AUSTRALIA'S MAGNA CARTA INSTITUTE

RULE OF LAW EDUCATION

Update to the Implied Freedom of Political Communication Case Note

Clubb v Edwards; Preston v Avery [2019] HCA 11

The two cases described in this case note deal with the implied freedom of political communication as it specifically relates to protests about abortion and legislation which protects persons accessing services in abortion clinics. Teachers therefore need to consider whether it's an appropriate case study for their students.

Facts - *Case 1 concerning Mrs Clubb*

Section 185D of the *Public Health and Wellbeing Act 2008* (Vic) (the Act) prohibits a person standing within 150 metres from an abortion clinic when communicating their views in relation to abortion in a manner able to be seen or heard by persons accessing or attempting to access premises at which abortions are provided, and if the communication is reasonably likely to cause distress or anxiety ("the communication prohibition").

Mrs Clubb stood about five metres from the entrance to the East Melbourne Fertility Control Clinic where she spoke to a couple about to enter the clinic, and proffered them a pamphlet which offered counselling and assistance about pregnancy, and which the couple declined.

Mrs Clubb was convicted in the Magistrates Court of Victoria for breaching the Act. The matter was then appealed to the High Court

Facts - Case 2 concerning Mr Preston

Section 9(2) of the *Reproductive Health (Access to Terminations) Act 2013* (Tas) (the Act) prohibits protests in relation to abortions that are able to be seen or heard by a person accessing premises at which abortions are provided ("the protest prohibition"). The law has a similar geographic restriction to the Victorian law of 150 metres. Mr Preston stood on the footpath outside Specialist Gynaecology Centre in Hobart on several occasions holding placards containing words and images of fetuses indicating his opposition to abortion. These placards were visible to persons who might enter or attempt to enter the Centre.Mr Preston was convicted in the Magistrates Court of Tasmania for breaches of the Act.

The Appeal to the High Court

Mrs Clubb and Mr Preston appealed their matters to their respective state Supreme Courts and the issues of implied freedom of political communication were removed to the High Court (*Clubb v Edwards; Preston v Avery). T*hey argued the legislation on which their two convictions were based interfered with the implied freedom of political communication and were thus invalid.

The High Court decision: *Clubb v Edwards/ Preston Avery*

The High applied the legal test from *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 and *McCloy v New South Wales* (2015) 257 CLR 178 to the Victorian Act.

They asked three questions as a test which weighed up whether the state legislation impacted disproportionately on the implied freedom of communication; which would in turn have a detrimental effect on our democracy and representative government. The three questions asked were:

[blockquote]1. Does the law effectively impact 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, are the requirements imposed by the law proportionate and therefore compatible with the maintenance of the constitutionally prescribed system of representative and responsible government? [/blockquote]

Proportionality analysis asks whether there is no practical/legislative alternative means of achieving the same purpose which has a less burdensome effect on the implied freedom of political communication.

In applying proportionality analysis, in these cases, it should be shown the freedom to express anti abortion communications are not proprortionally disadvantaged to pro-abortion communications.

If both these questions are answered yes, the question is then whether the challenged law is "adequate in its balance". This last stage of the analysis requires a value judgment by the court, comparing the positive effects of realising the law; with the negative effects of imposing a burden on the implied freedom.

In both cases the majority of justices **Kiefel CJ, Bell J, Keane J, Nettle J** found:

1. The restriction on communications resulting from the legislation may burden the implied freedom of political communication to the degree that both the appellants were not stopped from expressing their anti-abortion sentiments, if they are considered political views, both Mrs Clubb and Mr Preston were just required to stand 150 metres from the clinics.
2. The laws in question had a legitimate purpose in ensuring 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. The law was suitable, with a rational connection to its purpose of promoting public health. There is no distinction between pro and anti-abortion communications in the law.
3. Therefore, there was no unreasonable disproportion (between the burden on political communication affected by the safe access zones ie 150 metre restriction and the law's legitimate purpose.
4. In respect of Mr Preston's appeal, Kiefel CJ, Bell and Keane JJ determined that the Tasmanian legislation was more likely to be intrusive on the implied freedom as the Act directed at "protests". Unlike the Victorian legislation there was no object in the law so the provision

was not limited by a requirement that the protest be reasonably likely to cause distress or anxiety.

The High Court unanimously found safe access zones around reproductive health clinics to be constitutionally valid and dismissed both appeals. They did however differ in their views as to whether they could assess the constitutional validity of the Victorian laws. The Majority (Kiefel CJ, Bell and Keane JJ and Nettle J writing separately) found that they could determine the validity of the Victorian laws for a number of reasons.

Gageler, Gordon and Edelman JJ, wrote separate judgements. They determined they should only consider the appeal of Mr Preston as his communication was political in nature differing in that respect, from the facts in Mrs Clubb's case.

Gordon J held that while the Tasmanian provision did burden the implied freedom of political communication this burden was not substantial as it related to a restriction of political communication in respect of time, place and manner.

The High Court decision: *Preston v Avery*

All justices agreed that Mr Preston was involved in political communication and dismissed the appeal. They found that the Tasmanian legislation differed from the Victorian legislation in that it does not expressly state its objects, it is directed at a protest about abortion, and its scope is not limited by a requirement that the protest be reasonably likely to cause distress or anxiety. In applying the McCloy test, the majority (**Kiefel CJ, Bell J, Keane J and Nettle J** found:

1. The protest prohibition was a burden on the implied freedom of political communication.
2. There was a legitimate purpose of the protest prohibition (legislation) to protect the safety, wellbeing, privacy and dignity of persons accessing the premises where terminations were provided.

3. As to suitability, it was held that the protest prohibition had a rational connection to the purpose of facilitating effective access to termination services. A public demonstration about abortion in the vicinity of a clinic constitutes a threat to the equanimity, privacy and dignity of a pregnant woman seeking access to termination services. Lastly, there is no manifest disproportion between the burden on political communication and the law's legitimate purpose, as it only applies within access zones.

The Tasmanian statute was adequately balanced for the same reasons as the Victorian: it was geographically restricted, imposed a slight burden, and did not discriminate between sides in the debate.

Gaegler J, in a minority judgment found that the purpose of the protest legislation was to ensure that women had access to premises where lawfully provided in an atmosphere of privacy and dignity. This purpose is constitutionally permissible and, by any objective measure, compelling.

"Were the reach of the protest prohibition to have the effect of preventing a protest on the subject matter of abortion being held at a location meaningfully proximate to a place at which abortion services are provided during the hours of its operation, I would consider enactment of the protest prohibition to be legislative overreach...Nevertheless, I am satisfied that confining the protest prohibition within that 150m limit leaves enough opportunity for protests to be held at other locations meaningfully proximate to the premises to warrent the conclusion that the burden that the protest prohibition places on political communication, although not insubstantial, is not undue." [210]

The tension between implied freedom of political communication and citizens enjoyment of other rights was eloquently expressed by Edelman J in his dissenting judgement in the *Preston* case:

...courts cannot substitute their own assessment for that of the legislative decision-maker … The Act...ensuring that women have access to termination services in a confidential manner without the threat of harassment... is concerned with basic issues of public health. These social human rights goals involving respect for the dignity of the human person involve deep-seated issues of public policy within the legal system generally." [499]

Alex Deagon of the University of Queensland also sums up the crucial issues in the case below:

Justice Edelman insightfully observes that perhaps the outcome in these cases says more about Australia's constitutional and political system than anything else (see [502]-[508]). While the US allows significant and controversial law reform to be driven by judicial decisions, Australia has more faith in democratic (legislative and political) processes to achieve policy outcomes.

Similar legislation in other states are:
Public Health Act 2010 (NSW) Part 6A (effective 15 June 2018); the *Termination of Pregnancy Act* 2018 (Qld), Part 4 (effective 3 Dec 2018); the *Health* Act 1993 (ACT), Part 6, Div 6.2 (effective 22 March 2016); and the *Termination of Pregnancy Law Reform Act* 2017 (NT) (effective 2 July 2017).

These laws, in general terms, ban different sorts of communication about terminations of pregnancies, in the interest of protecting the privacy and dignity of women seeking medical treatment.

Read more about proportionality analysis here.
