Protesting and the implied freedom of communication

Sarah Danne reports on *Clubb v Edwards; Preston v Avery* [2019] HCA 11

The High Court unanimously upheld the constitutional validity of two statutes prohibiting particular conduct within 150 metres of pregnancy termination clinics. The statutes in question were found to burden the implied freedom of communication about governmental or political matters, but not impermissibly so. This decision reinforces that the implied freedom is not personal in nature and that it is permissible to burden that freedom where to do so is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and is otherwise in accordance with the relevant invalidity test.

Background

The decision resulted from two separate proceedings against individuals in different States. Mrs Clubb and Mr Preston were each found guilty at first instance in the Magistrates Court of Victoria and Tasmania, respectively. The charges in both cases concerned their engagement in prohibited behaviour, including certain communications about the termination of pregnancy conducted within 150 metres of termination clinics.

In response to both charges, the defence that the relevant statutory provisions impermissibly burdened the implied freedom

of communication was unsuccessful. It was accepted in both matters that the behaviour of each individual was prohibited by the relevant Act on its face. Both individuals appealed their respective first instance decisions, most relevantly on the basis of the abovementioned defence, and each Supreme Court removed certain aspects of those appeals to the High Court where the two matters were heard together.

The provisions of the two Acts that were challenged by the appellants, s 185D of the *Public Health and Wellbeing Act 2008* (Vic) and s 9(2) of the *Reproductive Health (Access to Terminations) Act 2013* (Tas), contained substantial similarities to one another.

However, the Tasmanian legislation prohibited 'a protest' about terminations whereas the Victorian legislation prohibited more generally 'communicating by any means' about terminations.

Other notable differences included that the Victorian legislation set out its own objects and the relevant prohibition was limited by a requirement that the communication be reasonably likely to cause distress or anxiety. Both these elements were absent in the Tasmanian Act.

Ultimately, these distinctions did not result in different outcomes in the appeals.

Decision

Despite the unanimous dismissals, five judgments were handed down with complex and varied reasoning.

All judges considered the issue of necessity as a precondition to constitutional adjudication. In separate judgments, Gordon, Edelman and Gageler JJ all determined that the facts did not necessitate determination of

the constitutional question of validity of the Victorian Act in relation to the Clubb appeal and declined to proceed further on that point. The four judges who did consider the constitutional question in relation to Clubb did so in two separate judgments. The joint judgment of Kiefel CJ with Bell and Keane JJ and the separate judgment of Nettle J found that the communication prohibition which was breached by Mrs Clubb burdened the implied freedom insofar as the first step of the invalidity test was to be applied. The entire bench found that the prohibition breached by Mr Preston burdened the implied freedom.

In line with previous High Court decisions concerning the invalidity test, there remained a diversity of views on the bench as to use of the structured proportionality analysis on the question of whether the law was reasonably appropriate and adapted to advance its legitimate object.

Certain submissions were made to the Court to the effect that any burden imposed by the relevant Act, particularly in the case of the Victorian Act, was 'of small magnitude' or 'insubstantial' and that the Court should not be persuaded that it need examine the matter further. However, the Court emphasised that it is not the magnitude of the burden which determines the question and that determination as to whether the challenged law is reasonably appropriate and adapted for its purpose must proceed regardless, if a burden is identified (Kiefel CJ, Bell and Keane JJ at [65] and Nettle J at [260]-[261]).

The judgments consistently emphasised that the geographical limitations imposed by the Acts were significant in reducing the burden placed on the implied freedom. However, Gageler J found that 150 metres must be 'close to the maximum reach that could be justified as appropriate and adapted' to achieve the legitimate purpose of the prohibited conduct law under the Tasmanian law and that any greater distance would have likely imposed an undue burden (at [213]).

Most of the Court addressed the premise that the object of the statutes of protection of human rights was an important consideration, and central to the maintenance of the constitutionally prescribed system of representative and responsible government. Several members of the Court cited the protection of dignity as contributing to the importance of the underlying statutes (Kiefel CJ, Bell and Keane JJ at [49]-[51] and Edelman J at [497] – [499]).

Necessity as a precondition to constitutional adjudication

The implied freedom of communication about government and political matters is found as a necessary implication of sections 7, 24, 64 and 128 and related sections of the Constitution. It is not a personal right or freedom granted by the Constitution. Rather, it is a limitation on the ability of government to regulate communication relating to matters of government and politics. Various judgments confirmed these points as a prelude to consideration, which was given by each judge, regarding whether the constitutional question needed to be addressed.

The Court reflected on the established practice to decline to answer a constitutional question unless it were clear that it was necessary to do so in order to determine a right of liability in issue. It was observed that it is sometimes considered inappropriate for a Court to determine a hypothetical question for reasons including imprudence, over-eagerness and also that justice does not require the question to be resolved (Kiefel CJ, Bell and Keane JJ at [30]-[36], Nettle J at [217], Gordon J at [336]).

It was unanimous that the constitutional question must be addressed in Mr Preston's appeal because, among other factors, Mr Preston had clearly engaged in communication relating to political matters.

However, this was distinguished from the Victorian matter, in which Mrs Clubb did not accept that she had engaged in communication relating to political matters. On this basis, the Attorney-General of the Commonwealth submitted that as a result, the High Court should not find it necessary to determine the validity or otherwise of the Victorian provisions because, even in the case of invalidity, their application to political communication could be severed therefore leaving the provision available for present purposes.

Even those judges who found it necessary to answer the constitutional question accepted that there was force in the Attorney-General's submission. However, the joint judgment pointed to the established practice as not being a 'rigid rule' and proceeded on the basis that it was 'expedient in the interest of justice' (Kiefel CJ, Bell and Keane JJ at [36] and [40]). Nettle J proceeded on the basis that there was sufficient support for the proposition of disposing of an attack on the constitutional validity of a law to conclude that, 'assuming without deciding that the impugned law would otherwise be invalid, it could be read down or severed operation in relation to the plaintiff and so be considered as valid to that extent' (Nettle J at [230]).

In their separate judgments, Gageler, Gordon and Edelman JJ decided that the constitutional question was not necessary to address. They each addressed severance first to determine necessity, and two found severance to be available in relation to the legislation and therefore determined that no further analysis was required. Edelman J differed, finding that severance could not be applied but instead that the legislation could be partially disapplied if necessary, therefore reaching the conclusion that the appeal could be disposed of nonetheless (at [434] to [443]).

Test for invalidity

The High Court reinforced the test for invalidity which it previously adopted in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 and subsequently explained and applied in *McCloy v New South Wales* (2015) 257 CLR 178 and *Brown v Tasmania* (2017) 261 CLR 328. It is summarised as follows (Kiefel CJ, Bell J, Keane J at [5]):

1. Does the law effectively burden the implied freedom in its terms, operation or effect?

2. If 'yes', is the purpose of the law legitimate in that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

3. If 'yes', is the law reasonably appropriate and adapted to advance that legitimate object in a manner i.e., compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

Four members of the Court supported the use of a proportionality analysis to assist with the third step (Kiefel CJ, Bell J, Keane J at [6] and Nettle J at [215]). Namely, if it can be found that the relevant law is both (i) 'suitable', in that it has a rational connection to the purpose of the law, and (ii) 'necessary', in that there is no obvious and compelling alternative, reasonably practical, means of achieving the same purpose which has a less burdensome effect on the implied freedom, then the final question to be answered is whether the relevant law is 'adequate in its balance'.

The appropriateness of the proportionality analysis for constitutional matters was challenged by three members of the Court. Gordon and Edelman JJ did not abandon the validity of the analysis as a tool but cautioned its unqualified use (Gordon J at [390] and Edelman J at [408]). Gordon J referred (at [403]) to its civil law origins and cited Gageler J in *McCloy* at [142] who noted that the difficulty with adopting 'standardised criteria' to apply uniformly across many kinds of laws, and the incongruity of this approach with the common law method. Gageler J maintained reservations about the tool but declined to repeat his reasoning (at [160]). The High Court's decision in this matter did not settle conclusively the use of proportionality analysis for future decisions but did effectively provide confirmation that it is currently accepted as a valid tool for use, although not without qualification or the possibility for further evaluation.