Rights and Responsibilities of Conscientious Objectors under the *Abortion Law Reform Act 2008* (Vic)

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Abstract

The landmark *Abortion Law Reform Act 2008* (Vic), which came into force on 23 October 2008, has decriminalised abortion in Victoria. A woman's informed consent is now the only requirement for a termination of pregnancy up to 24 weeks gestation. After 24 weeks, two medical practitioners must determine that a termination is appropriate in all the circumstances. While this provides health practitioners who perform abortions through either medical or surgical means with the clarity and security they have long sought, health practitioners who object to abortion on grounds of conscience are now in unchartered legal territory. When requested by a patient or client to provide advice on or perform an abortion, s8 of the new Act imposes certain obligations on registered health practitioners who object to abortion on grounds of conscience. The provision has sparked considerable disquiet among Catholic health practitioners and other 'doctors of conscience'. Critics of the clause claim that, far from protecting the right to freedom of conscience, the clause in effect violates that right. This paper analyses the relevant clause – s8 of the *Abortion Law Reform Act* – and tests the claim that it infringes the human rights of health practitioners who object to abortion by compelling them to act against their conscience. It argues that the obligations created do not unduly infringe on freedom of conscience because practitioners are able to take simple steps to prevent the obligations arising.

Key words: abortion; conscientious objection; rights to freedom of thought, conscience and religion; law reform; responsibilities of practitioners.

Introduction to the Abortion Law Reform Act 2008 (Vic)

The landmark *Abortion Law Reform Act 2008* (Vic), decriminalising abortion in Victoria, came into force on 23 October 2008. It was something of a surprise that the Bill was passed in its original form, given the length and intensity of the parliamentary debates. Parliamentarians exercised a conscience vote and the 'numbers' in support of the Bill were particularly tight in the Legislative Council. As might be anticipated, there was strong opposition to decriminalisation of abortion expressed by the Catholic Church, Catholic Health providers and Right to Life organisations. Of course, groups supporting decriminalisation, such as Pro-Choice Vic, Liberty Victoria and Women's Health Victoria, also organised and lobbied hard for the Bill to be passed.

This was despite the fact that the government had decided on the 'compromise' option put forward by the Law Reform Commission. The Abortion Law Reform Bill did not introduce the preferred model of women's pro-choice groups – Option C – which proposed that a woman's informed consent be the only condition for a lawful termination by a medical practitioner at any stage of pregnancy (see Victorian Law Reform Commission 2008: 93). Instead, the Bill was based on the Law Reform Commission's Option B, so that a woman's consent is now the only requirement for a termination of pregnancy by a registered health practitioner up to 24 weeks gestation. After that time, two medical practitioners must reasonably believe that a termination is appropriate in all the circumstances.

The successful passage of the Bill was thus a celebrated but limited 'victory' for women's rights. In many respects it was intentional that the decriminalisation of abortion in Victoria was something of an anticlimax: the *Abortion Law Reform Act 2008* (Vic) was designed, at the explicit request of the Attorney-General, to reflect current clinical practice with respect to abortions in Victoria, so as to make terminations neither more 'freely' available nor more difficult to access (see Victorian Law Reform Commission 2008: 12). The Act was intended to bring the law up-to-date without effecting practical change in the rate or provision of abortion services.

But while Victorian women may not see many changes, the Act is not without practical effect. Importantly, it affords health practitioners who provide abortion services new certainty and clarity regarding the circumstances under which abortion is lawful in Victoria, and practitioners consequently immune from prosecution. However, while practitioners who provide abortion services in Victoria now do so on a ground of legal certainty, health practitioners who object to abortion on grounds of conscience are now in unchartered legal territory.

It should have been uncontroversial to include a 'conscience clause' in the Act. However, the wording of the relevant Victorian provision has sparked considerable disquiet among, and even calls for 'conscientious disobedience' (Brennan 2008a) from Catholic health practitioners and other 'doctors of conscience' (see Miller 2008; Craven 2008; Tell the Truth Coalition 2008; Medew 2008). Indeed, critics of clause 8 claim that, far from protecting the right to freedom of conscience enshrined in Article 18(1) of the International Covenant on Civil and Political Rights, the clause in effect violates that right. So strongly was this claim made that the issue dominated the mainstream media coverage of the Bill's landmark passage. It continues to be canvassed in the medical press, and is clearly an issue of considerable concern to a number of medical practitioners (East 2008: 20).

This paper analyses the relevant clause – s8 of the *Abortion Law Reform Act* – and tests the claim that it infringes the human rights of health practitioners who object to abortion by compelling them to act against their conscience. It argues that the obligations created do not unduly infringe on freedom of conscience because practitioners are able to take simple steps to prevent the obligations arising.

Obligations of Health Practitioners Who Have a Conscientious Objection to Abortion

Section eight of the *Abortion Law Reform Act 2008* (Vic) imposes certain obligations on a registered health practitioner[1] who has a conscientious objection to abortion in the following terms:

> (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.

Sub-section one does not apply in 'an emergency where the abortion is necessary to preserve the life of the pregnant woman': in that circumstance registered medical practitioners are obliged to perform, and registered nurses to assist, an abortion notwithstanding any conscientious objection (ss(3)-(4)). Both the obligation to refer and the obligation to assist in an emergency have been challenged as a violation of freedom of conscience (see Brennan 2008b; Tell the Truth Coalition 2008), however this paper will only address the concerns raised by the obligation to refer.

The Victorian provision is unlike the conscience clauses contained in the relevant legislation in other Australian and overseas jurisdictions which, with limited variation, provide that, except in an emergency when an abortion is necessary to save a woman's life, no person is under a duty to assist with or perform an abortion, notwithstanding other contractual, statutory or legal obligations (see, for example, the *Health Act 1993* (ACT) s84(1); *Criminal Law Consolidation Act 1935* (SA) s82A(5); *Health Act 1911* (WA) s334(2); *Abortion Act 1967* (UK) s4; *Contraception, Sterilisation, and Abortion Act 1977* (NZ) s46). Rather than explicitly specifying the right to refuse to assist with or perform an abortion, the Victorian provision specifies the responsibilities of a registered health practitioner who has a conscientious objection to abortion. In short, in the event that a woman contemplating a termination asks for advice or assistance, the practitioner must inform the woman of their objection to abortion and refer her to a practitioner who does not object. The Explanatory Memorandum accompanying the introduction of the Reform Bill explains that the intention of clause eight was that 'if a woman seeks advice or service from a health practitioner who has a conscientious objection to abortion, she will be referred promptly to another equivalent health practitioner who is able to assist her' (Abortion Law Reform Bill 2008 Explanatory Memorandum: 3). The Memorandum also recognized that the objecting practitioner may need to make enquiries or take other steps to identify practitioners who do not object to abortion in order to meet the legislative obligation to refer. So ignorance was not to be an excuse in this respect.

It is the positive obligation created by the Victorian Act in s8(1)(b) to refer a woman who requests an abortion, or advice on a proposed abortion, to a practitioner who will be 'able to assist her' that has sparked opposition. The Catholic Archbishop of Melbourne, Denis Hart, the CEOs of Victoria's 15 Catholic hospitals, the President of the Australian Medical

Association (Victoria) and the Editor of Melbourne's leading newspaper, *The Age*, all attacked the provision as a denial of freedom of conscience (see Miller 2008; Craven 2008; Medew 2008; Editorial, *The Age*, 24 September 2008). The claim advanced is that a practitioner who holds a conscientious objection to abortion cannot, in good conscience, facilitate an abortion through referral of a woman to an 'abortion provider' thereby becoming, in the words of one doctor, 'an agent of destruction of an unborn child' (Shanahan 2008).

It is argued that the obligation to refer thereby violates objecting practitioners' human rights (Craven 2008; Brennan 2008b; Miller 2008). Greg Craven, for example, wrote in the Melbourne *Age* newspaper:

> it is this concept of assistance and contribution that lies at the heart of one of the nastiest human rights abuses Victoria ever has contemplated. By compulsorily referring a patient for an abortion, an objecting medical practitioner necessarily makes him or herself complicit in an action they regard as ethically and morally impossible.

I would argue that the perception of 'complicity' raised by Craven here is not as fixed or absolute as he assumes. Not all health practitioners who would exercise rights to refuse to participate in the direct provision of an abortion treatment or procedure would necessarily refuse to refer a woman to a non-objector. As might be expected with an issue of conscience, there is no single view as to what an objection to abortion requires of an individual, or indeed as to whether particular religious beliefs are inconsistent with abortion in all circumstances (see Centre for Reproductive Rights 2005).

However, as Professor Frank Brennan (2008b) from the Australian Catholic University has argued, the new provision does appear to go beyond the more limited obligation imposed on medical practitioners by the Australian Medical Association Code of Ethics s1.1(p):

> When a personal or moral judgement or religious belief alone prevents you from recommending some form of therapy, inform your patient so that they may seek care elsewhere (AMA Victoria 2008).

Brennan maintains that the AMA Code does not oblige the conscientious objector to 'do anything' beyond informing the patient of their views: 'The Code does not require the medical practitioner actually to make a referral. It is for the informed, self-determining, autonomous patient to "seek care elsewhere"' (Brennan 2008b).

So if the legal obligation to refer is new, does it impose unwarranted and unjustifiable restrictions on the freedom of conscience of objecting practitioners?[2] Arguably, conscience clauses have never extended to ancillary tasks such as referral. The protection of conscience clauses in Australia varies across jurisdictions but they consistently provide that no person has a duty to participate in an abortion by either 'performing' or 'assisting' one. That is extended to abortion counselling in Tasmania (*Criminal Code Act 1924* (Tas) s164(7)) and to disposal of an aborted foetus in the Northern Territory (*Medical Services Act* s11(6)). However, the scope is still limited to what might be considered 'direct' participation in abortion services and procedures. There is no right to refuse to undertake expected duties or professional tasks that may be indirectly related to the performance of an abortion, such as providing pre- and post-operative care for a patient receiving an abortion. The House of Lords decision in *Janaway v Salford AHA* (1989) also confirmed that a person is not exempt from related duties that they may object to as likely to facilitate an abortion, such as typing a referral letter. It is likely that traditional protections for freedom of conscience in relation to abortion in Australia would be similarly interpreted as limited to direct forms of participation, such that an obligation to refer a woman on to a non-objecting practitioner is not inconsistent with the conscience clauses in other jurisdictions.[3]

Does the Obligation to Refer Infringe on Practitioners' Freedom of Conscience?

The question then becomes whether the scope of conscientious objection should be extended beyond direct participation in abortion services to include referral in order to protect the rights to 'freedom of thought, conscience and religion' of objecting practitioners. Before this question can be answered, we may need a better understanding than we currently have of exactly what the obligation to 'refer' in s8(1)(b) actually requires of the practitioner. Critics of the clause appear to have assumed that 'refer' in s8 is used in the sense of a medical referral whereby one medical practitioner sends a patient, usually with a formal written letter of introduction, to another medical practitioner for their opinion or treatment (see MPBV 2006: 12). In these circumstances, referral establishes and necessitates a working relationship between the primary medical practitioner and the practitioner from whom the referral is sought. However it is by no means certain that 'refer' in s8(1)(b) has this specific meaning, given that the provision applies to all objecting registered health practitioners and so would include nurses and pharmacists who are asked to advise on or perform an abortion – for example, through the supply or administration of an abortifacient.

Given the broad application of s8, I would suggest that 'refer' in s8(1)(b) is more likely to be given its ordinary meaning than its technical medical meaning. The ordinary meaning of refer is simply 'to send on or direct' (Moore 2004: 1185) and in this sense, the obligation may be satisfied by a recommendation to consult the pharmacy down the street that is known to stock the requested drug, the local community health centre that is known to have information to hand on abortion services, or even the Better Health Channel. If such actions are deemed to satisfy the obligation to refer, this weakens I think the argument that s8 constitutes an unjustifiable limitation on the right to freedom of conscience of objecting practitioners. However, even if the formal medical referral of care is required of medical practitioners, I do not believe that objecting practitioners are being unjustifiably coerced or compelled to act against their conscience. This is because objecting practitioners have the power to take steps to prevent finding themselves in a position where they are legally obliged to refer a woman to someone they would regard as an 'abortion provider'.

The obligation under s8(1)(b) only arises when a practitioner has a conscientious objection to abortion *and* a woman requests that practitioner 'to advise on a proposed abortion, or to perform, direct, authorise or supervise an abortion' for her. A practitioner can take a number of steps to ensure that their female patients or clients do not ask them to perform, authorise or advise on an abortion. Such steps could include:[4]

- GPs displaying signs in their waiting room to advise patients that they do not advise on, perform, authorise or arrange abortions.
- The same notice can be included in the written information about the practice that is routinely distributed to new and prospective patients; it can be included in practice emails or newsletters, on practice websites and even on the information for patients provided on recorded announcements that play when the phone is answered or put on 'hold'.
- Advertisements for health and medical services (such as those commonly seen in local newspapers, Yellow Pages and online community guides such as TrueLocal) can note that the practitioner does not advise on, perform, authorise or arrange abortions.
- If only one doctor at a practice has an objection to abortion (and they would also object to referring to another practitioner) they can display a notice on their door and have information held at reception that is distributed exclusively to their patients.

- Patient registration forms can include the notice and patients can be required to sign to acknowledge that they have read and understood the information as a condition of (commencing or continuing) access to the practitioner's services
- Objecting GPs can also send notice of their practice limitations with respect to abortion to local community health centres, hospital emergency departments, school welfare coordinators, midwives associations, mothers' groups, women's health specialists and all other sources of likely or known referral.
- Specialist obstetricians and gynaecologists writing to inform all referring GPs and hospital emergency departments that they do not advise on, perform or authorise abortions; they can even specify that they will only accept referral of female patients who also have a conscientious objection to abortion.

Of course, even if a practitioner takes all reasonable steps to inform patients of their conscientious objection, they may still be asked for advice or assistance with an abortion. However, one would expect such cases to be infrequent. The most likely scenario is that the woman making the request in these circumstances has not been able to understand the information previously provided to her – in which case she *will* need active assistance to locate another practitioner who is able to advise and treat her. In such a case, the s8(1)(b) obligation on the objecting practitioner to refer the woman is appropriate as she is unlikely to be able independently to seek care elsewhere. Another possible, but less likely, scenario is that the woman making the request for abortion advice or services, despite the practitioner taking all reasonable steps to inform patients in advance of his/her conscientious objection, is doing so provocatively. In these circumstances I would recommend that the practitioner provide an appropriate referral but would suggest that if they failed to do so, any disciplinary board hearing a resulting complaint would be likely to take the information already available to the patient into account.

Conclusion

Section 8 of Victoria's new Abortion Law Reform Act 2008 has created considerable controversy and concern regarding health practitioners' freedom of conscience, thought and religion. However, this paper has argued that the obligations contained in s8 do not constitute an unjustified infringement on the human rights of practitioners given that a practitioner can take simple steps to prevent having to act against their conscience by making an effective referral, and given that the requirement to refer may be able to be discharged simply by provision of sufficient information to enable the patient to seek appropriate care elsewhere. Indeed, as it is now beyond doubt that abortion is a lawful medical treatment or procedure in Victoria, if a health practitioner does not take responsibility for advising patients, clients and referring agencies of any limitations on their services as a result of their objection to abortion, I do not believe they should be entitled to look to the law for relief of any and all responsibility for assisting a woman who, unaware of that practitioner's objection, requests abortion advice or treatment.

Notes

[1] 'Registered health practitioner' in the *Abortion Law Reform Act 2008* (Vic) has the meaning given in the *Health Professions Registration Act 2005* (Vic).

[2] I am not here concerned with legal arguments that may be raised about the Victorian government's obligations under Article 18 of the *International Covenant on Civil and Political Rights* or under the similar provision in s14(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

[3] Requirements to refer in NSW and NZ are discussed in the Victorian Law Reform Commission Report (2008: 112-3).

[4] I am indebted to Dr Miranda Sandars for many of the suggestions in this list.

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