CMDFA Newcastle
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Health Professionals & the Law: Protecting Practice According to Conscience

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Thanks for having me along to the CMDFA, it is great to have a chance to meet Christian health professionals and to provide some general information about legal issues. Tonight, I will be addressing some thorny questions about the extent to which Christian health professionals are able to practice according to their conscience, where there may sometimes be pressure not to. Perhaps up front I should say that none of this is formal legal advice directed to any specific cases! But hopefully it will provide a framework to see where the issues may arise.

1. The legal framework of medical practice- overview

It might be good to start with the question: how is the practice of medicine regulated by the law in Australia? Let me just paint this with a broad brush!

Doctors and other health professionals of course are citizens of Australia and regulated by the legal system that applies to all citizens. This is a good thing- the Bible tells us that our rulers are put in place by God and are a good gift of God to encourage justice and order in society.

Romans 13 tells us:

> **13** Let everyone be subject to the governing authorities, for there is no authority except that which God has established. The authorities that exist have been established by God. **2** Consequently, whoever rebels against the authority is rebelling against what God has instituted, and those who do so will bring judgment on themselves.**3** For rulers hold no terror for those who do right, but for those who do wrong. Do you want to be free from fear of the one in authority? Then do what is right and you will be commended. **4** For **the one in authority is God's servant for your good**. But if you do wrong, be afraid, for rulers do not bear the sword for no reason. They are **God's servants, agents of wrath to bring punishment on the wrongdoer**. **5** Therefore, it is necessary to submit to the authorities, not only because of possible punishment but also as a matter of **conscience**.

So when we are speaking about "conscience", one of the key things we need to remember is that we have a duty (as a matter of conscience) to obey the law.

Health practitioners, then, in their dealings with patients, are to obey the criminal law, and to respect the legal rights of their patients under the civil law. Both types of law tell you that you cannot touch someone's body without their consent, if there is opportunity to ask for consent; and even if you are treating someone who is unconscious when they arrive before you, your treatment should respect as far as possible any expressed wishes of theirs that you can know about. These issues about consent, and the law of "battery" (as the tort action is called), are ones that apply to all practitioners.

As well as the general legal system, health professionals in Australia operate under professional guidelines which need to be satisfied if they are to be allowed to practice medicine and health care in the community. As I am sure you all know, regulation of health professionals in Australia is carried out under a "co-operative" scheme of uniform laws which are generally called the *Health Practitioner Regulation National Law*. (This approach is taken because there is no "head of power" in the Federal Constitution allowing the Commonwealth Parliament to enact national law on the matter; hence it has to be dealt with in each State and Territory separately. But the aim is that the laws are generally uniform.) In NSW our local version of the

[1] Newcastle Law School, NSW. Views expressed here are of course my own and not those of my institution.

law is the *Health Practitioner Regulation National Law* (NSW) which was enacted in 2009 and commenced operation in 2010.

There is an overall national body which is given functions under this scheme, AHPRA. It describes itself in this way:

> The Australian Health Practitioner Regulation Agency (Ahpra) works with the 15 National Boards to help protect the public by regulating Australia's registered health practitioners. Together, our primary role is to protect the public and set standards and policies that all registered health practitioners must meet. Each Board has a health profession agreement with Ahpra that sets out fees, budget and the services provided by Ahpra.[2]

The various "National Boards" deal with different kinds of health practitioners (for example, there is the "Medical Board of Australia" and the "Dental Board of Australia".) AHPRA is engaged in setting professional standards for practitioners, and in many jurisdictions in enforcing those standards by disciplinary proceedings where practitioners are in breach. In NSW, however, enforcement is carried out by a body called the Health Professional Councils Authority (HPCA).[3]

As it turns out, the Medical Board of AHPRA has recently issued a document called *Good medical practice: a code of conduct for doctors in Australia* (due to commence in October 2020) (which I will refer to as the "*General Code of Conduct"*).[4] Since it would be impossible to cover all the different national areas of practice, I will just refer to this one tonight. However, I will also refer briefly to another resource which was issued in November 2019, a "guideline" issued by the Medical Board on *Social media: How to meet your obligations under the National Law (*the *"Social Media Guideline").* [5]

2. Areas where conscience problems may arise

Health professionals are involved with patients at all the key stages of life: conception, birth, early development, puberty, sex and marriage, pregnancy, maturity, old age and death. As the modern world is deeply divided on matters such as the meaning of life, the value of life, and the relevance of God's word to human behaviour, especially in sexual morality, it is not surprising that many of these raise deep moral concerns. A few of the more obvious ones are:

- Contraception- some Roman Catholic practitioners will regard this as morally wrong in all cases; many Christians will have concerns at assisting in prescribing contraception for teenagers;
- Abortion- most Christians who take their faith seriously, historically and now, are opposed to "abortion on demand", and many will oppose abortion in all instances except where the life of the mother may be at immediate risk;
- Sexual identity issues- many will not want to take a view that a person's sex can be changed, and will be concerned if asked to assist in a "gender transition" process; concerns may also come up if asked to use someone's "preferred pronoun";
- Assisted dying- many Christians will object to a law which allows a person to seek an early death on grounds which include simply being "tired of life" or "ready to go".

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[2] https://www.ahpra.gov.au/About-AHPRA/Who-We-Are.aspx .
[3] https://www.hpca.nsw.gov.au .
[4] https://www.medicalboard.gov.au/Codes-Guidelines-Policies/Code-of-conduct.aspx . For some general comment on this see "What is expected of Australia's doctors? New code of conduct revealed" Matt Woodley (Sep 15, 2020) https://www1.racgp.org.au/newsgp/professional/what-is-expected-of-australia-s-doctors-new-code-o .
[5] See https://www.medicalboard.gov.au/Codes-Guidelines-Policies/Social-media-guidance.aspx .

There are no doubt other dilemmas which I have not mentioned. My aim is not to survey all conscience issues which may arise for practitioners, but to discuss in broad terms where the law may impact on these decisions.

3. Protection of conscientious action under Australian law

Suppose a patient, or your employer, asks you to be involved in a procedure that you find morally objectionable. Or suppose that you decide you want to make a comment that reflects a Biblical world-view on matters such as sexual activity or gender identity, but it may not be approved of by some of your colleagues or patients. Perhaps the consequence of you taking such a stance is that you are sacked by your employer, or suffer some other bad consequences- you may, for example, find your professional registration restricted or revoked. Does Australian law provide protection for conscientious action of this sort?

One could start logically a bit further back and ask: are these activities against the law in themselves? Because of course if you are breaking the law in doing these things, you can't really expect not to suffer some consequences.

As a general rule most professionals in Australia will have a choice (as far as the general law is concerned) to opt out of obligations they find objectionable. There are not many laws which would require a person to **do** something they morally object to. But where it gets messy is where you choose to do a particular *type* of activity, and within that activity your choice may sometimes be restricted by the law.

The area of abortion can raise these issues. While you can usually choose not to engage in the area of providing health care in relation to pregnancies, once you choose to practice in that area the law may impose certain positive obligations. In Victoria the following law is in place:

> **ABORTION LAW REFORM ACT 2008 - SECT 8**
>
> **Obligations of registered health practitioner who has conscientious objection**
>
> (1) If a woman requests a registered health practitioner to advise on a proposed abortion, or to perform, direct, authorise or supervise an abortion for that woman, and the practitioner has a conscientious objection to abortion, the practitioner must—
>
> (a) inform the woman that the practitioner has a conscientious objection to abortion; and
>
> (b) refer the woman to another registered health practitioner in the same regulated health profession who the practitioner knows does not have a conscientious objection to abortion.

Here there is a legal obligation, even if a health practitioner has a "conscientious objection", to provide a referral to someone who does not have such an objection. While some may think that acceptable, for others this will make them "complicit" in the abortion, and they would find that an act of assisting an unlawful killing.[6]

In NSW we now have the *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).[7]

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[6] There is a detailed discussion of these issues in a helpful article from the Dean of Notre Dame Law School, Sydney: 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, Available at SSRN: https://ssrn.com/abstract=2946620 .

[7] In this description of the operation of s 9 I will explain what I think is its intended effect. 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

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.[8]

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.[9]

So, there are legal obligations here to do something which a person may find objectionable. There is no general principle under Australian law protecting an action motivated by conscience or religious belief which might over-ride that law. I have spoken here before about protection of religious freedom in Australia, but for tonight let me simply summarise by saying that, as far as NSW is concerned:

- Any protections for "free exercise" of religion provided by s 116 of the Constitution are only aimed at laws passed by the Commonwealth, and this provision does not restrain State laws.
- There is no overarching human rights protection in Australia, and in particular NSW does not have a "Human Rights Act" or anything similar.

What other religious actions might breach the law? The one that would be of most interest to us, I think, are the limits imposed by **discrimination** law and what we might loosely call "**vilification** laws". To focus for the moment on decisions in relation to treatment of patients, it is possible that a treatment decision might be said to be unlawful discrimination if a criterion of the decision is what we might call a "protected ground". So, for example, if a couple comes to you seeking assistance in having a child, and you decline to help because they are unmarried, or because they are a same-sex couple, then in theory you may be guilty of discrimination. Under the *Sex Discrimination Act* 1984 it is unlawful to treat someone detrimentally by denying them a "service" on the grounds of their marital status; so not assisting a *de facto* couple to have a child might be unlawful there. It is also unlawful to deny someone a service on the grounds of their "sexual orientation", so to refuse to help a same sex couple access "reproductive services" might also be said to be discrimination. (I appreciate of

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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.

[8] 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".

[9] 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 6 at p 1237 n 2.

course that one could argue in this last case that helping a same sex couple, say, find sperm or a "surrogate mother" is quite different to assisting a heterosexual couple deal with fertility problems. One could argue that there is no unlawful discrimination where the very nature of the couple means that similar services cannot be provided. But I raise it as a possible example.)

Let's turn to "vilification" laws. In NSW these have a fairly narrow scope, but we do have a provision that prohibits "homosexual vilification", under s 49ZT of the *Anti-Discrimination Act* 1977. Suppose you write a comment for a medical conference about the detrimental consequences of homosexual activity. You may be thought by some to have breached this provision:

> **ANTI-DISCRIMINATION ACT 1977 - SECT 49ZT**
>
> 49ZT HOMOSEXUAL VILIFICATION UNLAWFUL
>
> (1) It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the homosexuality of the person or members of the group.

Arguably, by merely presenting an objective and evidence-based review of the are, you have not done "incited" anything of the sort, but it is worth knowing that this provision is there. It is also worth knowing, however, that there is a defence under s 49ZT(2) for

> (c) a public act, done reasonably and in good faith, for **academic**, artistic, religious instruction, **scientific** or **research** purposes or for **other purposes in the public interest**, including discussion or debate about and expositions of any act or matter. (emphasis added)

So far we have been considering behaviour which is actually unlawful. But of course, you can suffer a practical penalty for your faith even if the legal system does not punish you directly. One is that you may lose your job, or you may lose professional registration. Does the law provide any protections in those circumstances?

There are cases where the law forbids discrimination against persons on the basis of protected characteristics, and one of those characteristics in some jurisdictions is "religious belief". But in NSW there is no general prohibition of discrimination on this ground. Of course, before COVID-19 struck there was a Federal *Religious Discrimination Bill* about to be introduced to Parliament, and this may come back when things settle down.[10] There has also been a draft Bill introduced by Mark Latham into the NSW Legislative Council covering similar areas, though as a Private Senator's Bill it seems unlikely that it will pass.[11]

However, there is one law which provides some protection in the area of employment for religious belief: the *Fair Work Act* 2009 (Cth) contains some provisions making it unlawful to dismiss a worker on the grounds of their religious belief. The mainly relevant section, s 772 provides:

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[10] For comments on the latest version generally, see my blog post "Submission on Second Draft of Religious Discrimination Bill" https://lawandreligionaustralia.blog/2020/01/28/submission-on-second-draft-of-religious-discrimination-bill/ (Jan 28, 2020). I also presented a paper at Newcastle Uni on the possible impact of the Bill on medical practitioners- see https://lawandreligionaustralia.blog/2019/11/04/the-draft-religious-discrimination-bill-and-possible-impact-on-healthcare-professionals/ (Nov 4, 2019).

[11] For a submission on this Bill from "Freedom for Faith", see https://lawandreligionaustralia.blog/2020/08/24/submission-on-anti-discrimination-amendment-religious-freedoms-and-equality-bill-2020/ (Aug 24, 2020). I appeared before the Parliamentary Committee considering the Bill on behalf of Freedom for Faith, and some of my comments are cited in the recent Report: see NSW Legislative Council, Portfolio Committee No 5, *Report No 55: Anti-Discrimination Amendment (Complaint Handling) Bill 2020* (Sept 2020) https://www.parliament.nsw.gov.au/lcdocs/inquiries/2583/Report%20No%2055%20-%20PC%205%20-%20Anti-Discrimination%20Amendment%20(Complaint%20Handling)%20Bill%202020.pdf .

> An employer must not terminate an employee's employment for one or more of the following reasons, or for reasons including one or more of the following reasons:..(f)…religion.

It may be recalled that it was this provision which footballer Israel Folau was partly relying on in arguing that his dismissal for making a social media post critical of homosexual behaviour was unlawful.[12]

Of course, in the context of health care, another sanction that might be applied to a health practitioner would be the sanction of removing their registration so that they would be unable to practice or earn a living in that profession.[13]

Here is where the codes of conduct mentioned previously might come up. Let's take some examples from the *General Code of Conduct* where it might be suggested that a Christian doctor has behaved contrary to the code. (There may be others.)

- 2.1: "Good medical practice also involves practising in a way that is culturally safe and respectful; being aware of your own culture and beliefs and **respectful of the beliefs and cultures of others**, and recognising that these cultural differences may impact on the doctor–patient relationship and on the delivery of health services" – where a Christian doctor wants to suggest that a cultural practice such as fasting is harmful for children?
- 2.2: "While there are professional values that underpin good medical practice, all doctors have a right to have and express their personal views and values. However, the boundary between a doctor's personal and public profile can be blurred. As a doctor, you need to consider the **effect of your public comments and your actions outside work, including online**, related to medical and clinical issues, and how they reflect on your role as a doctor and on the **reputation of the profession**." See below where we discuss the social media rules.
- 3.2.14: "Ensuring your personal views do not adversely affect the care of your patient or the referrals you make."
- 3.4.3: "Upholding your duty to your patient and not discriminating against your patient on grounds such as race, religion, sex, gender identity, sexual orientation, disability or other grounds, as described in antidiscrimination legislation." – views concerning homosexual activity?
- 3.4.6: "Being aware of your right to not provide or directly participate in treatments to which you conscientiously object, informing your patients and, if relevant, colleagues of your objection, and not using your objection to impede access to treatments that are legal. In some jurisdictions, legislation mandates doctors who do not wish to participate in certain treatments, to refer on the patient."
- 3.4.7: "Not allowing your moral or religious views to **deny patients access to medical care**, recognising that you are free to decline to personally provide or directly participate in that care."
- 4.8: "Cultural safety involves understanding what individual patients and/or their family believe is culturally safe. Culturally safe and respectful practice requires genuine efforts to adapt your practice as needed, to respect diversity

[12] See my comments on this at https://lawandreligionaustralia.blog/2019/04/14/reflections-on-the-israel-folau-affair/ and elsewhere on the blog.

[13] Under s 41 of the *Health Practitioner Regulation National Law* (NSW), codes of practice issued by National Boards are "admissible in proceedings under this Law… against a health practitioner registered in a health profession for which the Board is established as evidence of what constitutes appropriate professional conduct or practice for the health profession". The *General Code of Conduct* was issued by the Medical Board under s 39 of the National Law and hence has this legal effect.

and avoid bias, discrimination and racism. It also involves challenging assumptions[14] that may be based on, for example, gender, disability, race, ethnicity, religion, sexuality, age or political beliefs."

- 10.2.3: "Avoiding **expressing your personal beliefs** to your patients in ways that exploit their vulnerability or are likely to cause them distress." – see below on "sharing one's faith".

In addition to the *General Code of Conduct*, we also have the *Social Media Guidelines*. Here are some interesting quotes:

- "Where relevant, National Boards may consider social media use in your private life (even where there is no identifiable link to you as a registered health practitioner) if it raises concerns about your fitness to hold registration."
- "Example 1: A health practitioner, who works in a small town makes their religious views about sex before marriage and homosexuality public by tweeting: 'Abstinence is the best way to avoid HIV. Not sure why we are investing public dollars into developing vaccines. Just do what the bible tells us to do'. A patient sees this and now feels concerned they cannot reveal their sexuality to the practitioner, thereby compromising their health and safety. They make a notification about discrimination."

We will pick these issues up in one of our case studies.

4. Applying these principles to some specific cases of interest

Let's see how these principles might play out in some case studies.

(a) Sharing faith with patients during consultations

Can a doctor share an insight with a patient from their own religious perspective?

There have been examples where complaints have been made about this. Here is an example from Christian Concern, a group in the UK that defends religious freedom cases:

> Richard, a GP with 28 years' experience as a doctor, faced an official complaint in 2011 after discussing faith with a patient.
>
> Richard says, *"I only discussed mutual faith after obtaining the patient's permission. In our conversation, I said that personally, I had found having faith in Jesus helped me and could help the patient. At no time did the patient indicate that they were offended, or that they wanted to stop the discussion. If that had been the case, I would have immediately ended the conversation."*
>
> Despite Richard following the General Medical Council's guidelines, he was given an official warning in 2012.
>
> Then, in 2019, another complaint was lodged by the National Secular Society after Richard prayed for a patient during a consultation.

On 10 Dec 2019 it was reported that the GMC had dismissed this latest complaint:

> However, after an investigation which lasted three months, the GMC finally concluded that there was no case to answer, stating in another letter to Richard that, *"There is no first-hand account of complaint from any patient about Dr Scott's practice. The NSS sent an anonymous hearsay account about how Dr Scott expressed his religious beliefs to a 'highly vulnerable' patient,"* and *"there is no convincing evidence that Dr Scott imposes his personal religious beliefs upon potentially vulnerable patients."*

[14] I find this one particularly hard to interpret. Who is doing the challenging? Is the professional meant to challenge their own assumptions? Or can they challenge the assumptions that the patient makes based on their gender or religion? I assume the former is intended but it is ambiguous.

> They also added, *"There is no evidence that [Dr Scott] discusses faith in situations where the patient has stated that they do not wish to discuss these matters or that he has continued to discuss faith after a patient has indicated that they do not welcome such a discussion."*
>
> The GMC clarified that Dr Scott's medical practice *"states that the majority of the Partners are Christians and that this faith guides the way in which they view their work."*
>
> For the future, the GMC has advised Dr Scott to document any discussions of faith that he has with his patients and that prayer must only be offered within the guidelines of the GMC's explanatory guidance on personal beliefs and medical practice.[15]

However, in January this year there were reports that the GMC investigation would be re-opened in light of new evidence.[16] There is a helpful review of the facts of the case provided by Peter Saunders in a 2012 article.[17]

Another significant case in the UK which made it to the courts was *Kuteh v Dartford and Gravesham NHS Trust* [2019] EWCA Civ 818 (14 May 2019.)[18] Ms Sarah Kuteh was a nurse at a hospital who regularly initiated conversations with patients about the Christian faith. Some complained. She was directed to stop having these conversations, but continued to do so. In the end she was dismissed, and her claim that her dismissal was unlawful as contrary to her right of religious freedom was rejected. Singh LJ commented that this was not a case where there was a "blanket ban" on all religious speech:

> [66]…The Respondent employer did not have a blanket ban on religious speech at the workplace. What was considered to be inappropriate was for the Claimant to initiate discussions about religion and for her to disobey a lawful instruction given to her by management

In Australia I am not aware of any cases of this nature, but the situation can no doubt arise. We saw that the *General Code of Conduct* 10.2.3 provides: "Avoiding **expressing your personal beliefs** to your patients in ways that **exploit their vulnerability** or are **likely to cause them distress**." This is not, of course, a total prohibition on ever offering to pray for a patient or offering a perspective from the Bible. But doing so would need to be done with appropriate precautions.

- I think in most cases it would be important to have the patient's consent for any comments or offers of this sort. The problem with "consent", of course, is that it could be argued that a patient is "vulnerable" in that they are in a position of less power in the relationship (being dependent on their doctor for good medical treatment), and so even a formal consent might be grudgingly given. My own view would be that for this sort of conversation to be safe, it would be best if were actually initiated by the patient, not the doctor- "I know you are religious, what does your church say about this?" or "can you pray for me?".
- It would perhaps be "likely to cause distress" if you took the initiative to say that "the Bible says you would be better off if you and your partner got married", or something similar. Again, advice that may be appropriate between fellow believers in a church context, may not always be appropriate in a medical consultation.

Of course, even with the patient initiating the conversation, it may be wrongly reported either by the patient or by others. While it was not a doctor/patient conversation, a case a few years ago in the UK involving a childcare worker illustrated some problems that can arise.

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[15] https://christianconcern.com/news/christian-doctor-secures-freedom-to-pray/ .
[16] https://www.theguardian.com/world/2020/jan/05/dr-richard-scott-evangelical-christian-gp-general-medical-council-review .
[17] See http://pjsaunders.blogspot.com/2012/06/reprimanded-by-gmc-for-sharing-faith.html .
[18] See http://www.bailii.org/ew/cases/EWCA/Civ/2019/818.html .

In *Mbuyi v Newpark Childcare (Shepherds Bush) Ltd* (Case No 3300656/2014; ET, 21 May 2015) the claimant, Sarah Mbuyi, got into a conversation with a fellow worker, "LP", about the Christian view of homosexuality. On the evidence that had been accepted by the employer the conversation involved LP asking questions about Ms Mbuyi's church, mentioning that she (LP) was a lesbian and asking whether she would be welcomed at the church, and enquiring as to whether God would approve of her relationship. Ms Mbuyi conveyed that, while God accepts sinners, God was "not OK" with homosexual behaviour. LP was upset and complained to a supervisor. Ms Mbuyi was then dismissed from her job; but this tribunal decision held that she had been unfairly dismissed and that her sacking was "indirect discrimination" on the basis of her religion.[19]

However, it has to be noted that no such action would have been available in NSW, and of course the relationships in that case were much more on an "equal" basis. My recommendation would be that if conversations with patients raise spiritual discussion, you should immediately make a detailed file note about it for your own purposes while the events are fresh, noting carefully who initiated the conversation and what was said, in case complaints are later made.

(b) Doctors and social media - case study Dr Jereth Kok

Let's turn to the issue of comments being made on social media. A recent decision involving Dr Jereth Kok from Melbourne brings out a number of points here. The decision is that of the Victorian Civil and Administrative Tribunal in *Kok v Medical Board of Australia (Review and Regulation)* [2020] VCAT 405 (27 March 2020).[20]

Dr Kok's registration as a medical practitioner was suspended by the Medical Board under s 156(1)(e) of the *Health Practitioner Regulation National Law Act 2009* ("the National Law") in August 2019 on the ground that "immediate action" was necessary "in the public interest". This was done on the basis of comments made on various online forums. The comments relied on by the Board were summed up by the Tribunal as follows:

> [3] In its reasons for decision, the Board said the information before the Board is evidence that Dr Kok publishes comments on social media/internet forums that include but are not limited to:
>
> *(a) Denigrating, demeaning and slurring medical practitioners who:*
>
> *(i) Provide terminations of pregnancy services;*
>
> *(ii) Recognise and treat gender dysphoria in a manner that is in accordance with accepted medical practice; and*
>
> *(iii) Recognise that people who identify as transgender, are not suffering from a mental health condition.*
>
> *(b) Sentiments of violence:*
>
> *(i) Endorsing / calling for violence and/or genocide toward racial and religious groups; and*
>
> *(ii) Endorsing calls for capital punishment for members of the profession who provide terminations of pregnancy services;*
>
> *(c) Commentary expressing and encouraging views regarding LGBQTI persons that:*
>
> *(i) has no proper clinical basis and is contrary to accepted medical practice, and/or*
>
> *(ii) is otherwise demeaning.*

Some of those things sound pretty shocking, of course. "Calling for violence and genocide toward racial and religious groups"! Calling for capital punishment for doctors who

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[19] For more details see https://lawandreligionaustralia.blog/2015/06/09/freedom-of-religion-in-the-nursery-homosexuality-and-the-jilbab/ .

[20] http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2020/405.html .

carry out abortions! On the other hand, the mix of things looks odd, doesn't it. Along with "calling for capital punishment" of abortion providers, we have "Denigrating, demeaning and slurring" such people. That would be a strange mix of comments.

Well, you have to read the whole decision to see what they said, but right up front let me say two things. (1) Dr Kok (who I have interacted online with for a few years) is a passionate person who often used sarcasm and humour to make a point. In doing so he can cross lines that I wouldn't cross in the way he expresses himself. But (2) the Medical Board seems to have gone out of its way to read his obviously sarcastic comments as if they were recommendations for action, and he has been treated very badly.

Here is a summary of the case from the website of the Human Rights Law Alliance, a group of Christian lawyers who are acting for Dr Kok:

> Dr Jereth Kok is a Victorian family doctor with over fifteen years of experience and an unblemished record of medical practice. The Medical Board received two anonymous complaints about Dr Kok's personal social media posts regarding same-sex marriage, transgenderism, radical feminist theory and various conservative political issues. The complainants were not made by patients. Despite Dr Kok never receiving a complaint of discrimination or differential treatment from any of his patients, the Medical Board exercised emergency powers to investigate over ten years of his internet history and pick out potentially offensive comments. The investigation was conducted over 3 months without Dr Kok's knowledge and he was given a week to provide his defence.
>
> The Medical Board suspended Dr Kok's registration to practice medicine on the basis that it was in "the public interest". Dr Kok appealed to the Victorian Civil and Administrative Tribunal, and whilst the Tribunal acknowledged that "No evidence was placed before us to show that in his actual practice Dr Kok has not endeavoured to protect and promote the health of individuals and the wider community," it upheld the decision to suspend Dr Kok pending the final outcome of the investigation. Dr Kok has been suspended since August 2019 and will remain prohibited from practicing until the Medical Board finally brings the matter to trial where his medical license may be struck off for good.[21]

Let me make just a few points about the VCAT decision:

- It addresses briefly the question of whether immediate suspension was appropriate. In a note to s 156 of the National Law, the example given by the legislation where immediate suspension was needed in the public interest was: "A registered health practitioner is charged with a serious criminal offence, unrelated to the practitioner's practice". Clearly that was not this case. VCAT's discussion points out that the example is not meant to be exclusive, but it seems to me that the example does show the seriousness of the sort of wrongdoing that is needed for immediate suspension to be appropriate, and there is no way that Jereth's behaviour reached that level of seriousness. It is also worth noting that the HRLA has pointed out:

> The "public interest" test, under which Dr Jereth was suspended, was inserted into the National Law in 2018. Dr Jereth's case is the third case in which this new power has been exercised by the Medical Board. The previous two cases involved doctors who have been charged with serious crimes (slavery and rape respectively); neither of these previous cases ultimately resulted in suspension of the doctors.

- Later in the decision VCAT say at [84] that they "spent considerable time contemplating" whether a lesser penalty (such as the imposition of a ban on social media postings) was adequate. In my view this is clearly the most severe penalty that should have been imposed, if any was appropriate. They concede

[21] See for a document listing a number of religious freedom cases from Australia https://d3n8a8pro7vhmx.cloudfront.net/acl/pages/11394/attachments/original/1594345836/200708_-_HRLA_Religious_Freedom_Cases_v2_-_Web_version.pdf?1594345836 . For a document commenting specifically on Dr Kok's case see https://australiawatch.com.au/wp-content/uploads/2020/04/200403-HRLA-Article-Jereth-Kok-Doctors-under-Threat-Part-2-Final.pdf .

that there have been absolutely **no** cases where patients have claimed that Jereth has been disrespectful. Eg

> [78] No evidence was placed before us to show that in his actual practice Dr Kok has not endeavoured to protect and promote the health of individuals and the wider community. No evidence was placed before us to show that when consulting with his patients, Dr Kok *does* compromise their best interests.

- Jereth admits to posting comments which might offend some people. He denies ever advocating violence, saying that in the context in which they were made these comments were sarcastic and intended to be humorous.[22] But consider the way that VCAT deals with the content of the posts:

> [46] We do not propose to describe in detail each post made by Dr Kok. Dr Kok's posts span volumes. The extraction of small parts of the posts do not fully or properly represent Dr Kok's social media engagement. **It would be meaningless for the purposes of immediate action to attempt to determine precisely what meaning each post carries or is intended to carry or if that meaning differs when read in isolation or as part of a thread**. It is the reality of social media postings that they are not always read or understood in their full context. This is however, arguably part of the danger of posting on social media.
>
> [47] There is no doubt that Dr Kok posts extensively on social media. He has **clear conservative leanings.** (emphasis added)

- I found this astonishing. His livelihood was to be taken away on the basis of social media posts. But VCAT blithely suggests that they do not need to determine the meaning of the posts! And for some reason the fact that he has "clear conservative leanings" is mentioned, as if this on its own condemns him.
- I think the Tribunal decision is wrong, and I think it might be overturned if appealed. But I am not sure whether Jereth has the energy to appeal. The Medical Board decision was actually a preliminary to a full disciplinary hearing, so he may be marshalling his arguments for that one.

There is an online video with an interview with Jereth where he talks about his case.[23]

The HRLA document noted previously mentions a couple of other cases involving medical practitioners (using pseudonyms).

> Jeremy* is a Christian medical practitioner with over 40 years' experience. He shared his opinion on social media regarding psychological challenges faced by LGBT+ people and an anonymous complaint was made to the Medical Board. Jeremy was subsequently investigated, with his internet history being placed under close scrutiny. Up until this point Jeremy had an unblemished record and no complaints from patients or other health practitioners over his many years as a practitioner. Jeremy was **cautioned** and had **invasive restrictions placed on his license to practice medicine**, which included heavy restrictions on his use of social media and education on gender and sexuality issues.
>
> Peter* was a doctor in QLD who had complaints made about him to the Medical Board over personal posts on a social media platform regarding traditional Christian beliefs on sexuality and gender. Without notification to Peter of any problematic posts, the Medical Board started an investigation into Peter's social media use. The investigation questioned whether Peter's personal posts promoted the health of the community and wellbeing of individual patients. Peter rejects the (anonymous and unclear) accusations of breaching any policy. The **proceedings were discontinued after legal assistance was provided**.[24]

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[22] For a clear explanation of the shocking "genocide" allegation, see https://familyvoice.org.au/news/the-medical-board-falsely-defames-a-family-doctor . As the author notes, "Anybody with a reading age above 12 can tell, in context, that this is irony, a rhetorical device".

[23] See https://www.youtube.com/watch?v=6RH7wY7zppQ&fbclid=IwAR1D2X7s2R1kJ04KacNT0GdpduTjDAFncP3xXCq6ADlGmXQy5_2rLkPKUT4 .

[24] See above n 21.

What can we say about all this? The reasons offered for disciplining Jereth by the Medical Board were the need to maintain the "reputation" of the medical profession, and "public confidence" in the profession- see eg paras [13], [35]. VCAT comments on:

> [50]…the real potential to cause concern/offence to a range of members of the community including (but not limited to) women seeking abortions, other health practitioners and the hospitals/practices in which they work, multiple named races, and members of the LGBTIQ+ communities…
>
> [62] Some of the posts on a simple reading of them, arguably denigrate, demean and slur medical practitioners who provide termination of pregnancies, recognise and treat gender dysphoria (in a manner that is in accordance with accepted medical practice) and recognise that people who identify as transgender are not suffering from a mental health condition. Some of the posts, **particularly read in isolation**, do appear to endorse or call for violence and/or genocide towards racial and religious groups and endorse calls for capital punishment for members of the profession who provide termination of pregnancy services. Some of the posts do arguably express demeaning views regarding LGBQTI+ individuals.

Presumably these comments would fall foul of the instruction in the *General Code of Conduct* : "As a doctor, you need to consider the **effect of your public comments and your actions outside work, including online**, related to medical and clinical issues, and how they reflect on your role as a doctor and on the **reputation of the profession**."

I find it frustrating, however, that they say things like "read in isolation". The posts were mostly made on a private Facebook page to people who knew Jereth. Others were in the context of debate about issues where a sensible reading would detect the attempts at humour or sarcasm. And the findings of VCAT have a real tendency to limit and punish free speech on important issues.

For what it is worth, I think that medical practitioners should remain free to comment on important public issues from a Biblical perspective. I think these conduct rules need to be clearer in support of such free speech, although they do provide some recognition; eg para 2.2 "all doctors have a right to have and express their personal views and values".

Of course, comments should be made with grace and care. If there is one lesson from Jereth's case, it would be that an over-use of sarcasm and irony can be dangerous where remarks are provided online and may be "trawled through" some years later. But if Biblical views are not seen to be held by respected persons in society such as health professionals, then they will increasingly be seen as "out of bounds" for everyone. So my own view would be to encourage courage and wisdom and not to retreat from the truth of God's word where it can be graciously and clearly communicated.

And if you do run into problems, there is some help to be found in the good folk at the Human Rights Law Alliance.[25]

(c) Religious freedom for medical practitioners - conscientious objections

This paper is already a bit too long, so I want to be fairly brief in this last area.

There are clearly some procedures where practitioners may have conscientious objections to being involved. I think the paras quoted already from the *General Code of Conduct* are not too bad here:

- 3.4.6: "Being aware of your right to not provide or directly participate in treatments to which you conscientiously object, informing your patients and, if relevant, colleagues of your objection, and not using your objection to impede access to treatments that are legal. In some jurisdictions, legislation mandates doctors who do not wish to participate in certain treatments, to refer on the patient."

[25] https://www.hrla.org.au .

- 3.4.7: "Not allowing your moral or religious views to **deny patients access to medical care**, recognising that you are free to decline to personally provide or directly participate in that care."

For most procedures the key will be early communication to a patient so that they have an opportunity to go elsewhere. (I discussed the special processes around abortion in NSW previously.)

What if you are instructed by your boss to be involved in such procedures? I noted above that there is no general discrimination protection applying to religious beliefs, but if the worst comes to the worst and you are sacked, there may be some recourse under the *Fair Work Act* s 743.

A particular example that might arise is an instruction to use a patient's "preferred pronoun". I think the Bible is clear that biological sex is determined at birth and that social "gender" ought to follow biology. Many Christians will agree. Many take the view that they will use any personal name someone asks them to use but will not be forced into using a pronoun that does not correspond with reality.

In the UK, in *Mackereth v Department for Work and Pensions* (ET: Case Number: 1304602/2018; 26 Sept, 2019), Dr David Mackereth, an experienced health care professional, had taken on a contract position as a Health and Disabilities Assessor ("HDA") on behalf of the Department for Work and Pensions ("DWP"), undertaking assessments of clients and potential clients of the Department. His position commenced in May 2018, and at an early stage he was required to attend an induction session for new physicians. One of the other participants asked how they should refer to clients who were "transgender". The DWP trainer said something to the effect that clients should always be referred to in their preferred gender.

Dr Mackereth indicated that he was not happy with that policy. He said: "As a Christian, I cannot use pronouns in that way in good conscience" (para [66]). The trainer said that he would refer the issue to a supervisor. At a later meeting with a senior officer of the agency he was working for, he was in effect told that he would have to use a client's preferred pronouns, whatever his private views on the issue might be. He was then denied work because he would not agree to do this.

The outcome of the case was that his claim that he had been the subject of religious discrimination was rejected. His view on gender was said to be "not worthy of protection".[26]

In Australia, should something like this come up, I think it would be vital to point out that it is not true that merely refusing to use someone's preferred pronoun is always "unlawful discrimination". In my view it is not.[27] I should note that since the blog post in the note was written, the case referred to there from Queensland has been overturned on appeal: see *Tafao v State of Queensland* [2020] QCATA 76 (22 May 2020). It does hold that declining to use a prisoner's "preferred pronoun" in a prison setting can amount to "indirect discrimination". But as far as I know it is the only case in point and I think there are reasons for doubting whether it is correct. In any case, the ruling may not be applicable in other circumstances.

Again, even if declining to use an inaccurate pronoun is not unlawful, it is possible one might face discipline or dismissal. The law might provide a remedy, or it might not. This is one of those areas where believers will have to be convinced in their own mind, and do what is right, trusting themselves to a faithful God.

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[26] For a detailed analysis of this case, and another from the US, see "Fired for using the wrong pronouns" (Oct 6, 2019) https://lawandreligionaustralia.blog/2019/10/06/fired-for-using-the-wrong-pronouns/ .

[27] See "Transgender discrimination law in Australia- uncertainties" (July 21, 2019) https://lawandreligionaustralia.blog/2019/07/21/transgender-discrimination-law-in-australia-uncertainties/ .

See 1 Peter 3:17- “For it is better to suffer for doing good, if that should be God's will, than for doing evil;” 1 Peter 4:19 “Therefore let those who suffer according to God's will entrust their souls to a faithful Creator while doing good.”

5. Conclusion

I have not provided answers to all the issues that I have raised tonight. I hope that what this paper does, though, is help you understand the legal framework in which issues of conscience in medical and other health-care practice are resolved in Australia. I think there is a lot of room for improvement in the avenues of legal protection that are offered to religious freedom in our country. I would like to see the Federal government bring the proposed *Religious Discrimination Bill* back into the Parliament for a sensible debate on the issues.

In the meantime, Australia needs its dedicated and hard-working medical professionals, and especially it needs those who serve the Lord Jesus in serving their fellow citizens, and seek to glorify him in all that they do. May God continue to bless those who undertake this vital work of caring for others through healthcare.