Clinical Unit in Ethics and Health Law (CUEHL)
University of Newcastle, Seminar 4 Nov 2019

"The Draft Religious Discrimination Bill and possible impact on healthcare professionals"
Associate Professor Neil Foster[1]

Questions of religious freedom have become quite prominent in Australia in recent times. Part of the impetus for this debate was the recognition of same sex marriage in December 2017,[2] when the course of Parliamentary debate led to the then-Prime Minister Malcolm Turnbull undertaking to commission further work on how religious freedom was protected, and whether any changes were needed. This took place through a Panel of Experts chaired by Phillip Ruddock, which provided its report to the Government in May 2018 (although the report was not made public until December that year, after the leaking of its recommendations led to some controversy.)[3]

Going into the May 2019 Federal election, the new Prime Minister, Scott Morrison, promised to implement a number of recommendations of the Ruddock Report. After his (somewhat unexpected) re-election, the promise has been fulfilled in part by the release for comment of an Exposure Draft of a *Religious Discrimination Bill*.[4] The Bill has not yet been formally introduced into Parliament, but it seems worthwhile to note the issues it raises, and in this context in particular possible impacts on health-care and health-care practitioners.

Dealing with possible adverse treatment of people on the basis of their religious beliefs or activities (which is the function of "religious discrimination laws") is only one part of furthering religious freedom in Australia generally. But it has already caused some controversy. Religious bodies and individuals have generally expressed support for the Bill, although noting some perceived defects in coverage.[5] Others have expressed concern that the Bill may have an adverse impact on health-care.[6] I want to set out these concerns and what needs to be considered to determine whether they are valid or not.

But first, it is worth setting the scene in relation to religious freedom generally in Australia.

Religious Freedom Protection in Australia

I have written a paper on protection of religious freedom in Australia under

---

[1] Newcastle Law School, University of Newcastle. Of course, the views expressed here are my own informed academic opinions, and not necessarily those of my employer. For more on "Law and Religion" issues see https://lawandreligionaustralia.blog .

[2] See the *Marriage Amendment (Definition and Religious Freedoms) Act* 2017 (Cth), which commenced operation on 9 December 2017.

[3] *Religious Freedom Review: Report of the Expert Panel* (Dec 2018), https://www.ag.gov.au/RightsAndProtections/HumanRights/Documents/religious-freedom-review-expert-panel-report-2018.pdf

[4] See https://www.ag.gov.au/Consultations/Pages/religious-freedom-bills.aspx . For my previous comments on the Bill and its related material, see two blog posts: "New Commonwealth Religious Freedom Laws" (Aug 30. 2019) https://lawandreligionaustralia.blog/2019/08/30/new-commonwealth-religious-freedom-laws/ ; and "Legal Reflections on the Religious Discrimination Bill" (Sep 2, 2019) https://lawandreligionaustralia.blog/2019/09/02/legal-reflections-on-the-religious-discrimination-bill/ .

[5] See for example the submission of Christian "think-tank" Freedom for Faith, at https://freedomforfaith.org.au/library/fff-submission-to-the-religious-freedom-bill-2019 .

[6] A Remeikas, "Religious discrimination bill would create barriers to women's healthcare, advocates warn" *The Guardian*, 10 Oct 2019, at https://www.theguardian.com/australia-news/2019/oct/10/religious-discrimination-bill-would-create-barriers-to-womens-healthcare-advocates-warn .

current laws,[7] where I give a couple of important quotes from the courts on the topic:

> "Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society..."[8]

> "Religious faith is a fundamental right because our society tolerates pluralism and diversity and because of the value of religion to a person whose faith is a central tenet of their identity."[9]

Religious freedom has been a key part of our common law tradition. It is protected to some extent under s 116 of the Commonwealth Constitution. In addition, in more recent years, it has been recognised as a vital part of the human rights framework set up by international human rights treaties. For example, the International Covenant on Civil and Political Rights, the ICCPR, which Australia has committed itself to abide by, says this in art 18:

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private to manifest his religion or belief in worship, observance, practice and teaching.
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
> 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

These are key rights which are sadly very seriously breached in some other parts of the world - for example, in China, where Muslim Uighers are being interned and "re-educated" in Xinjiang province, primarily on the basis of their faith.[10] But we have been fortunate to generally have a tradition of religious freedom in Australia for many years.

Nevertheless, there are important issues which are becoming recognised as significant problems for members of Australian society with religious beliefs. The threats do not usually come from official punishment for belief from the government, but there can be other sanctions which are applied to believers in response to their desire to practice their faith and live it out in their lives. Notice that under art 18 the right to religious freedom includes not only the right to believe and worship in church, or at the mosque or synagogue or temple, but also the right to "manifest… religion or belief in … observance, practice and teaching." Of course, a right to manifest belief cannot be absolute- it, like all other human rights, must be balanced with other rights of other persons. No-one can claim a religious right to commit physical violence on other people in the name of religion. We don't want to see sacrificial offering in public squares under the guise of a revival of Aztec religion! And we have a strong consensus these days that even a practice that is sometimes justified as a "religious" custom, such as female genital mutilation, will not be accepted where it does violence to the bodies of girls.[11]

---

[7] Neil J Foster, "Religious Freedom in Australia overview 2017 update" (2017), available at: http://works.bepress.com/neil_foster/112/ .

[8] *Church of the New Faith v Commissioner for Pay-Roll Tax* (1983) 57 ALJR 785 at 787, per Mason ACJ and Brennan J.

[9] *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75 at [560] per Redlich JA.

[10] See https://www.theguardian.com/commentisfree/2019/oct/31/china-uighurs-muslims-religious-minorities-marco-rubio .

[11] Recently the High Court of Australia heard an appeal in a prosecution for FGM – see *The Queen v A2; The Queen v Magennis; The Queen v Vaziri* [2019] HCA 35 (16 October 2019). They overturned the NSW Court of Appeal's dismissal of a prosecution and sent the matter back for a new trial. Kiefel CJ and Keane J commented

But it has been increasingly recognised in recent years that religious beliefs cannot be simply ignored- and in many situations should be suitably accommodated by employers and others where possible.

Discrimination law and religious freedom

What role does discrimination law play in protecting religious freedom? There are some other ways of protecting this right. We do have a provision in our Federal Constitution, s 116, which forbids the Commonwealth Parliament from making "any law for…prohibiting the free exercise of any religion"- but it has been interpreted quite narrowly, and in any event only applies to the Commonwealth Parliament, leaving the States quite free to limit religious freedom. There are some State or Territory laws which implement a Bill or Charter of human rights; but not in NSW, and the ones elsewhere have not been very effective in protecting religious freedom so far.

As it turns out, one of the key ways of protecting religious freedom in Australia in recent years has been through discrimination laws. This happens in two ways. One is that there are laws which make it unlawful to discriminate against someone on the basis of their religious belief or activity. The second way that discrimination laws protect religious freedom is that, in laws that forbid discrimination on other grounds, those laws provide exemptions, or what I prefer to call "balancing clauses", recognising the need to allow believers to express their faith in their actions.[12] So, to take one obvious example, since the *Sex Discrimination Act* 1984 (Cth) ("SDA") was introduced making it generally unlawful to make employment decisions on the basis of gender, the Roman Catholic Church has continued to ordain only men as priests. Why? Because the SDA contains a "balancing clause" allowing religious groups to make employment decisions, and some other decisions, based on their fundamental religious commitments.[13]

Well, against that background, let me give you an overview of how the draft Bill operates and some details of how it might impact healthcare professionals.

The Draft Religious Discrimination Bill

As mentioned, the draft that has been released was an "Exposure Draft" for public comment and has not yet been introduced into Parliament for debate. I understand that might still happen this month, so then we will see how the Government has responded to the comments that have been provided so far.[14] So some of the details I mention here may change, though I suspect the overall structure will be very similar.

(a) Religion as a protected characteristic

Like other discrimination laws, the Bill when enacted will make it unlawful for people to discriminate against another person on the grounds of a "protected characteristic"- here, that characteristic is "religious belief or activity". Discriminate here means in general terms to "treat a person less favourably" than someone else would be treated who does not have the religious

---

at [4]: "The Crown did not suggest that the procedure has a basis in religion but rather suggested that it is cultural in nature". (See also Edelman J at [166] quoting a statement in Parliament: "While the practice is often linked to certain religious communities, this view is in fact mistaken. The origins of the practice pre-date most major religions.") But even if it were accepted that the practitioners were convinced it was a religious obligation, it is clear that it would still be a valid criminal offence.

[12] See Neil J Foster, "Freedom of Religion and Balancing Clauses in Discrimination Legislation" *Oxford Journal of Law and Religion* Vol. 5 (2016) p. 385 – 430; available at: http://works.bepress.com/neil_foster/108/ .

[13] The relevant provision is s 37 of the SDA. For a more general overview of the interaction between religious freedom and discrimination laws see a paper linked at my blog post, "Religious Freedom and Discrimination Law" (Oct 19, 2019) https://lawandreligionaustralia.blog/2019/10/19/religious-freedom-and-discrimination-law/.

[14] For those who are interested, there are a small selection of the 6000 submissions linked on the official website for the Bill- see https://www.ag.gov.au/Consultations/Pages/religious-freedom-bills.aspx .

belief or engage in the religious activity that the other person does.

The Bill defines "religious belief or activity" in cl 5(1) as follows:

> ***religious belief or activity*** means:
> (a) holding a religious belief; or
> (b) engaging in lawful religious activity; or
> (c) not holding a religious belief; or
> (d) not engaging in, or refusing to engage in, lawful religious activity.

So, one thing that is clear is that it will protect atheists from being punished for their atheism, as well as protecting religious people.

But one issue that immediately comes up for many people is this: how do we define "religion" in this context? Well, here the Bill doesn't provide a clear answer. It does not provide a comprehensive definition of what amounts to a "religion". But it seems clear that it is relying on the definition that was provided by the High Court of Australia in its decision in *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* ("the *Scientology case*").[15] While there was a 3-way split in that case around the definition issue, two of the judgments have provided pretty clear guidance and have been used by other courts later.[16]

Mason ACJ and Brennan J said (at 136):

> We would therefore hold that, for the purposes of the law, the criteria of religion are twofold: first, belief in a **supernatural Being, Thing or Principle**; and second, the acceptance of **canons of conduct in order to give effect to that belief**, though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion. (emphasis added)

Their Honours explicitly noted that this did not mean that a religion had to be "theistic".

> We would hold the test of religious belief to be satisfied by belief in supernatural Things or Principles and not to be limited to belief in God or in a supernatural Being otherwise described. (at 140)

However, they rejected as "religion" a view of "ultimate meaning" which had no elements of a "higher power" at all.

Wilson and Deane JJ were more discursive, though adopting a similar approach (at 174):

> One of the more important indicia of "a religion" is that the particular collection of ideas and/or practices involves **belief in the supernatural**, that is to say, belief that reality extends beyond that which is capable of perception by the senses. If that be absent, it is unlikely that one has "a religion". Another is that the ideas **relate to man's nature and place in the universe and his relation to things supernatural**. A third is that the ideas are accepted by adherents as requiring or encouraging them to observe **particular standards or codes of conduct** or to participate in specific practices having supernatural significance. A fourth is that, however loosely knit and varying in beliefs and practices adherents may be, they constitute an **identifiable group or identifiable groups**. A fifth, and perhaps more controversial, indicium (cf. Malnak v. Yogi [1979] USCA3 125; (1979) 592 F (2d) 197 is that the adherents **themselves see the collection of ideas and/or practices as constituting a religion**.
>
> As has been said, no one of the above indicia is necessarily determinative of the question whether a particular collection of ideas and/or practices should be objectively characterized as "a religion". They are no more than aids in determining that question and the assistance to be derived from them will vary according to the context in which the question arises. All of those indicia are, however, satisfied by

[15] [1983] HCA 40; (1983) 154 CLR 120.

[16] See the more recent decision of the UK Supreme Court in *Hodkin & Anor, R (on the application of) v Registrar-General of Births, Deaths and Marriages* [2013] UKSC 77 (11 December 2013), which effectively adopts many of the features of the Australian *Scientology* decision.

> most or all leading religions. It is unlikely that a collection of ideas and/or practices would properly be characterized as a religion if it lacked all or most of them or that, if all were plainly satisfied, what was claimed to be a religion could properly be denied that description. Ultimately however, that question will fall to be resolved as a matter of judgment on the basis of what the evidence establishes about the claimed religion. Putting to one side the case of the parody or sham, it is important that care be taken, in the exercise of that judgment, to ensure that the question is approached and determined as one of arid characterization not involving any element of assessment of the utility, the intellectual quality, or the essential "Truth" or "worth" of tenets of the claimed religion. (emphasis added)

The comments on "parody or sham" here lead to the comment that the courts are well suited to reject spurious claims of "religious" status. The deference given by courts to the practitioners of a genuine religion to say what their beliefs are, does not mean the courts are blind to possibility of a fraud or sham set up for purely satirical or money-making causes, or designed to avoid the application of the law. Courts all over the world, for example, have had no problem concluding that the so-called "Church of the Flying Spaghetti Monster" is a parody invented for argument, rather than being a true religion[17]. In the UK, the Charity Commission has ruled that the "Jedi Order" (based on beliefs from the fictional Star Wars universe) is not a genuine religion.[18]

However, there is one issue with the definition above of "religious belief or activity" where I think more work is needed. The definition in relation to "activity" is restricted to "**lawful** religious activity". While the concern not to allow seriously harmful practices to be protected is supported, use of the broad phrase "lawful" seems to run the risk of negating much of the protection provided by the Bill.

On its face it would seem to mean that a State or Territory government, or even a local Council, could pass a law banning certain activities which might be regarded as core religious behaviour (preaching in a public park, for example, or hiring a hall to run church services). While of course some types of "religiously motivated" acts should not be protected (for example, FGM and under-age marriage), simply using the broad category of "unlawful" will potentially undermine the protection of religious freedom under Federal law. More attention needs to be paid to precisely what forms of "unlawful" activity should not be regarded as protected by the law. It may be more honest to remove the qualification "unlawful" altogether, but to openly acknowledge in a separate clause that some religiously inspired acts are not protected, and work on drawing up guidelines for these.

(b) Prohibited discrimination

The core of the Bill is found in the provisions that make discrimination of different kinds unlawful. The Bill then outlines in what areas of life such prohibitions operate, and then provides some exemptions or "balancing clauses" which recognise other rights that need to be balanced in this area.

(i) Direct discrimination

As with most other discrimination laws, the Bill provides for both "direct" and "indirect" discrimination. **Direct discrimination** is dealt with in cl 7. This is where the protected characteristic is openly and clearly the basis of a decision. One example would be a café which had a sign up saying that they did not serve Buddhists (a practice not currently unlawful in NSW!) Most decisions of this sort are not quite so open, however.

(ii) Indirect discrimination

Indirect discrimination is dealt with in cl 8. This provision (also present in most other discrimination laws on other grounds) is designed to deal with the situation where a decision

[17] See eg *Cavanaugh v Bartelt* (12 April 2016; USDC for Nebraska, 4:14-CV-3183).
[18] See a note of the decision at https://www.farrer.co.uk/news-and-insights/charity-commission-decision-thetemple-of-the-jedi-order/ (8 March 2018).

may apparently be made on a lawful ground, but the *impact* of the decision on those with a protected characteristic would be worse than its impact on others. (To some extent this is designed to deal with the problem of "sham" decisions which are in fact based on the relevant characteristic but are covered up by a false claimed motive. But it applies more generally as well.)

An example of this would be an employer implementing a rule that there is an essential staff meeting that all personnel must attend on a Friday after sunset. Here an orthodox Jewish believer would be unable to attend as Sabbath would have commenced. It could then be argued that this was indirect discrimination on the basis of religion. Under cl 8 what would need to be shown is this:

- The employer has imposed a "condition, requirement or practice";
- This has the effect of "disadvantaging persons who have or engage in the same religious belief or activity";
- The condition etc is not "reasonable".

Note that in the case of direct discrimination there is no defence of "reasonableness", but there is in the case of indirect discrimination. How do you determine whether a condition etc is reasonable? Clause 8(2) sets out various factors to be considered- the "nature and extent of the disadvantage", "the feasibility of overcoming or mitigating the disadvantage", whether the disadvantage is "proportionate to the result sought" by the employer, and finally, where there is a rule laid down by an employer that "relates to dress, appearance or behaviour"[19], whether the rule would "limit the ability of an employee… to have or engage in the employee's religious belief or activity".

Let me unpack this in the case of the "Friday evening team meeting" rule (which one can imagine might be laid down, say, by a hospital for medical staff).

- The rule would "disadvantage" an orthodox Jewish practitioner as it would stop them from observing the Jewish sabbath by not working.
- It would be a serious disadvantage for such a person, as observance of the Sabbath is a key part of orthodox Judaism.
- Is there some way of overcoming or mitigating this? The obvious answer is yes, have the meeting at some other time. Here is where the reasons for scheduling the meeting on Friday evenings will need to be examined. It is just convenience for the team leader, or is there some serious medical or other reason why it has to be on a Friday evening?
- Even if there is some reason, is it sufficiently crucial to over-ride this fundamental religious obligation? This is the "proportionate" issue.
- If it is a rule about "behaviour" (and that is not entirely clear), then would enforcing this rule limit the employee's ability to engage in this important religious activity?

The various facts may lead to different answers. But what can be seen is that the law treats this person's deep religious commitments as important, and as something that needs to be seriously weighed up in decision-making in the workplace.

Let me be clear. It is not enough for an employer of a health professional to say, "when you become a doctor, or a nurse, you just have to put your religious beliefs aside and comply with what the other doctors and nurses do". That is not even the law now, and it will certainly not be the law if the Bill, or something similar, is introduced.

In recent years it has not been uncommon to see arguments put forward that there should be no recognition of a doctor's conscientious religious beliefs that certain medical procedures are inappropriate. So Julian Savelescu says:

[19] See the definition of "employer conduct rule" in cl 5(1).

> If people are not prepared to offer legally permitted, efficient, and beneficial care to a patient because it conflicts with their values, they should not be doctors.[20]

On that view, of course, the medical profession will exclude a large number of talented, caring, hard-working and conscientious Roman Catholic, other Christian, Jewish and Muslim professionals, simply because no accommodation can be provided in the small number of cases where there may be religious objections.

But the fact is that our society does **not** say to employees that they must abandon their consciences when they become professionals. Take the example of those medical professionals who were working on Nauru and Manus Island, who wanted to speak out about the shocking health condition of some asylum seekers. The government enacted laws saying that they had to keep silent. When some of them broke silence and spoke out, were they met with a barrage of commentators saying, "if you can't abide by your employment conditions, you shouldn't be a doctor"? Not really. Many people admired and approved of their behaviour, even though it was not in accordance with their contractual obligations, because it was seen that in some contexts there is a higher principle than obeying your contract.

Let's come to the situation of a health professional who believes on religious grounds that termination of pregnancy amounts to the taking of a human life and is morally wrong except in very rare cases where the mother's own life is at stake. (Such a view could well be held on other grounds, but many Christian doctors, for example, take that view because they see the Bible teaching that all human beings are made "in the image of God" and infinitely precious and that humanity starts at the moment of conception.) Traditionally the medical profession has sought to accommodate such objections by allowing the person not to be involved in those procedures.[21]

How would the Bill operate in circumstances where a health professional was threatened with disciplinary action or dismissal for declining to either be actively involved in a pregnancy termination, or to provide a formal written "referral" for such to take place?[22]

First, we should note that dismissing someone on the grounds of their religious belief or activity would be contrary to cl 13(2)(c) of the Bill. Part 3 of the Bill sets out the areas of life in which discrimination is unlawful, and they include a range of activities to do with work in Division 2: employment (cl 13), forming and dissolving partnerships (cl 14), rules applied by "qualifying bodies", which would include bodies that certify health professionals (cl 15), membership of trade unions (cl 16), and employment agencies (cl 17).

In general terms, there would be a plausible argument that dismissing someone who objects to performing abortions might amount to indirect discrimination under cl 8 of the Bill. To dismiss someone who had a religiously motivated objection to abortion would probably not amount to "direct" discrimination (as the ground would not itself relate to religion) but would seem to qualify as "indirect" discrimination. That is because a "condition, requirement or practice" that someone be always willing to conduct or facilitate abortions will clearly have the

---

[20] BMJ. 2006 Feb 4; 332(7536): 294–297. For similar views expressed by other commentators, see Michael Quinlan, "When the State Requires Doctors to Act Against Their Conscience: The Religious Freedom Implications of the Referral and the Direction Obligations of Health Practitioners in Victoria and New South Wales" (December 1, 2016). *Brigham Young University Law Review*, No. 4, 2016; at p 1258. Available at SSRN: https://ssrn.com/abstract=2946620 .

[21] See for example the *Australian Medical Association Code of Ethics*, noted by Quinlan, above n 19 at 1237: "The Code expressly preserves a doctor's right to decline to recommend a form of therapy on the grounds of personal moral judgment or religious belief".

[22] For reasons helpfully outlined by Quinlan, above n 19 at pp 1268-1269, many Roman Catholic practitioners would regard an obligation to provide a formal referral for an abortion as making them morally complicit in what they would see as an act of murder of an innocent human being.

effect of "disadvantaging" persons who hold a religious objection to abortions.

The question that would then be asked would be whether this condition etc. was "reasonable" (and the onus of proving this is borne by the employer- see cl 8(7).) Consideration can then be given to the matters we noted above in relation to the "Friday night meeting" condition. How serious a "disadvantage" is this? Is it feasible by rostering or in some other way to overcome it? Is the disadvantage to the believer "proportionate" to the goal being achieved?

(iii) Special provisions relating to health practitioners

But in the case of what the Bill calls "health practitioners", it contains some additional provisions which need to be considered. Clauses 8(5) and 8(6) deal with two different situations.

Clause 8(5) relates to the situation where there is an **existing law of a State or Territory** which allows a health practitioner to "conscientiously object" to providing a health service "because of a religious belief… held… by the health practitioner". Let's take the recently enacted *Abortion Law Reform Act* 2019 (NSW), which commenced operation on 2 October 2019. Section 9 of that Act deals with the situation where a registered health practitioner has a "conscientious objection" to the performance of a termination- see s 9(1)(b).[23] In those circumstances the practitioner has two obligations- they must tell any other health professional who has requested that the procedure be performed, about their objection as soon as practicable (s 9(2)), and in relation to the possible patient, they must "without delay… give information to the person on how to locate or contact a medical practitioner who, in the first practitioner's reasonable belief, does not have a conscientious objection to the performance of the termination" or otherwise transfer their care to another practitioner. Section 9(4) (amended in the contentious passage of the law through Parliament) says that the practitioner satisfies the requirement to "give information" if they supply the patient with an information sheet put out by the Health Department.[24]

Interestingly one thing that s 9 does *not* do is to clarify that a practitioner declining to carry out an abortion due to conscientious objection, will not suffer any penalty from their employer or a professional accreditation body. This might be the implication of the section, but it is not spelled out. Section 10(1)(c) of the Act referring to professional misconduct proceedings does say that in such proceedings "regard may be had to whether the practitioner… contravenes section 9", but it does not spell out what consequences may follow if the practitioner *complies with* section 9, and does not explicitly provide any protection from such action in that situation.[25]

To come back to the Religious Discrimination Bill, then, under cl 8(5) we read this:

> For the purposes of paragraph (1)(c), if a law of a State or Territory allows a health practitioner to conscientiously object to providing a health service because of a religious belief or activity held or engaged in by the health practitioner, a **health practitioner conduct rule** that is not consistent with

[23] In this description of the operation of s 9 I will explain what I think its intended effect is. It has to be said that it is a very convoluted provision which in my view is quite unclear- for example, s 9(1) seems to suggest it is designed to deal with a situation where a "first person" asks a practitioner to perform a termination on "another person" (presumably other than the first person.) But then s 9(3) assumes that "a person" may be asking about a termination to be performed on themselves. But I suspect it is intended to operate as described in the text.

[24] The relevant sheet can now be downloaded at https://www.health.nsw.gov.au/women/pregnancyoptions/Factsheets/abortion-bill-public.pdf . It provides a free call number for "pregnancy options, including continuing a pregnancy, terminating a pregnancy and seeking pregnancy options counselling".

[25] Note that there are other laws in other Australian jurisdictions which do clearly provide protection for a health practitioner in such circumstances- see eg *Health Act* 1983 (ACT) s 84A; *Criminal Law Consolidation Act* 1935 (SA) s 82A(5); *Health (Miscellaneous Provisions) Act* 1911 (WA) s 334(2). Other provisions are noted in Quinlan, above n 20 at p 1237 n 2.

> that law is not reasonable.

What is a "health practitioner conduct rule"? This term is defined in cl 5(1) as follows:

> ***health practitioner conduct rule*** means a condition, requirement or practice:
> (a) that is imposed, or proposed to be imposed, by a person on a health practitioner, and
> (b) that relates to the provision of a health service by the health practitioner; and
> (c) that would have the effect of restricting or preventing the health practitioner from conscientiously objecting to providing the health service because of a religious belief or activity held or engaged in by the health practitioner, being a religious belief or activity that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the health practitioner's religion.

How does all this fit together? In NSW, where a law of the State (s 9 of the Act noted above) allows conscientious objection, there might be still a medical practice or a hospital which says: if you have a conscientious objection to abortion, you can't work for us, or we will dismiss you. (Remember, the only effect of s 9 is to impose obligations to report an objection and provide information to the patient about other services; it does not provide any protection to the practitioner.)

Assume the practitioner's objection is based on their religious beliefs. This directive of the employer would have the effect of "restricting or preventing" the practitioner from conscientious objection, in the sense that threatening dismissal would seriously impair a person's right to make such an objection. Hence this requirement of the employer is a "health practitioner conduct rule". In those circumstances, if the practitioner is dismissed and claims to have been indirectly discriminated against under s 8, when considering whether imposing such a condition was "reasonable", s 8(5) says that it is not!

Clause 8(6) then deals with a situation where the relevant State or Territory does not allow conscientious objection. If an employer in that jurisdiction imposes a condition that a person not conscientiously object to providing an abortion, the clause says that in an indirect discrimination action, the condition is not reasonable, unless

> compliance with the rule is necessary to avoid an unjustifiable adverse impact on: (a) the ability of the person imposing, or proposing to impose, the rule to provide the health service; or (b) the health of any person who would otherwise be provided with the health service by the health practitioner.

In that context, then, a court considering whether there was indirect discrimination would be required to determine if the condition was "necessary" (a high standard) to allow the employer to provide the service, or to avoid an "adverse impact" on the health of the potential patient. Given the fairly ready availability of abortion services in most major cities, it would probably be hard to satisfy para (b) in most cases. Under para (a) it will be important to determine whether there was some way of organising work activities to allow those with a conscientious objection not to be involved.

To sum up- the additional clauses in cl 8 have the effect of providing some further protection to health practitioners who have religiously based conscientious objections to providing certain medical procedures, abortion being one obvious example.

Does this justify the concerns expressed in the press such as this?

> "The law puts the personal religious views of a health professional before patient needs, creating enormous complexity and uncertainty for health services, and making it easier for doctors with objections to use their religious belief to not only refuse to provide care themselves but also to refuse

> to provide information about unbiased advice and care that is available elsewhere."[26]

Having explained the operation of the draft legislation, I will have to leave it to the reader to consider whether this outcome is a bad one or not. My comment would be that the "personal views" of health professionals are always important, and cannot be ignored in the health care system. It is those personal views and values that lead many to enter a difficult and demanding profession to care for the most vulnerable in society. If there are other options readily available for services that some practitioners cannot in good conscience provide, will it be a good outcome to expel these practitioners from the medical profession? These are big issues as to which there is not general agreement.

There may be other procedures that create issues for religiously committed health practitioners- "voluntary assisted dying" would be one area, and another might be the question of treatment of transgender persons. But I will move on.

(c) Areas of application of the Bill

I've already mentioned that the Bill forbids religious discrimination in areas related to paid work, under Division 2 of Part 3. In Division 3 it sets out others areas of activity where such discrimination is unlawful: education (cl 18), access to premises (cl 19), provisions of goods, services and facilities (cl 20), provision of accommodation (cl 21), disposal of land (cl 22), sport (cl 23), membership of clubs (cl 24), provision of Commonwealth benefits (cl 26). It is also made unlawful to request information from someone if the purpose of the question is to facilitate discrimination against them (cl 25).

However, there are a number of exceptions to the application of these provisions, and in particular there is one major clause which operates as a "balancing clause" for religious organisations.

(d) Where discrimination is lawful

The balancing clause noted is **clause 10**. While the legislation aims to make it unlawful to treat someone detrimentally on account of their religion where this religion is irrelevant to the activity (the example I mentioned before of refusing service at a café to someone who is Buddhist), there are some areas of life where a person's religious belief or activity, or lack of religion, may actually be *relevant*. The most obvious example is where employment in a religious group is being considered. We would expect, for example, a political party to employ someone who shared its views. Similarly, the legislation in broad terms allows a church or a religious body to maintain its "message" by only employing people who share their religious ethos.

That is the effect of clause 10- or should I say, that should be the effect of clause 10 if it operated sensibly! The core of the provision is s 10(1):

> A religious body does not ***discriminate*** against a person under this Act by engaging, in good faith, in conduct that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion in relation to which the religious body is conducted

In general, I think this is a sensible clause. It means that churches can employ persons who share their religious views. In s 10(2)(a) this is explicitly extended to "educational institutions" that are what might be called "faith-based", Christian schools or training colleges or Universities. Under paras (b) and (c) religious charities and other "religious bodies" are picked up, but oddly (in my view) these paragraphs do not apply to such bodies that "engage

[26] Remeikas, above n 6.

solely or primarily in commercial activities".

I say this is odd because there are a number of explicitly faith-based organisations in our community which need to charge commercial fees to operate, even though they are clearly operated for religious purposes. The most obvious example in the current context is a religious hospital, such as the Calvary Mater Hospital here in Newcastle. Its religious nature is very clear at every point. I fail to see why it should be required to appoint to its staff, for example, someone who would aim to undermine the religious ethos of the hospital. I have urged the Government in my submission to remove the restriction in cl 10 so that it applies to all genuinely religious bodies.

There are a number of other "exception and exemptions" set out in Division 4 of Part 3. I don't have time to go through all of them, but let me mention briefly some of the more important:

- Under cl 27, nothing in the Bill will make it unlawful to discriminate against someone who has urged others, on the basis of their religion, to commit or condone a "serious offence", defined as an offence involving harm or financial detriment with a penalty of 2 years imprisonment or more. This is a sound provision excluding, for example, the protection of the Bill from someone known to be a supporter of violent terrorism.
- Clause 31(2) exempts decisions made about work where religion is an "inherent requirement" of a particular position. Religious groups can mostly rely on cl 10, but this clause would cover a "commercial" religious group (if cl 10 remains as it is) or a purely secular group where a specific position required religious belief (perhaps a secular hospital which wanted to appoint a "chaplain" from a specific religious tradition.)
- Clause 35 allows a "voluntary body" which restricts its membership to persons of a particular belief, to continue to do so. The Christian Medical and Dental Fellowship, for example, can still require its members to be professing Christians.[27]

(e) Free religious speech

The final part of the Bill I want to note is one that has been somewhat controversial. Under clause 41, which is the only clause in Part 4 of the Bill, it is provided that "statements of belief" do not, without more, constitute discrimination under any Commonwealth, State or Territory discrimination law. In particular, under cl 41(1)(b), a statement of belief is said not to contravene s 17 of the Tasmanian *Anti-Discrimination Act* 1998, which prohibits the causing of "offence" on a number of grounds, including sexual orientation (though not including religious belief).

There are a number of complexities here we cannot explore fully. But an important part of the background here is that around the time of the debates on same sex marriage, the Roman Catholic Archbishop of Hobart, Julian Porteous, was sued under s 17 for causing "offence" on the grounds of "sexual orientation", for his action in distributing to students at Roman Catholic schools, a booklet outlining the Roman Catholic view of marriage.[28] This was regarded at the time by people on both sides of politics as a pretty outrageous interference with free speech, and the action was later withdrawn. But this provision of the Bill aims to prevent similar actions in the future.

However, the clause, cl 41(2)(b), excludes from its protection speech that "would, or is

[27] See http://www.cmdfa.org.au .

[28] For more details, see my blog post, "First they came for the Catholics…" (Nov 13, 2015) https://lawandreligionaustralia.blog/2015/11/13/first-they-came-for-the-catholics/ .

likely to, harass, vilify or incite hatred or violence against another person or group of persons". A number of commentators have called for this term "vilify" to be more clearly defined. No-one wants to support speech which incites hatred or violence. But since those things are already mentioned in the paragraph, what else is covered by "vilify"? Does it "vilify" a transgender person for a doctor to suggest that it would be best not to move immediately to transition through drugs or surgery, but to delay while other options are explored?

A recent Tribunal decision in the UK sharply raises these issues.[29] Dr David Mackereth was dismissed by an employment agency which was providing his services to a government department as a health assessor, because as part of his training he was told that he had to use the "preferred pronoun" of any transgender patients he was seeing. He claimed that his religious beliefs did not allow him to do so, though he agreed to use whatever personal name the patient preferred. He took an action against the department for indirect discrimination. He lost for a number of reasons.[30] Under the new Bill here in Australia, he may have been able to argue that he was being penalised for a "statement of belief" and hence had a defence under s 41- but the lack of clarity around the word "vilifies" makes it unclear whether he would succeed.

Conclusion

This has been a quick overview of some of the issues raised by the Bill. No doubt there are other matters that may have an impact on health practitioners, which I would be happy to attempt to comment on in response to your questions. Perhaps I will just conclude by noting that, whether or not one agrees with the specific terms of this Bill, the introduction of the Bill is in my view a welcome development in recognising the importance of religious belief to many Australian citizens, and the need for serious reasons when those beliefs are to be over-ridden for any reason.

[29] *Mackereth v Department for Work and Pensions* (ET: Case Number: 1304602/2018; 26 Sept, 2019).

[30] See my discussion of the case: "Fired for using the wrong pronouns" (Oct 6, 2019) https://lawandreligionaustralia.blog/2019/10/06/fired-for-using-the-wrong-pronouns/ .