Introduction

The World Federation of Doctors who Respect Human Life was established by the late Professor Jerome le Jeune, who discovered the chromosomal basis of Downs syndrome and devoted his life to the wellbeing of children born with that condition. It is an international association of doctors dedicated to the traditional western ethic of medicine, as expressed in the Oath of Geneva 1948 (an updated statement of the Hippocratic Oath) which states, in part:

“…I will maintain the utmost respect for human life from the time of conception. Even under threat, I will not use my medical knowledge contrary to the laws of humanity…”

In Australia, we doctors find ourselves being compelled by state laws on abortion “to use our medical knowledge contrary to the laws of humanity” - principally the timeless moral law against the killing of the innocent. This foundational “law of humanity” was put most plainly by the Select Committee on Medical Ethics of the UK House of Lords: “the prohibition of intentional killing is the cornerstone of law and social relationships”. There is no more essential ground of religious and conscientious liberty than being free from state compulsion to collaborate in killing.

The question is whether the proposed federal legislation does protect this core liberty. Therefore we will, as an association of doctors, focus on this aspect that affects us most urgently and on which there is a need for clarity in the law.

We commend the Attorney-General for aspects of his draft Bill (while sharing the concerns expressed most lucidly in the Freedom for Faith submission). But we sincerely ask the Attorney-General whether, on the most fundamental matter of religious and conscientious freedom, the “defence” provided in this federal law is effective or is simply overridden by “attacks” on our freedom by state law. Specifically we refer to section 8 of Victoria’s Abortion Law Reform Act 2008 and Queensland’s Termination of Pregnancy Act 2018 which compels doctors to collaborate (by referral) in the aborting of babies “on demand” to the fifth or sixth month of pregnancy, even on grounds such as sex-selection abortion of girls.

Our key question to the Attorney-General is this: can the Commonwealth legislation not be drafted in a way that “covers the field” when it conflicts with State law, such as this conscience-coercing abortion legislation in Victoria and Queensland? If it cannot, then it is useless in protecting the most fundamental religious and conscientious freedom of all: the right not to collaborate in killing the innocent.
Uncertain Clauses

Will the proposed federal legislation protect doctors against moral coercion by such laws that, in the judgement of Frank Brennan (of the Ruddock Review), carry “the hallmarks of totalitarianism”?

We need clarification. On the one hand, we read in the Explanatory Notes at point 29:

In addition, the Bill provides that conditions, requirements or practices imposed on health practitioners which would have the effect of restricting or preventing a health practitioner from conscientiously objecting to providing a health service on the basis of their religious belief or activity are not reasonable in certain circumstances for the purposes of the test of indirect discrimination, and therefore will constitute unlawful discrimination.

And we take hope from the apparent protection of conscientious objection at Part 2, Section 8:

Conditions that are not reasonable relating to conscientious objections by health practitioners

(5) 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 that law is not reasonable.

(6) For the purposes of paragraph (1)(c), if subsection (5) does not apply, a health practitioner conduct rule 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.

Note: A requirement to comply with a health practitioner conduct rule that is not reasonable under this subsection is also not an inherent requirement of work (see subsection 31(7)).

Burden of proof

(7) For the purposes of subsection (1), the person who imposes, or proposes to impose, the condition, requirement or practice has the burden of proving that the condition, requirement or practice is reasonable.

Note: As a result of this subsection, the person who imposes, or proposes to impose, the condition, requirement or practice also has the burden of proving that compliance with the rule is necessary as referred to in subsection (3) or (6).

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.

On the other hand, at Part 3, Division 4 A, 29 it is not clear whether State laws compelling doctors to collaborate in abortion are, or are not, overridden by the “regulations” in Part 2 (8). We hope that the passage highlighted below does mean what we hope it means:

(3) Nothing in Division 2 or 3 makes it unlawful for a person to discriminate against another person, on the ground of the other person’s religious belief or activity, if:

(a) the conduct constituting the discrimination is in direct compliance with a provision of a law of a State or a Territory; and

(b) that provision is not prescribed by the regulations for the purposes of this paragraph.

(4) Despite subsection 14(2) of the Legislation Act 2003, regulations made for the purposes of paragraph (3)(b) of this section may prescribe a provision of a law of a State or a Territory as in force at a particular time or as in force from time to time.

It appears that Part 2, section 8 of this draft legislation protects doctors from unreasonable “conduct rules” imposed by “employers” (which I assume includes the Medical Board as our registering body). But does it protect doctors from unreasonable laws imposed by State Parliaments, such as section 8 of the Victorian and Queensland abortion laws? If not, it fails to defend the religious and conscientious liberty of doctors and nurses who refuse to collaborate in intentional killing.

The situation confronting doctors and nurses

At the moment Australian law is manifestly failing to protect the conscientious and religious freedom of doctors and nurses on matters of life and death.

Victoria’s Abortion Law Reform Act 2008 and Queensland’s Termination of Pregnancy Act 2018 both crush the conscientious and religious liberty of doctors in that state. Under section 8 of both Acts, a doctor who conscientiously objects to an abortion is compelled to refer the client to a doctor who has no such objection so the abortion can proceed.

AHPRA, the Australian Health Practitioners Regulation Authority, is a federal statutory body that has ruled against the conscientious and religious objections of doctors on matters including abortion. Does this proposed Religious Discrimination Bill have the power to protect conscientious objectors against this federal government agency? If not, can it be altered to ensure it has that power?

Consider a well-known case: on April 28th 2012 we read in the Herald Sun about a GP falling foul of section 8 of the Victorian abortion law, and later falling foul of AHPRA:

A Melbourne doctor who refused to refer a couple for an abortion because they wanted only a boy has admitted he could face tough sanctions… The couple had asked Dr Mark Hobart to refer them to an abortion clinic after discovering at 19 weeks they were having a girl when they wanted a boy. By refusing to provide a referral for a patient on moral grounds or refer the matter to another doctor, Dr Hobart admits he has broken the law and could face suspension, conditions on his ability to practice or even be deregistered. “I’ve got a conscientious objection to abortion, I’ve refused to refer in this case a woman for abortion and it appears that I have broken the rules,” he said.

Here is a vivid case of Australian law failing to adequately protect conscientious and religious freedom. Indeed, the law is directly attacking those freedoms. Another Victorian doctor, Eamonn Matheson, says section 8 exists “to put fear into the hearts of doctors who practice medicine with a conscience and a morality different to the authors of this law”.

What then of the Victorian Charter of Rights and Freedoms that is meant to give adequate protection for fundamental liberties of conscience and belief?
A distinguished member of the Religious Freedom Review committee, Frank Brennan SJ, was scathing back in 2008 about the failure of the Victorian Charter to protect conscientious and religious freedom. He wrote, in an article entitled 'The Right not to Kill':

One would have thought the right to freedom of thought, conscience and belief in the Victorian Charter of Rights and Freedoms would have counted for something when the legislators were considering the plight of those doctors and nurses who in good faith regard the abortion of a viable foetus as the moral equivalent of murder.

Ms Maxine Morand, the Victorian Minister for Women's Affairs, has taken the view that all Charter rights and freedoms of all individuals are irrelevant when it comes to abortion because s.48 provides: 'Nothing in this Charter affects any law applicable to abortion or child destruction'.

Presumably the Victorian Parliament could also pass a law prohibiting discussion about abortion if it so wished, without need for any assessment of the freedom of expression, given that such a prohibition would be contained in a law applicable to abortion. This makes a mockery of the Charter.

A few years later that absurd scenario was partly confirmed. Medical ethicist, the late Professor Nicholas Tonti-Filippini, observed in The Age in November 2013 that section 8 appears to have the power to silence discussion about a conscientious objection to abortion:

A doctor who merely discussed with other doctors on Facebook his intention not to refer has been brought before a panel of the Australian Health Practitioners Regulation Authority (AHPRA) and he was cautioned about unprofessional conduct....

The actions of AHPRA have made it a risk for doctors to publish the view that a doctor has the right to practice medicine according his or her own conscience where that involves not referring for abortion...

It is extraordinary that the law should compel a doctor to act against most codes of medical ethics... But it is even more extraordinary to be pursued by the regulator for what one says about this situation.

No law, no professional board, has the authority to compel any doctor to violate the principles of their vocation or mutilate their own conscience by collaborating in intentional killing. Yet in Victoria and Queensland, under section 8 of their abortion laws and with the complicity of the federal regulator, that compulsion is exactly what doctors and nurses face.

When Mark Hobart told the Herald Sun "I've got a conscientious objection to abortion... and it appears that I have broken the rules," it was reported that "Medical Practitioners Board spokeswoman Nicole Newton said doctors were bound by the law and a professional code of conduct." And so it appears that the Medical Practitioners' Board, AHPRA, was saying that wherer a medical procedure is legal, even if considered by some to be gravely immoral, a doctor must comply or be punished.

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I would have hoped that AHPRA Board members would say, “We have a conflict here between an outrageous law, indeed a totalitarian law, and the time-honoured professional principle of conscientious liberty, and we will not raise a finger to trouble such a doctor unless compelled to do so by government. And if we are compelled to do so by government, we will resign.”

That would have been a Board worthy of the medical profession and of a free society. But instead, AHPRA sided with section 8 and interrogated Dr Hobart for refusing to send a 19-week baby girl to her death!

The role of AHPRA is particularly disturbing because their pursuit of Dr Hobart - and of the other unnamed doctor who merely argued on Facebook against section 8 and abortion - is in defiance of AHPRA’s own code of ethics for doctors, which does acknowledge conscientious objection and does not insist on referral for abortion. Indeed every medical code of ethics in this country stands on the side of Dr Hobart, and against section 8 and its enforcers from the government regulator.

The Australian Medical Association in Victoria has made this admirably clear, ever since 2008 and especially since the case of Dr Hobart:

AMA Victoria supports legislative reform which would remove the requirement that a doctor with a conscientious objection must refer a patient seeking advice or treatment in relation to abortion to a doctor who they know does not have a similar objection.

And the federal President of the AMA at the time, Steve Hambleton, said, “The Victorian legislation is incongruous with the medical profession’s code of practice and appears to fail to recognise that doctors have rights too.”

In effect, Dr Mark Hobart had no rights of conscientious or religious objection. He rightly refused to collaborate with an evil law that would put a 19-week-old baby girl to death for the crime of being a girl. Far from having his conscientious or religious liberty protected, he was harassed by the statutory authority for refusing to obey a law that the Vice-Chancellor of ACU, Professor Greg Craven, labelled as ‘fascist’. Professor Tonti-Fillipini agreed that “expecting a doctor to act against his conscience is totalitarian”, and the mild-mannered father of general practice in this country, Emeritus Professor John Murtagh, was moved to call section 8 “Stalinesque”.

Queensland and Victoria’s section 8 and AHPRA’s compelling of a doctor’s conscience reveals a defect, to put it mildly, in Australian law, a glaring failure to adequately protect the human right of freedom of conscience and religion.

And yet, does the Government’s proposed Religious Discrimination Bill provide a defence against such Stalinesque laws and bureaucratic tyranny? If not, can this Commonwealth legislation be amended in a way that “covers the field” against State laws? If it cannot, then this legislation fails on the most profoundly important matter of conscientious and religious freedom: the refusal to collaborate in any way in the taking of innocent life.

Thank you for considering these concerns and, if possible, clarifying the draft legislation.
Appendix

Why discriminate against non-religious people of conscience?

As an afterword, may I put to the Attorney-General what I have been arguing in the public square - such as in the Spectator Australia article below - that it is unjust and inadequate to protect merely “religious” freedom without protecting the conscientious freedom of those who have no formal religious framework to their life. The draft legislation, from the start, should have been a “conscientious and religious freedom Bill”, not just a Bill for religious people.

Specifically, there are many doctors who have no particular religious faith but who will conscientiously object to the abortion of babies up to 6 months of pregnancy “on demand” where the justification may include sex-selection abortion of unwanted girl babies.

Why should their conscientious objection not be protected by your proposed legislation, whereas a religious doctor's identical objection might be protected?


CONSCIENCE RULES, OK?

Two problems with Scott Morrison’s proposed Religious Discrimination Bill. First, what does it mean for those who make a stand on conscientious, not religious, grounds? Why should our laws protect religious dissenters but not agnostic dissenters?

Second, does it effectively address the actual threats facing religious people? These are not threats to the freedom to worship but the freedom to speak one’s truth in the public square (not so, Izzy?) or educate one’s children in a faith-based school (not a ‘Safe School’) whose teachers uphold religious values.

Let me give two personal anecdotes of the overarching threat, whether to religious or irreligious people, which is the threat to free speech. Without free speech we cannot defend our deepest conscientious or religious convictions.

So I ask the question: how would a Religious Discrimination Bill protect the free speech, and therefore free conscience, of traditional-minded people like me who make a stand on conscientious, not religious, grounds?

I once had an outing to the Anti-Discrimination Commission of Queensland for arguing, in a published newspaper article, that the institution of two-man ‘marriage’ is unjust. My argument was not religious; in essence I said it is wrong to force children to live without their mother, and that is what happens when we establish motherless families as an ideal in our law.

Of course I had nothing to conciliate with the offended activist from Gay Dads NSW and gave no ground to his worthless complaint of ‘vilifying the homosexual community’.

The complaint was withdrawn unconditionally, but not until the process had cost me time and money – and that is the whole point: ‘the process is the punishment’. The anti-discrimination apparatus intimidates free speech.
More recently another LGBT Twitter warrior had me investigated, absurdly, by the Medical Board of Australia. This valuable body exists to protect the public from unregistered or incompetent medics. No longer content to stick to its knitting, it now seeks to spin a sticky ideological web to entrap doctors, even in their private lives, who exhibit insufficiently PC opinions.

My alleged offence was that I forwarded, without comment, a tweet by leading columnist Miranda Devine and a tweet by Senate candidate Lyle Shelton. Devine had criticised the teaching of gender fluidity in Queensland schools, and my mate Lyle Shelton had promoted a scholarly book critical of gender theory by another comrade of mine, Ryan Anderson. That was my heinous crime, comparable only to Izzy Folau’s sackable offence of forwarding a tweet by @StPaul.

Once again, I had nothing to conciliate and respectfully objected to the Board policing the private political communications of a free citizen. Once again, the activist went away empty-handed, save for the pleasure of watching a government agency do his bidding to harass a total stranger. And here again, a Religious Discrimination Bill that does not also cover conscientious objectors would have been useless in protecting me from such harassment, since my objection to the weird notion of gender fluidity is not a religious objection.

It appears the only effective way to protect free speech and conscientious and religious liberty in an age of vexatious offence-taking is to defang the raving Boards and Commissions that prowl the boundaries of acceptable beliefs.

How strange, then, to have the prowler-in-chief, head of the Australian Human Rights Commission, present on the Ruddock Review of Religious Freedom.

Emeritus Professor Rosalind Croucher AM was courteous when I spoke with the committee, even though I had been blunt in the submission she had before her: ‘The Australian Human Rights Commission has no mandate to act as the national arbiter of acceptable opinion. For Australian law to adequately protect freedom of conscience and religion, the Human Rights apparatus will have to be relieved of its power to intimidate citizens who express conscientious convictions that are well-founded but out of step with the spirit of the age.’

One thinks of the late great cartoonist, Bill Leak, whose conscience-pricking depiction of the plight of Aboriginal children resulted in relentless and despicable intimidation by our Human Rights Commission.

I also said to the Ruddock committee that their inquiry marks a watershed moment. We can either reaffirm the primacy of the individual conscience, an unusual idea that arose from the unprecedented importance of the individual soul in Christian culture, or we can give primacy to the ‘group conscience’ of identity politics and sink slowly back into the collectivism characteristic of human history.

The greatest affirmation of the individual against the collective comes in the Universal Declaration of Human Rights, which opens thus: ‘All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.’

Note that the epitome of human dignity is ‘reason and conscience’, not yet religion. That comes later in Article 18: ‘Everyone has the right to freedom of thought, conscience and religion’. This threefold freedom is at the heart of human rights, because it is at the heart of human life. These are the freedoms that, throughout history, men and women would die for. A focus on merely ‘religious’ freedom will not do justice to human dignity.
And so it was a pleasure to see that the Ruddock Review’s final report opens with the words: ‘Freedom of thought, conscience and religion is a right enjoyed by all, not just those of faith.’ Faced with that opening statement, MPs will need to broaden the proposed legislation beyond a Religious Discrimination Bill and address freedom of conscience – which means freedom to speak one’s mind – for all of us.

Yeah righto – what’s it’s name, then? It needs to be a Conscientious and Religious Discrimination Bill. And it needs the power to clip the wings of those censorious ‘Human Rights’ commissions that would intimidate quiet Australians from thinking freely, speaking freely and living as religiously or irreligiously as they like, according to conscience.