Reproductive Health Act

The Reproductive Health Act also governs safe access to abortion facilities and includes a definition of safe access zones that closely mirrors that of the Public Health Act, as s 9 of the Act states that an "access zone" is "an area within a radius of 150 metres from premises at which terminations are provided". However, the definition of "prohibited behaviour" under this Act differs from its Victorian counterpart. Unlike the Public Health Act, prohibited behaviour includes 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".[17] This Act therefore prohibits protests rather than mere communications in relation to abortions. Further, the prohibition has not been limited by a requirement that "the protest be reasonably likely to cause distress or anxiety."[18]

The court in *Clubb v Edwards* commented that this definition under the Reproductive Health Act places a stronger burden on the implied freedom because firstly, it is directed at a "familiar form of political communication"; secondly, it does not articulate an object of the Act that justifies this "intrusion on the implied freedom"; and finally, the protest prohibition is not limited to circumstances where the actions in question have "a potential to cause distress or anxiety."[19] However, ultimately, the court did not find these differences persuasive in deciding whether the Preston appeal warranted a different result.[20]

Implied freedom to political communication

The established constitutional right to an implied freedom of political communication *limits* the executive's power to "regulate communication relating to matters of government and politics."[21] The court acknowledged the importance of this freedom in protecting the public's ability to make a free and informed choice of electors.[22] However, this right does not provide a comprehensive ability for any individual or group to communicate any message they choose in any way they see fit.[23]

Each appellant submitted that the respective provisions under each Act that were being challenged were invalid on the basis that they impermissibly burdened "the freedom of communication about matters of government and politics which is implied in the Constitution".[24] In order to resolve this issue, the court applied the test (the McCloy test) for invalidity as stated in *Lange v Australian Broadcasting Corp*[25] (*Lange*) and explained in *McCloy v New South Wales*[26] (*McCloy*) and *Brown v Tasmania*[27] (*Brown*). The McCloy test is outlined as follows:[28]

1. Does the law effectively burden the implied freedom in its terms, operation or effect?
2. If "yes" to question 1, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?
3. If "yes" to question 2, is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

The court in *McCloy* held that the third question required a proportionality test to "determine whether the restriction which the provision imposes on the freedom is justified."[29] This analysis involves consideration of the extent of the burden effected by the impugned provision on the freedom. There are three stages to the proportionality test:[30]

- firstly, whether the law in dispute is "suitable", which requires a "rational connection to the purpose of the law"
- secondly, whether the law is "necessary", which requires "no obvious and compelling alternative,

reasonably practical, means of achieving the same purpose which has a less burdensome effect on the implied freedom"

- thirdly, whether law is "adequate in its balance", which requires "a [value] judgment, consistently with the limits of the judicial function, [describing] the balance between the importance of the purpose served by the [restrictive measure] and the extent of the restriction it imposes on the implied freedom"

Reasons for decision

The High Court unanimously dismissed the appeals brought by both Clubb and Preston. In reviewing the reasons, this article outlines the full decision of the joint majority judgment before highlighting key areas of interest or difference in the remaining judges' reasons.

Kiefel CJ, Bell and Keane JJ (joint majority judgment)

Kiefel CJ and Bell and Keane JJ delivered the joint majority judgment on the question on whether the relevant provisions in the Public Health Act and the Reproductive Health Act breached the implied constitutional freedom of communication about matters of government and politics. Their Honours held that while it is well-settled that the implied freedom limits the power of government to regulate political matters, it does not confer a right on the public to communicate a particular message. Rather, the right to protest may be limited by statute, provided that limitation is valid.[31] In providing judgment, the court dealt with the Clubb appeal first, followed by the Preston appeal.

Clubb

Prior to making a decision, the court was required to deal with a threshold issue raised by the Commonwealth Attorney-General in respect of the court's power to determine the appeal on the basis that Mrs Clubb's conduct had not been political in nature and therefore there could be no infringement of her implied freedom in this case.[32] The court agreed that Mrs Clubb's conduct in handing over pamphlets lacked a connection with the public's electoral choices, but rather was designed to persuade the recipient against proceeding with an abortion.[33]

Given that finding, the court considered whether it was within its power to deliver judgment on the issue given it is generally accepted that courts will not determine whether a statute is constitutionally valid unless necessary to do so.[34] The court held that it was warranted that the court made a decision in this case as a similar case, which did involve political communication and would be possible in the future; the lines between political and moral communications can be blurred where politically contentious issues are discussed, and it is necessary to finally determine the issue to avoid the same threshold issue being raised in the future.[35]

In making their decision, Kiefel CJ, Bell and Keane JJ applied the McCloy test.

A burden on the implied freedom

In relation to the first question, the court found the Public Health Act proscribes many communications which may be characterised as "political", as acknowledged by the Solicitor-General of Victoria.[36]

Legitimate purpose

Mrs Clubb argued that the purpose of the Public Health Act prohibition is the suppression of public expression of anti-abortion sentiment, and that is not a legitimate purpose.[37] On the other hand, the Solicitor-General for Victoria submitted that the purpose was to reduce the environment of "conflict, fear and intimidation" outside abortion clinics which was harmful to patients and staff.[38]

The court considered the wording of the Public Health Act and the Second Reading speech, in particular s 185A which expressly declares the purpose to be the "protection of the safety and wellbeing of, and the preservation of the privacy and dignity of, persons accessing lawful medical services, as well as staff and others accessing the premises".[39] The court placed particular emphasis on the protection of "privacy and dignity" of those accessing abortion services given the connection between human rights and dignity. The court therefore held that the protection of dignity of the people of the Commonwealth is a legitimate purpose.[40]

Mrs Clubb further submitted that the prohibition is not legitimate as it is discriminatory against the anti-abortion side of the debate when compared to the pro-choice side.[41] The court however held that the legislation is not discriminatory as it applies equally to both sides of the debate, even though it may be more commonly breached by anti-abortion activists. Further, there is nothing to suggest that a person seeking access to the premises would be less likely to be caused distress or anxiety by a pro-choice activist trying "to co-opt her as part of their message".[42]

Advancing the legitimate purpose — proportionality

The court was lastly required to determine "whether the law can be seen to be irrational in its lack of balance in the pursuit of its object."[43] This is to be determined by reference to the terms of the benefits the law seeks to

achieve in the public interest and the extent of the burden on the implied freedom. The Solicitor-General for Victoria submitted that any burden on the implied freedom is incidental as not all abortion communications are political, people may still protest outside the 150 m zone and it is a legitimate "time, manner and place" restriction.[44]

On the other hand, Mrs Clubb raised a number of arguments in relation to the effect of the prohibition on the implied freedom. Her arguments and the court's findings are summarised as follows:

- Mrs Clubb argued that, as the communication does not need to be seen or heard, it is an impermissible burden on the freedom. The court found that this argument does not appreciate the protective purpose of the legislation, which is to preserve a corridor of access to reproductive health care facilities rather than to punish interference with a person seeking to access the facility.[45]
- Mrs Clubb submitted that political communications about abortions are most effective when they occur at relevant clinics. The court rejected this argument on the basis that this finding was not supported by fact or evidence, was not analogous to other similar cases and did not consider the intrusion on privacy and dignity of those seeking to use facilities in the safe access zone. The court further found that people wishing to protest have an unimpeded ability to do so outside the 150 m.[46]
- It was therefore held that the law is suitable and has a rational connection to its statutory purpose of promoting public health, in particular "a measure that seeks to ensure that women seeking a safe termination are not driven to less safe procedures"[47] due to shame or fear of the loss of privacy. This was found to be a rational response to a serious public health issue.
- The law was also found to be necessary in light of evidence that previous attempts by police and local councils prior to the introduction of the laws to stop harassment of patients had been ineffective.[48] The court overall found that burden on the implied freedom is slight in respect of the subject matter and geographical extent and therefore proportionate to the objectives of the communication prohibition.[49]

Preston

In providing reasons for the Preston appeal, their Honours firstly considered the key differences between the Victorian and Tasmanian legislation, finding as follows:[50]

- the Reproductive Health Act does not state its objects
- the prohibition in the Reproductive Health Act is directed at "protests"
- the scope of the prohibition is not limited to a protest that is reasonably likely to cause distress of anxiety

Given those differences, the court noted that the burden is arguably stronger than in Victoria, given the targeting of more clearly identifiable political communication, a lack of objects to justify the prohibition and no requirement that the communication cause distress or anxiety. However, despite this, the differences did not warrant a different result in the Preston appeal.[51]

As with the Clubb appeal, the court applied the McCloy test as follows.

A burden on the implied freedom

There was no doubt that the word "protest" encompasses a public demonstration about abortion which may in some cases contain a political communication.[52]

Legitimate purpose

The Solicitor-General stated that, despite no objects being contained in the Reproductive Health Act, the purpose is to protect "the safety, wellbeing, privacy and dignity of persons accessing premises where terminations are provided."[53] This was supported by the Second Reading speech which stated that without "safe, legal and accessible reproductive services, women experience poorer health outcomes" and went on to address the obstacles, stigma and shame associated with accessing those services.[54] Relying on this, it was held that the object of the specific protest prohibition is to "protect the safety and wellbeing, physical and emotional, of persons accessing and leaving abortion clinics and to ensure that women may have unimpeded access to, and doctors may provide, terminations."[55]

As with the Clubb appeal, Preston argued that the prohibition was discriminatory. This was again rejected on the same basis, namely that the prohibition does not target one side of the debate over the other.[56]

Advancing the legitimate purpose — proportionality

The court found that the prohibition had a rational connection to its purpose, in particular, it states that women may be deterred from accessing the service where termination-related protests can be seen or heard.[57] It was also necessary as a legitimate response to avoiding stress or anxiety from witnessing a termination-related protest would be to avoid the relevant health service, which may result in adverse health outcomes.[58]

In balancing the purpose with the restriction on the freedom, the court again referred to the prohibition only operating within a safe access zone and the communication being limited to the discussion of abortion. The same finding was therefore made in relation to Tasmania as was made in relation to Victoria.[59]

Gageler J

Gageler J, while reaching the same decision as the joint judgment, found that the prohibition in both Victoria and Tasmania was direct, substantial and discriminatory. In particular:

- In contrast to the joint judgment, Gageler J found that while the prohibition is viewpoint neutral, in practice it impacts differently on pro-choice and pro-life activists.[60] Referring to the Tasmanian Minister for Health's Second Reading speech, which stated that "the prohibition would not stop a sermon in a church or 'an exchange of personal views between mates at a restaurant or pub'",[61] Gageler J found that the intention of the exclusion zone is to curtail protests by those who seek to express disapproval of abortion services.
- Gageler J also referred to the case of *Brown*, which also concerned onsite protesting. However, in Brown, the conduct was pro-conservation protests in forests, which have been seen to have particular communicative power whereas anti-abortion protests have been largely ignored in the media. However, despite the difference in perceived effectiveness, Gageler J found that the protection of the implied freedom is not greater for those who are media-savvy or for causes with popular appeal.[62]

In determining the proportionality of the restriction, Gageler J made a comment on the choice of 150 m as the appropriate exclusion zone by reference to similar legislation and decisions in Canada, the US and Europe. For example:

- Two cases in Canada related to an exclusion zone of 50 m, which were upheld as "justified in a free and democratic society".[63]
- None of the cases in the US Supreme Court have involved buffer zones as extensive as the Victorian and Tasmanian 150-metre zone. Rather, a zone of 100 ft, which prohibited knowingly approaching a non-consenting person within 8 ft to protest was found to be reasonable. On the other hand, a 300-feet exclusion zone was struck down.[64]
- In the UK, the High Court of Justice of England and Wales found that a "safe zone" around an abortion clinic could be defined as a particular grassy space about 100 m from the entrance to the clinic.[65]

Taking into account those examples, Gageler J acknowledged that it is not the role of Australian courts to tinker with legislative design. They do, however, have a responsibility to ensure that the chosen legislative restriction is appropriate.[66] Gageler J found that total and permanent prohibition of public expression of political opinion is not trivial, and is not automatically justified by pointing to the ability to express the opinion elsewhere.[67] However, while 150 m must be close to the maximum justified reach, it was held to be appropriate given that there is enough opportunity for protests to be held at other locations meaningfully proximate to the premises.[68]

Gordon J

In Gordon J's judgment, her Honour expressed caution in applying a proportionality analysis under the McCloy test. In particular, she noted that such an analysis was rigid and may fail to answer the uncertainty created by those standards set by the test set out in *McCloy* and *Lange*.[69] She made the following key points:

- Firstly, not every law which effectively burdens the freedom of political communication, but which is directed to a legitimate end, demands the same degree of justification. As a result, each of these laws do not need to be subjected to the same level of scrutiny and a "one size fits all" approach should be avoided.[70]
- Secondly, she considered that the proportionality test should only be applied to a right and the competing non-right interests, noting that "not only is the implied freedom of political communication not a right, but the conceptual origins of structured proportionality find no readily identifiable equivalents in the Australian constitutional structure or jurisprudence."[71]
- Finally, her Honour noted that the concept of structured proportionality, as adopted by the proportionality test, is contested conceptually, geographically and in its sphere of application and influence. She noted that some countries have abandoned this concept and adopted a concept of reasonableness in its place, with others noting it is not the only, or even preferred, method of legal reasoning.[72]

Comment

Overall, the case of *Clubb v Edwards* highlights the importance of protecting employees and patients accessing public health services. In particular, government intervention is supported because it ensures these services can be accessed safely and ensures members of the

public aren't prevented from seeking medical assistance with these procedures. It is possible that the courts will see more examples like those of Mrs Clubb and Mr Preston, with the spotlight on restrictions imposed on implied freedoms.

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Footnotes

1. *Clubb v Edwards; Preston v Avery* (2019) 366 ALR 1; [2019] HCA 11; BC201902725.
2. Above, at [4].
3. Public Health Act, s 185B; and Reproductive Health Act, s 9.
4. Above n 1, at [9].
5. Above n 1, at [9].
6. Above n 1, at [11].
7. Above n 1, at [11].
8. Above n 1, at [10].
9. Above n 1, at [14].
10. Above n 1, at [106].
11. Above n 1, at [109].
12. Public Health Act, above n 3, s 185A.
13. Public Health Act, above n 3, s 185D.
14. Public Health Act, above n 3, s 185B(1).
15. Public Health Act, above n 3, s 185B(1).
16. Public Health Act, above n 3, s 185D.
17. Reproductive Health Act, above n 3, s 9(1).
18. Above n 1, at [116].
19. Above n 1, at [117].
20. Above n 1, at [117].
21. Above n 1, at [8].
22. *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520 at 560.
23. Above n 1, at [8].
24. Above n 1, at [4].
25. Above n 22.
26. *McCloy v New South Wales* (2015) 257 CLR 178; 325 ALR 15; [2015] HCA 34; BC201509677.
27. *Brown v Tasmania* (2017) 261 CLR 328; 349 ALR 398; [2017] HCA 43; BC201708656.
28. Above n 1, at [5].
29. Above n 26, at [2].
30. Above n 1, at [6].
31. Above n 1, at [8].
32. Above n 1, at [25]–[26].
33. Above n 1, at [31].
34. Above n 1, at [34].
35. Above n 1, at [36]–[39].
36. Above n 1, at [43].
37. Above n 1, at [45].
38. Above n 1, at [46].
39. Above n 1, at [47].
40. Above n 1, at [51].
41. Above n 1, at [52].
42. Above n 1, at [55].
43. Above n 1, at [66].
44. Above n 1, at [75].
45. Above n 1, at [78]–[79].
46. Above n 1, at [80]–[83].
47. Above n 1, at [84].
48. Above n 1, at [86].
49. Above n 1, at [102].
50. Above n 1, at [116].
51. Above n 1, at [117].
52. Above n 1, at [119].
53. Above n 1, at [120].
54. Above n 1, at [121].
55. Above n 1, at [122].
56. Above n 1, at [123].
57. Above n 1, at [124].
58. Above n 1, at [126].
59. Above n 1, at [128].
60. Above n 1, at [170].
61. Above n 1, at [171].
62. Above n 1, at [173].
63. Above n 1, at [201], referring to *R v Lewis* (1996) 139 DLR (4th) 480 and *R v Spratt* (2008) 298 DLR (4th) 317.
64. Above n 1, at [202]–[203].
65. Above n 1, at [204].
66. Above n 1, at [207].
67. Above n 1, at [210].
68. Above n 1, at [213].
69. Above n 1, at [404].
70. Above n 1, at [391].
71. Above n 1, at [393].
72. Above n 1, at [395].