ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.

CLUBB v EDWARDS; PRESTON v AVERY [2019] HCA 11

High Court of Australia, Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon, Edelman JJ, 10 April 2019

Constitutional law implies a freedom of communication about governmental or political matters

Key words: Advocacy, Commonwealth Constitution, High Court, Protest, Communication Outside Abortion Clinics, Valid Abrogation of the Common Law Right to Protest

1. This was an appeal against the validity of two separate legislative provisions: s 185D of the *Public Health and Wellbeing Act 2008* (Vic) (the Public Health Act), which, by virtue of the definition of "prohibited behaviour" in s 185B(1), prohibits, in certain circumstances, "communicating by any means in relation to abortions"; and s 9(2) of the *Reproductive Health (Access to Terminations) Act 2013* (Tas) (the Reproductive Health Act), which, by virtue of the definition of "prohibited behaviour" in s 9(1), prohibits, in certain circumstances, "a protest in relation to terminations".

2. Each of the appellants argued that the challenged provision was invalid because it impermissibly burdened the freedom of communication about matters of government and politics which is implied in the *Constitution* (the implied freedom): see *Lange v Australian Broadcasting Corporation* [1997] HCA 25, as explained in *McCloy v New South Wales* [2015] HCA 34 and *Brown v Tasmania* [2017] HCA 43.

3. Kiefel CJ, Bell and Keane JJ (with whom the remaining justices agreed, though Nettle J for slightly differing reasons) held that the test to be applied was the so-called "*McCloy* test", as follows:
    I. Does the law effectively burden the implied freedom in its terms, operation or effect?
    II. 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?
    III. 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?

4. The appellants argued that the challenged laws failed to satisfy the *McCloy* test. The High Court held that they did not. The common law right to protest or demonstrate may be abrogated by statute. The issue in each appeal was whether the statutory abrogation in each case was valid.

5. The statutory provision challenged in each appeal operated within a "safe access zone", which is the area within a radius of 150 metres from premises at which terminations are provided. In each case, the restriction was confined to communications about terminations that are able to be seen or heard by a person seeking access to such premises.

6. In the Clubb appeal, Clubb was charged for attempting to hand out leaflets advising against abortion, within the prescribed zone, to persons entering an abortion clinic. The High Court agreed that there was a burden on the implied freedom. However, the second step in the McCloy test was satisfied (at [60]):

> The purposes of the communication prohibition do not impede the functioning of the constitutionally prescribed system of representative and responsible government. To the extent that the purposes include protection against attempts to prevent the exercise of healthcare choices available under laws made by the Parliament, those purposes are readily seen to be compatible with the functioning of the system of representative and responsible government. Further, a law that prevents interference with the privacy and dignity of members of the people of the Commonwealth through co-optation as part of a political message is consistent with the political sovereignty of the people of the Commonwealth and the implied freedom which supports it

7. As to the third step in the McCloy test, the High Court said that what is involved is not a comparison of the general social importance of the purpose of the impugned law and the general social importance of keeping the implied freedom unburdened. Rather, what is to be balanced are the effects of the law – in terms of the benefits it seeks to achieve in the public interest and the extent of the burden on the implied freedom (at [72]). On this point, the High Court held that (at [84]-[85]):

> The impugned law is suitable, in that it has a rational connection to its purpose. The communication prohibition has a rational connection to the statutory purpose of promoting public health. Unimpeded access to clinics by those seeking to use their services and those engaged in the business of providing those services is apt to promote public health. A measure that seeks to ensure that women seeking a safe termination are not driven to less safe procedures by being subjected to shaming behaviour or by the fear of the loss of privacy is a rational response to a serious public health issue. The issue has particular significance in the case of those who, by reason of the condition that gives rise to their need for healthcare, are vulnerable to attempts to hinder their free exercise of choice in that respect. In addition, the communication prohibition has a rational connection to the statutory purpose of protecting the privacy and dignity of women accessing abortion services. As noted above, that connection accords with the constitutional values that underpin the implied freedom.

8. In this case, the limited interference with the implied freedom was not manifestly disproportionate to the objectives of the communication prohibition. The burden on the implied freedom was also limited spatially, and confined to communications about abortions. There was no restriction at all on political communications outside safe access zones. There was no discrimination between pro-abortion and anti-abortion communications. The purpose of the prohibition justified a limitation on the exercise of free expression within that limited area. Therefore, the communication prohibition satisfied the third step of the *McCloy* test. The appeal was dismissed.

9. Preston was charged with carrying placards and leaflets outside a clinic in Hobart. He appealed his conviction. The High Court noted that there were differences between the Reproductive Health Act and its Victorian counterpart. First, the Reproductive Health Act did not expressly state its objects. Secondly, the impugned prohibition was directed at "a protest" about terminations. Thirdly, the scope of the operation of the prohibition was not limited by a requirement that the protest be reasonably likely to cause distress or anxiety. The High Court said in this respect that (at [117]):

> It might be said that the case to be made for the invalidity of the protest prohibition as an impermissible burden on the implied freedom is stronger than the case to be made against its Victorian counterpart because the prohibition is directed squarely at what is a familiar form of political communication, because the Tasmanian legislation does not articulate the objects that justify its intrusion on the implied freedom, and because the protest prohibition does not require a potential to cause distress or anxiety. It might also be said that the Victorian legislation is an example of an obvious and compelling alternative measure less intrusive upon the implied freedom. In the end, however, these differences do not warrant a different result in the Preston appeal.

10. There was no doubt that the protest prohibition in the Tasmanian legislation was a burden on the implied freedom. However, the prohibition in the legislation was “viewpoint neutral” and would have equally been breached by pro-abortion as by anti-abortion protests. Moreover, it had a rational connection to the purpose of facilitating effective access to pregnancy termination services (at [124]), and there was no manifest disproportion between the burden on political communication effected by the protest prohibition and the law's legitimate purpose (at [128]). The appeal was dismissed.

IMPLICATIONS

The basis of the freedom is summarised in Brown (2017) 261 CLR 328 at 430 [312]-[313] as:

> "[It] is an indispensable incident of the system of representative and responsible government which the *Constitution* creates and requires. The freedom is implied because ss 7, 24 and 128 of the *Constitution* (with Ch II, including ss 62 and 64) create a system of representative and responsible government. It is an indispensable incident of that system because that system requires that electors be able to exercise a free and informed choice when choosing their representatives, and, for them to be able to do so, there must be a free flow of political communication within the federation. For that choice to be exercised effectively, the free flow of political communication must be between electors and representatives and 'between all persons, groups and other bodies in the community'.
>
> The implied freedom operates as a constraint on legislative and executive power. It is a freedom from government action, not a grant of individual rights. The freedom that the *Constitution* protects is not absolute. The limit on legislative and executive power is not absolute.[1] The implied freedom does not protect all forms of political communication at all times and in all circumstances. And the freedom is not freedom from all regulation or restraint. Because the freedom exists only as an incident of the system of representative and

[1] *Tajjour* (2014) 254 CLR 508 at 558 [59].

responsible government provided for by the *Constitution*, the freedom limits legislative and executive power only to the extent necessary for the effective operation of that system."

The High Court justices had differing opinions about how much the laws restricted political communication in this case. Chief Justice Kiefel and Justices Bell, Keane and Gordon held that the burden on political communication was "slight", "minimal" or "insubstantial". The laws regulated only the time, place and manner of the conduct in a limited zone. At all other times and places, people could engage in the same conduct without impediment. Justices Gageler, Nettle and Edelman took the view that the impact on political communication of the respective laws was significant, but agreed that the importance of the laws outweighed their impact on political communication.

The main approach that was adopted in the case was that of proportionality analysis, which requires judges to determine whether:

- the law is rationally connected to its objective;
- there are any "obvious and compelling" alternative ways of drafting the law that restrict political communication to a lesser extent;
- the law adequately balances the competing interests at stake.

Further see ACPNS reports of: Unions NSW v New South Wales (2013) 252 CLR 530; *McCloy v New South Wales* [2015] HCA 34; *Brown v Tasmania* [2017] HCA 43; (2017) 261 CLR 328; *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539.

VIEW THE CASE

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