

Reproductive Rights and the Religious Discrimination Bill

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About the Authors

This issues paper was researched and authored by UQ law students **Phoebe Evans, Emma Kendall and Isabelle Peart** under the academic supervision of associate lecturer **Mandy Shircore**. This paper was prepared for and on behalf of Children by Choice, a not-for-profit feminist organisation that offers pro-choice, all-options pregnancy counselling, information and referrals for people experiencing unplanned pregnancy in Queensland.

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1. Executive Summary

Religious freedom has become a point of contention in Australia, with debates surrounding marriage equality,¹ and Israel Folau's dismissal by Rugby Australia dominating recent public discourse.² The question of how a balance should be struck between religious freedom and other civil liberties has been central to such discussions. The *Religious Discrimination Bill 2019* (Cth) was drafted, to make religious discrimination unlawful in certain areas of public life.³ One such area includes the rights of medical practitioners to refuse certain services.⁴ As such, the Bill raises concerns regarding its implications for reproductive rights and specifically the rights of women seeking termination services. This position paper, written for Children by Choice, looks at whether the Bill will have any direct impact on reproductive rights in Queensland or any other Australian jurisdictions. The findings presented in this paper are based on research and statutory interpretation surrounding the bill itself, in addition to current legislation at the state, federal and international levels.

The research finds that the Bill, as it currently stands, does not harm reproductive rights in Australia. However, the recommendation has been made that Australia ensure that it has an effective regulatory framework in place guaranteeing that any refusals arising from the Bill's provisions do not impede access to legal reproductive health care, in line with the recommendations of UN Treaty Monitoring Bodies.⁵

2. Methodology

As the *Religious Discrimination Bill 2019* (Cth) has the potential to adversely impact reproductive rights in regard to conscientious objector exemptions for health practitioners and freedom of speech protections impacting safe access zones, these elements were researched with respect to Queensland and the other Australian jurisdictions. Finally, the question of whether international human rights law has any bearing on the matter was discussed. In answering these questions, a review of relevant legislation, law reform reports, Hansard material, international law material, and literature was conducted.

¹ Explanatory Notes, *Religious Discrimination Bill 2019* (Cth) 3 [11]–[13].

² Neil Napper, 'Is There Such a Thing as "Free Speech" for Australian Employees?' (2019) 9 *Workplace Review* 125, 137.

³ *Ibid* 4 [24].

⁴ *Religious Discrimination Bill 2019* (Cth) s 8(6).

⁵ Centre for Reproductive Rights, 'Law and Policy Guide: Conscientious Objection', (Web Page, 2021) <https://maps.reproductiverights.org/law-and-policy-guide-conscientious-objection#footnote3_sfqc96c>.

3. Introduction

3.1 Background to the *Religious Discrimination Bill 2019* (Cth)

The *Religious Discrimination Bill 2019* (Cth) was drafted following a review into religious freedom in Australia. The review was announced in 2017 by then Prime Minister, Malcolm Turnbull, in response to calls for legislative reform to protect religious freedoms during the debate on marriage equality.⁶ It has further been suggested that the Bill was drafted with Israel Folau's dismissal by Rugby Australia for controversial 'religious' social media posts in mind.⁷

The Bill seeks to make religious discrimination unlawful in certain areas of public life.⁸ It protects, inter alia, freedom of speech vis-à-vis statements of religious belief,⁹ employment rights of people expressing religious views,¹⁰ and the rights of medical practitioners to refuse certain services.¹¹

It should be noted that conservative commentators have indicated that they view the Bill as part of incremental reform towards greater protections of religious freedoms.¹² The Human Rights Law Centre has expressed concerns about the Bill being expanded to allow people to express harmful views to women entering a clinic to receive abortion services.¹³ As such, it is important to examine the existing Bill and how it could potentially be expanded to adversely impact reproductive rights.

3.2 Relevant Provisions

While the *Religious Discrimination Bill 2019* (Cth) does not expressly refer to termination of pregnancy services, the Bill may be relevant to women's access to abortions through its conscientious objector provisions. Section 5(1) of the Bill defines a health practitioner to be a conscientious objector where they refuse to provide, or participate in, a certain kind of health service on the ground of their religious belief or activity, provided that a person of the same religion could reasonably consider such a refusal to be in accordance with the doctrines, tenets, beliefs or teachings of that religion.

Under the Bill, a person discriminates against another on the ground of their religious belief or activity if they impose a condition, requirement or practice on that person which is not reasonable.¹⁴ This may extend to a requirement to allow health practitioners to

6 Explanatory Notes, *Religious Discrimination Bill 2019* (Cth) 3 [11]–[13].

7 Neil Napper, 'Is There Such a Thing as "Free Speech" for Australian Employees?' (2019) 9 Workplace Review 125, 137.

8 Ibid 4 [24].

9 *Religious Discrimination Bill 2019* (Cth) s 8(3)–(4).

10 Ibid s 14.

11 Ibid s 8(6).

12 See, eg, Joel Harrison, 'Towards Re-thinking "Balancing" in the Courts and the Legislature's Role in Protecting Religious Liberty' (2019) 93 Australian Law Journal 734.

13 Human Rights Law Centre, 'Religious Discrimination Laws Explainer' (2020) <<https://www.hrlc.org.au/religious-discrimination-laws-explainer>>.

14 *Religious Discrimination Bill 2019* (Cth) s 8(1)(c).

conscientiously object to providing a particular health service because of a religious belief held by the practitioner.¹⁵

The Bill further makes it unlawful for an employer to discriminate against an employee on the ground of the employee's religious belief or activity in the terms of conditions of their employment, by denying the employees opportunities for promotion, transfer or training, by dismissing the employee, or by subjecting the employee to any other detriment.¹⁶

4. Impact of the *Religious Discrimination Bill 2019* (Cth) in Queensland

There are two key ways in which the *Religious Discrimination Bill 2019* (Cth) may adversely impact reproductive rights in Queensland. The first is through its conscientious objector provisions, which have the scope to limit the existing Queensland framework. The second is its freedom of speech protections, which potentially could be extended to limit safe access zones in Queensland.

4.1 Conscientious Objector

In Queensland, the primary legislation governing abortions is the *Termination of Pregnancy Act 2018* (Qld). The Act recognises the right of registered health practitioners to refuse a service or activity when asked to perform, assist or advise about a termination on a woman if they have a conscientious objection to such an activity.¹⁷ However, if a practitioner is a conscientious objector, they must still refer the woman seeking the termination to either another registered health practitioner or a health service which they believe can provide the requested service.¹⁸ Further, the conscientious objector framework does not limit any duty owed by a health practitioner to provide a service in an emergency.¹⁹

The conscientious objector provisions for medical practitioners in the *Religious Discrimination Bill 2019* (Cth) does not necessarily derogate from the conscientious objector regime set out in the *Termination of Pregnancy Act 2018* (Qld). The Bill allows health practitioners to refuse to provide, or participate in, health services on the ground of their religious belief or activity.²⁰ However, unlike the *Termination of Pregnancy Act 2018* (Qld), such a refusal is only permitted where a person of the same religious could reasonably consider the refusal to be in accordance with the doctrines, tenets, beliefs, or teachings of that religion.²¹ This indicates that the standard for a conscientious objector is

¹⁵ Ibid s 8(6).

¹⁶ Ibid s 14(2).

¹⁷ Termination of Pregnancy Act 2018 (Qld) s 8(1).

¹⁸ Ibid s 8(3).

¹⁹ Ibid s 8(4).

²⁰ Religious Discrimination Bill 2019 (Cth) s 5(1).

²¹ Ibid.

actually stricter in the *Religious Discrimination Bill*, since no further standard of proof is required under the *Termination of Pregnancy Act*.

The *Religious Discrimination Bill 2019* (Cth) expressly recognises conscientious objector provisions in State and Territory laws.²² It operates so that a rule in Queensland requiring health practitioners to provide abortion services would amount to discrimination under the Bill because it would contradict the conscientious objector provisions under the *Termination of Pregnancy Act*.²³ Termination of pregnancy is not explicitly referred to in this provision, however, the examples of participating in an assisted dying process and provision of contraception to women are expressly contemplated in the Bill. The Bill further recognises an exception for emergency medical situations.²⁴

Table 1 Comparison of conscientious objector provisions between Religious Discrimination Bill 2019 (Cth) and Termination of Pregnancy Act 2018 (Qld)

Provision	<i>Religious Discrimination Bill 2019</i> (Cth)	<i>Termination of Pregnancy Act 2018</i> (Qld)
Who is a conscientious objector?	<p>A health practitioner who refuses to provide, or participate in, a certain kind of health service on the ground of their religious belief or activity (section 5(1)).</p> <p>However, such a refusal is only permitted where a person of the same religion could reasonably consider the refusal to be in accordance with the doctrines, tenets, beliefs, or teachings of that religion.</p>	<p>A registered health practitioner who is asked to perform, assist or advise about a termination on a woman and the practitioner has a conscientious objection to such activity (section 8(1)).</p>
What are their obligations?	<p>A health practitioner cannot conscientiously object to an activity where doing so would lead to an unjustifiable adverse</p>	<p>A health practitioner cannot conscientiously object to providing</p>

²² Ibid s 8(6).

²³ Ibid.

²⁴ Ibid s 8(7). See further Explanatory Notes, Religious Discrimination Bill 2019 (Cth) 23 [177].

	impact on any person's health (section 8(7)).	a service in an emergency (section 8(4)).
	N/A	If asked to perform, assist or advise about a termination of pregnancy, the conscientious objector must disclose their objection and refer the woman, or transfer her care, to another registered health practitioner or health service who, in the objector's belief, can provide the requested service (section 8(2)–(3)).
How are they protected?	A health employer who believes they have been discriminated against for being a contentious objector may be able to make a complaint to the Freedom of Religion Commissioner. An employer cannot discriminate against a health practitioner who is a conscientious objector (section 14(2)).	There are no consequences set out in the <i>Termination of Pregnancy Act</i> for health practitioners who conscientiously object to providing a termination service.

4.2 Safe Access Zones

In Queensland, safe access zones exist 150m around termination services premises where it is an offence to engage in conduct that relates to terminations, or could reasonable be perceived as relating to terminations, which is directed at a person entering or leaving the premises and that is reasonably likely to deter those people from accessing the premises.²⁵ Safe access zones seek to protect the safety and well-being, and respect the privacy and dignity of persons accessing termination services and the employees who provide these services.²⁶ Under the *Termination of Pregnancy Act 2018* (Qld), safe access zones override the *Peaceful Assembly Act 1992* (Qld),²⁷ thus serving as a limitation on

²⁵ *Termination of Pregnancy Act 2018* (Qld) ss 14 and 15.

²⁶ Ibid s 11. See also Explanatory Note, *Termination of Pregnancy Bill 2018* (Qld) 11.

²⁷ *Termination of Pregnancy Act 2018* (Qld) s 12.

freedom of speech and expression.²⁸ The overwhelming positive impact of safe access zones on women seeking abortions have been documented.²⁹

The *Religious Discrimination Bill 2019* (Cth) is silent on the matter of safe access zones, so does not alter the current framework. Rather, it explicitly does not protect statements of religious belief which would, or are likely to, harass, seriously intimidate, or vilify another person.³⁰ These terms remain largely ambiguous, although the Bill's explanatory note indicates that speech inciting hatred or violence against another person would be caught by this provision.³¹ Whether anti-abortion protests would meet this threshold remains unclear.

The Human Rights Law Centre has raised concerns about conservative lobby groups calling to abolish safe access zones.³² However, as it stands, the *Religious Discrimination Bill 2019* (Cth) does nothing to alter the existing framework, and safe access zones under the *Termination of Pregnancy Act 2018* (Qld) would likely continue to be effective in protecting women seeking abortion services.

5. Impact of the *Religious Discrimination Bill 2019* (Cth) Conclusion on Other Australian Jurisdictions

5.1 Conscientious objection

Like with the Queensland termination legislation, the conscientious objector provisions for medical practitioners in the *Religious Discrimination Bill 2019* (Cth) does not necessarily derogate from the conscientious objector regimes set out in other Australian jurisdictions. The Commonwealth bill provides a standard that must be satisfied for a conscientious objection to be deemed acceptable. This standard requires that for a conscientious objector to refuse to provide a service on religious grounds, it must be that a person of the same religion as the objector would reasonably consider the refusal to be in accordance with the doctrines, tenets, beliefs, or teachings of that religion. For example, if a Catholic provider refused to provide a termination service on the grounds of their Catholic beliefs, a fellow Catholic person must be able to reasonably consider that the refusal is in accordance with the doctrines, tenets, beliefs, or teachings of Catholicism. By contrast, however, the respective states' termination legislation allows for a conscientious objection to be held by anyone, regardless of religious beliefs, and does not require any standard of proof to be met. This means that the standard provided for by the Commonwealth bill's

28 See further Ronli Sifris, Tania Penovic and Caroline Henckels, 'Advancing Reproductive Rights through Legal Reform: The Example of Abortion Clinic Safe Access Zones' (2020) 43(3) *University of New South Wales Law Review* 1078.

29 Ibid 1086.

30 *Religious Discrimination Bill 2019* (Cth) s 42(2).

31 Explanatory Notes, *Religious Discrimination Bill 2019* (Cth) 67–8.

32 Human Rights Law Centre, 'Religious Discrimination Laws Explainer' (2020) <<https://www.hrlc.org.au/religious-discrimination-laws-explainer>>.

conscientious objector protections is more difficult to satisfy than that provided for by the states' respective legislation.

In terms of the reasonableness of a rule that attempted to require a health practitioner to participate in an abortion despite their conscientious objection, the burden of proving that a condition, requirement or practice is reasonable in the circumstances rests with the person who imposed the condition, requirement or practice.³³ It is argued in the explanatory notes that placing the burden of proof on the person imposing or proposing to impose the condition, requirement or practice is appropriate as that person would be in the best position to explain or justify the reasons for the condition in all the circumstances, and would be more likely to have access to the information needed to prove that such a condition is reasonable. Conversely, requiring a complainant to prove that conduct is unreasonable is a significant barrier to successfully proving a complaint of indirect discrimination, particularly as the complainant is unlikely to have access to the information required to prove that an action is unreasonable.³⁴ Placing the burden of proof on the person imposing the condition requiring the practice of abortion may create difficulties in abortion access if the health practitioner is able to claim a conscientious objection without any challenge.

All jurisdictions except Western Australia have explicitly conscientious objector regulations. Western Australia's legislation does provide, however, that no one is under a duty to participate in the performance of an abortion. As the *Religious Discrimination Bill 2019* (Cth) expressly recognises conscientious objector provisions in State and Territory laws,³⁵ it would operate so that a rule in any of these jurisdictions requiring health practitioners to provide abortion services would amount to discrimination under the Bill because it would contradict the respective conscientious objector provisions (or no duty provision in the case of Western Australia) under their respective legislation.³⁶

The Bill further recognises an exception for emergency medical situations,³⁷ namely, where compliance is necessary to avoid an unjustifiable adverse impact,³⁸ as is similarly recognised in all states and territories, except Western Australia. The Bill does not attempt to distinguish between which adverse impacts are justifiable and which are unjustifiable. The Explanatory Notes say that a result of death or serious injury 'would clearly amount to an unjustifiable adverse impact'.³⁹ The only conclusions that can be drawn from this are that not all adverse impacts on patients will justify rules that limit conscientious objections. This appears to countenance a wide range of possible adverse health impacts in the name of protecting the freedom of religion of health practitioners. The risk involved in this approach is that patients may lose the ability to obtain 'information,

³³ *Religious Discrimination Bill 2019* (Cth) s 8(8).

³⁴ Explanatory Notes, *Religious Discrimination Bill 2019* (Cth) 24 [189].

³⁵ *Ibid* s 8(6).

³⁶ *Ibid*.

³⁷ *Ibid* s 8(7). See further Explanatory Notes, *Religious Discrimination Bill 2019* (Cth) 23 [177].

³⁸ *Religious Discrimination Bill 2019* (Cth) s 8(7).

³⁹ Explanatory Notes, *Religious Discrimination Bill 2019* (Cth) 24 [185].

prescriptions, or referrals' or to have procedures related to services such as abortion, euthanasia, contraception or sterilisation where, in all the circumstances, it would be reasonable to require health practitioners to provide those services or to make referrals to another health practitioner who is willing to do so. This is particularly the case where there is an absence of State or Territory law requiring such services or referrals to be provided.⁴⁰

5.1.1 New South Wales

In New South Wales, the primary legislation governing abortions is the *Abortion Law Reform Act 2019*. The Act recognises the right of registered health practitioners to refuse to perform, assist, make a decision about whether there are sufficient grounds for a termination to be performed, or advise about a termination if they have a conscientious objection to such an activity.⁴¹ They must, however, disclose their conscientious objection to the patient as soon as practicable after the patient makes the relevant request relating to termination, give information to the patient on how to locate or contact a medical practitioner who the practitioner believes does not have a conscientious objection, or transfer the patient's care to another registered health practitioner who or health service provider who the practitioner believes can provide the requested service and does not have a conscientious objection to the performance of the termination.⁴² Further, the conscientious objector framework does not limit any duty owed by a health practitioner to provide a service in an emergency.⁴³

5.1.2 Australian Capital Territory

In the Australian Capital Territory, the primary legislation governing abortions is the *Health Act 1993*. The Act recognises the right of an authorised person (medical practitioner or nurse) who conscientiously objects to participating in a termination to refuse to carry out or assist in carrying out a surgical abortion on religious grounds.⁴⁴ They must inform the person requesting the termination of their refusal to participate,⁴⁵ however, there is no statutory duty to refer the patient to another health practitioner that can carry out the abortion. They cannot refuse, only because of a conscientious objection, in the case of carrying out, or assisting in carrying out, a surgical abortion in an emergency where an abortion is necessary to preserve the life of the pregnant person; or to provide medical assistance or treatment to a person requiring medical treatment because of an abortion.⁴⁶

The provisions are silent on the matter of their interaction with the Australian Capital Territory's human rights legislation, the *Human Rights Act 2004*, and by extension, their

⁴⁰ Australian Human Rights Commission, Submission to the Attorney-General's Department, *Inquiry into the Religious Freedom Bills* (27 September 2019) 32 [131].

⁴¹ *Abortion Law Reform Act 2019* (NSW) s 9.

⁴² *Ibid* s 9(2)–(3).

⁴³ *Ibid* s 9(5).

⁴⁴ *Health Act 1993* (ACT) s 84A(1).

⁴⁵ *Ibid* s 84A(4).

⁴⁶ *Ibid* s 84A(2).

effect on the right to life, privacy, and security of the person.⁴⁷ The Act explicitly states, however, that the right to life applies to a person from the time of birth,⁴⁸ therefore, it has no effect upon the law of abortion in the Australian Capital Territory, and the right to life contained in the Act is not applicable in abortion cases.⁴⁹

5.1.3 Victoria

In Victoria, the primary legislation governing abortions is the *Abortion Law Reform Act 2008*. The Act recognises the right of a registered health practitioner who conscientiously objects to participating in an abortion to refuse to carry out or assist in an abortion. They must disclose their conscientious objection to the person requesting the abortion and refer them on to a practitioner or service who does not have a conscientious objection.⁵⁰ Despite any conscientious objection to abortion, a registered medical practitioner or nurse is under a duty to perform an abortion in an emergency where the abortion is necessary to preserve the life of the pregnant woman.⁵¹

The provisions are silent on the matter of their interaction with Victoria's human rights legislation, the *Charter of Human Rights and Responsibilities Act 2006*, and by extension, their effect on the right to life, privacy, and security of the person.⁵² The Charter contains a section which specifically provides that it has no operation for current and future Victorian law concerning abortion and child destruction. This provision is intended to encompass statute law, judicial interpretation of statute law and the common law. Section 48 states: '(N)othing in this Charter affects any law applicable to abortion or child destruction, whether before or after the commencement of Part 2'.⁵³ The Charter, therefore, has no effect upon the law of abortion in Victoria, and the rights contained in the Charter are not applicable in abortion cases.

5.1.4 Tasmania

In Tasmania, the primary legislation governing abortions is the *Reproductive Health (Access to Terminations) Act 2013*. The Act states that medical practitioners with a conscientious objection to abortion are not obliged to participate in termination of pregnancy procedures.⁵⁴ The medical practitioner must then refer the woman to another medical practitioner who the first-mentioned practitioner knows does not have a conscientious objection to terminations.⁵⁵ Doctors and counsellors are liable to be fined if they do not do so.⁵⁶ Despite any conscientious objection to terminations, a medical

⁴⁷ *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 9, 13, 21.

⁴⁸ *Ibid* s 9.

⁴⁹ Victorian Law Reform Commission, *Law of Abortion: Final Report* (Report No 15, March 2008) 162 [D.6] ('VLRC Abortion Report').

⁵⁰ *Abortion Law Reform Act 2008* (Vic) s 8(1).

⁵¹ *Ibid* ss 8(3)–(4).

⁵² *Human Rights Act 2004* (ACT) ss 9, 12, 18.

⁵³ VLRC Abortion Report (n 49) 162 [D.5].

⁵⁴ *Reproductive Health (Access to Terminations) Act 2013* (Tas) s 6(1).

⁵⁵ *Ibid* s 7(2).

⁵⁶ *Ibid* s 7.

practitioner or nurse is under a duty to perform a termination in an emergency if a termination is necessary to save the life of the pregnant woman or to prevent her serious physical injury.⁵⁷

5.1.5 South Australia

In South Australia, the primary legislation governing abortions is the *Criminal Law Consolidation Act 1935*. Under the Act, no person is under a duty, whether by contract or by any statutory or other legal requirement, to participate in any treatment authorised by this section to which he has a conscientious objection, but in any legal proceedings the burden of proof of conscientious objection rests on the person claiming to rely on it.⁵⁸ This does not, however, affect any duty to participate in treatment which is necessary to save the life, or to prevent grave injury to the physical or mental health, of a pregnant woman.⁵⁹ There are currently no provisions that require that the health practitioner who holds a conscientious objection must disclose their conscientious objection, and provide timely transfer of care or provide information to the patient regarding a willing health practitioner or health service. There is, however, currently a proposed bill to amend the relevant abortion legislation, owing to the fact that it was enacted over 50 years ago.⁶⁰ After a report by the South Australian Law Reform Institute (SALRI), a number of relevant recommendations were made, including that the health practitioner disclose their conscientious objection to the patient;⁶¹ transfer the patient's care to another health practitioner who, to the first practitioner's knowledge, can provide the requested service and does not hold a conscientious objection to the performance of the abortion; or, provide information on a health service provider at which, to the first practitioner's knowledge, the requested service can be provided by another health practitioner who does not have a conscientious objection to the performance of the abortion. The recommendations as to disclosing the conscientious objection and transferring the patient's care were accepted by the Department for Health and Wellbeing, but they did not accept the recommendation regarding the provision of information about alternative providers/services to women as an alternative or equivalent to active transfer of care by the health practitioner who holds a conscientious objection in relation to an abortion, owing to the fact that the Department did not believe that the provision of information to the patient regarding a willing health practitioner or health service was a sufficient alternative or equivalent to the timely transfer of the patient.⁶²

⁵⁷ Ibid s 6(3)–(4).

⁵⁸ *Criminal Law Consolidation Act 1935* (SA) s 82A(5).

⁵⁹ Ibid s 82A(6).

⁶⁰ South Australia Health, 'Abortion Legislation Reform', *SA Health* (Web Page, 9 February 2021) [21] <<https://www.sahealth.sa.gov.au/wps/wcm/connect/public+content/sa+health+internet/conditions/abortions/abortion+legislation+reform>>.

⁶¹ South Australian Law Reform Institute, *Abortion: A Review of South Australian Law and Practice* (Report No 13, October 2019) 33 [Recommendation 46].

⁶² Department for Health and Wellbeing, *Response to SALRI report—Abortion: A Review of South Australian Law* (Response to Report, November 2019) Table 1 [45]–[46].

5.1.6 Western Australia

In Western Australia, the primary legislation governing abortions is the *Health Act 1911*. Under the Act, no person, hospital, health institution, other institution or service is under a duty, whether by contract or by statutory or other legal requirement, to participate in the performance of any abortion.⁶³ In the case in which a medical practitioner is unwilling to participate in the performance of an abortion, they are under no statutory duty to refer their patients to another practitioner who is willing to participate in the abortion. Western Australia is the only jurisdiction that recognises both an individual's right and a hospital's or institution's right to conscientiously object. This is in contrast to the *Religious Discrimination Bill's* definition of a registered health practitioner, which restricts religious protections to individuals, not non-natural persons.⁶⁴ The Act also does not contain any exceptions as to when a doctor must participate in an abortion, such as in the case of an emergency.

5.1.7 Northern Territory

In Northern Territory, the primary legislation governing abortions is the *Termination of Pregnancy Law Reform Act 2017*. Under the Act, there is a requirement for medical practitioners with a conscientious objection to abortion to inform the patient of their conscientious objection in relation to the termination contemplated by the patient, and refer the patient, within a clinically reasonable time, to another medical practitioner known by the medical practitioner not to have a conscientious objection in relation to terminations.⁶⁵ Despite any conscientious objection in relation to terminations, a medical practitioner (including a medical practitioner who is not a suitably qualified medical practitioner) is under a duty to perform a termination in an emergency where the termination is necessary to preserve the life of the pregnant woman.⁶⁶

5.2 Safe Access Zones

Safe access zone laws have come into contention due to their potential impingement on the human rights and freedoms of expression and assembly. It should be noted, however, that human rights groups have supported safe access zone laws, arguing that they do not unreasonably limit the right to freedom of expression and assembly.⁶⁷ Further, the right to freedom of speech has never been an unqualified right, and Australia's implied freedom of political communication is not unlimited.⁶⁸ The High Court of Australia has affirmed this, upholding safe access zone laws on the basis that the laws serve a legitimate purpose, it imposes only a minimal and slight burden on the freedom (due to their limitation to 150

⁶³ *Health Act 1911* (WA) s 334.

⁶⁴ *Ibid* ss 5(1), 8(6)–(7).

⁶⁵ *Termination of Pregnancy Law Reform Act 2017* (NT) 11.

⁶⁶ *Ibid* s 13.

⁶⁷ Australian Lawyers for Human Rights, 'ALHR Supports the Introduction of Safe Access Zones in NSW to Stop Harassment at Abortion Clinics and Calls for the Decriminalisation of Abortion in NSW' (Media Release, 19 May 2018).

⁶⁸ *Ibid*; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

metres), and there is no general right to protest.⁶⁹ Therefore, the laws would almost certainly be considered constitutionally valid. This would likely apply to all states and territories regardless of whether or not they have statutory human rights protections. The interaction of the Australian Capital Territory's and Victoria's safe access zone laws with their human rights legislations will also be briefly discussed within their respective sections.

The silence of the *Religious Discrimination Bill 2019* (Cth) on the matter of safe access zones continues to preserve the safe access zone frameworks prescribed by the respective legislations, barring Western Australia which does not have any safe access zone laws.⁷⁰ The bill's lack of protection of expressions of religious belief which would, or are likely to, harass, seriously intimidate, or vilify another person are similar to the behaviour prohibited by the respective legislative provisions on safe access zone laws. It still remains unclear, however, whether any prohibited behaviour would meet this threshold.

5.2.1 New South Wales

In New South Wales, under the *Public Health Act 2010*, safe access zones exist 150m around termination services.⁷¹ The following behaviour is prohibited within a safe access zone:

- interfering with, including harassing, intimidating, besetting, threatening, hindering, obstructing, or impeding by any means, any person accessing, leaving, or attempting to access or leave, any reproductive health clinic at which abortions are provided;
- without reasonable excuse, obstructing or blocking a footpath or road leading to any reproductive health clinic at which abortions are provided;⁷²
- making a communication that relates to abortions, by any means, in a manner that is able to be seen or heard by a person accessing, leaving, attempting to access or leave, or inside, a reproductive health clinic at which abortions are provided, and that is reasonably likely to cause distress or anxiety to any such person. This provision does not apply to an employee or other person who provides services at the abortion clinic;⁷³
- intentionally capturing visual data of another person, by any means, without that other person's consent;
- publishing or distributing a recording of another person without that other person's consent if the recording was made while that other person was in a safe access zone, and contains particulars likely to lead to the identification of that other person.⁷⁴ These

⁶⁹ *Clubb v Edwards; Preston v Avery* [2019] HCA 11.

⁷⁰ *Religious Discrimination Bill 2019* (Cth) s 42(2).

⁷¹ *Public Health Act 2010* (NSW) s 98A.

⁷² *Ibid* s 98C.

⁷³ *Ibid* s 98D.

⁷⁴ *Ibid* s 98E.

provisions do not apply to the operation of security cameras, an employee or contractee of the reproductive health clinic, an agent of the abortion clinic when they are providing visual data to the clinic's operator or to a police officer, a police officer acting in the course of their officer duties if it is reasonable in the circumstances, or a person who has another reasonable excuse.

To do so is an offence.⁷⁵ There are a number of exceptions to these provisions, namely, it does not apply so as to prohibit:

- conduct occurring in a church, or other building, that is ordinarily used for religious worship, or within the curtilage of such a church or building, or
- conduct occurring in the forecourt of, or on the footpath or road outside, Parliament House in Macquarie Street, Sydney, or
- the carrying out of any survey or opinion poll by or with the authority of a candidate, or the distribution of any handbill or leaflet by or with the authority of a candidate, during the course of a Commonwealth, State or local government election, referendum or plebiscite.⁷⁶

5.2.2 Australian Capital Territory

In the Australian Capital Territory, under the *Health Act 1993*, the Health Minister can declare an area around an approved and qualifying medical facility to be a protection area, if they are satisfied that the area declared is not less than 50m at any point from the protected facility, and sufficient to ensure the privacy and unimpeded access for anyone entering, trying to enter or leaving the protected facility, but no bigger than necessary to ensure that outcome.⁷⁷ A person will commit an offense if they are in the protected area and engage in the following behaviour:

- The harassment, hindering, intimidation, interference with, threatening or obstruction of a person, including by the capturing of visual data of the person, in the protected period that is intended to stop the person from entering the protected facility; or, having an abortion, providing a surgical abortion or prescribing, supplying or administering an abortifacient in the protected facility;
- an act that can be seen or heard by anyone in the protected period, and is intended to stop a person from entering the protected facility; or having an abortion, providing a surgical abortion or prescribing, supplying or administering an abortifacient in the protected facility;
- a protest, by any means, in the protected period in relation to intending to stop a person from entering the protected facility; or having an

⁷⁵ Ibid ss 98C–E.

⁷⁶ Ibid s 98F.

⁷⁷ *Health Act 1993* (ACT) s 86.

abortion, providing a surgical abortion or prescribing, supplying or administering an abortifacient in the protected facility;⁷⁸

- publishing captured visual data of a person entering or leaving, or trying to enter or leave, a protected facility; and the person does so with the intention of stopping a person from having an abortion; or providing a surgical abortion; or prescribing, supplying or administering an abortifacient; and the recorded person did not consent to the publication.⁷⁹

The provisions are silent on the matter of their interaction with the ACT's human rights legislation, the *Human Rights Act 2004*, and by extension, their effect on the freedoms of expression and assembly. In light of the applicability of the relevant case law, however, the aforementioned conclusion on the validity of safe access zone laws would likely be reached in the ACT. This is further supported by the fact that the *Human Rights Act* stipulates that rights may be subject to reasonable limits.⁸⁰

5.2.3 Victoria

In Victoria, under the *Public Health and Wellbeing Act 2008*, safe access zones exist 150m from premises at which abortions are provided.⁸¹ A person will commit an offense if they are in the protected area and engage in the following behaviour:⁸²

- in relation to a person accessing, attempting to access, or leaving premises at which abortions are provided, besetting, harassing, intimidating, interfering with, threatening, hindering, obstructing or impeding that person by any means;⁸³
- communicating by any means in relation to abortions in a manner that is able to be seen or heard by a person accessing, attempting to access, or leaving premises at which abortions are provided and is reasonably likely to cause distress or anxiety.⁸⁴ This provision does not apply to an employee or other person who provides services at premises at which abortion services are provided;⁸⁵
- interfering with or impeding a footpath, road or vehicle, without reasonable excuse, in relation to premises at which abortions are provided;⁸⁶
- intentionally recording by any means, without reasonable excuse, another person accessing, attempting to access, or leaving premises at which abortions are provided, without that other person's consent;⁸⁷

⁷⁸ Ibid s 85.

⁷⁹ Ibid s 87.

⁸⁰ Ibid s 28.

⁸¹ *Public Health and Wellbeing Act 2008* (Vic) s 185B(1).

⁸² Ibid s 185D–E.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Ibid s 185B(2).

⁸⁶ Ibid s 185B(1).

⁸⁷ Ibid.

- without consent of the other person or without reasonable excuse publish or distribute a recording of a person accessing, attempting to access, or leaving premises at which abortions are provided, if the recording contains particulars likely to lead to the identification of that other person, and that other person as a person accessing premises at which abortions are provided.⁸⁸
- any other prescribed behaviour.⁸⁹

The provisions are silent on the matter of their interaction with Victoria's human rights legislation, the *Charter of Human Rights and Responsibilities Act 2006*, and by extension, their effect on the freedom of expression and right to assembly. As mentioned above, the Charter contains a section which specifically provides that it has no operation for current and future Victorian law concerning abortion and child destruction. This provision is intended to encompass statute law, judicial interpretation of statute law and the common law. Section 48 states: '(N)othing in this Charter affects any law applicable to abortion or child destruction, whether before or after the commencement of Part 2'.⁹⁰ The Charter, therefore, has no effect upon the law of abortion in Victoria, and the rights contained in the Charter are not applicable in abortion cases.⁹¹ Specifically in regard to safe access zone laws, the Victorian legislation contains similar provisions in regards to the freedom of speech rights that are enshrined in the International Covenant on Civil and Political Rights (ICCPR).⁹² As with the ICCPR, the Victorian Charter of Rights provides for freedom of expression but allows it to be limited for the "protection of public health."⁹³

5.2.4 Tasmania

In Tasmania, under the *Reproductive Health (Access to Terminations) Act 2013*, safe access zones exist within a radius of 150 metres from premises at which terminations are provided.⁹⁴ The following behaviour is prohibited within a safe access zone:

- in relation to a person, besetting, harassing, intimidating, interfering with, threatening, hindering, obstructing or impeding that person;⁹⁵
- a protest, or sidewalk interference, in relation to terminations;⁹⁶
- graphically recording, by any means, a person accessing or attempting to access premises at which terminations are provided;⁹⁷

⁸⁸ Ibid s 185E.

⁸⁹ Ibid s 185B(1).

⁹⁰ *VLRC Abortion Report* (n 49) 162 [D.5].

⁹¹ Ibid 162 [D.6].

⁹² Ibid.

⁹³ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 15.

⁹⁴ Ibid s 9.

⁹⁵ Ibid s 9(2)(a).

⁹⁶ Ibid s 9(2)(b).

⁹⁷ Ibid s 9(2)(c).

- any other prescribed behaviour.⁹⁸

To do so is an offence.⁹⁹

5.2.5 South Australia

In South Australia, under the *Health Care Act 2008*, health access zones are established within 150 metres of a protected premises, being any premises at which abortions are lawfully performed.¹⁰⁰ The following behaviour is prohibited within a health access zone:

- to threaten, intimidate or harass another person;
- to obstruct another person approaching, entering or leaving protected premises;
- to record (by any means whatsoever) images of a person approaching, entering or leaving protected premises;
- to communicate by any means in relation to abortions in a manner that is able to be seen or heard by a person accessing, attempting to access, or leaving protected premises and that is reasonably likely to cause distress or anxiety;¹⁰¹
- without the consent of the other person, publish or distribute a recording of a person approaching, entering or leaving protected premises if the recording contains information that identifies, or is likely to lead to the identification of, the other person, and identifies, or is likely to lead to the identification of, the other person as having accessed protected premises.¹⁰²

To do so is an offence.¹⁰³ There are a number of exceptions to these provisions:

- it does not prevent a person from lawfully engaging in behaviour outside of a health access zone, or engaging in lawful protest, or otherwise engaging in lawful behaviour, within a health access zone in relation to a matter other than abortion.¹⁰⁴
- It does not apply in relation to the recording of images, or the communication of information by a person employed, or otherwise providing services, at protected premises to which the health access zone relates; or, that occurs with the permission of the person whose image is recorded, or to whom the information is communicated; or, that occurs in circumstances prescribed by the regulations.¹⁰⁵

⁹⁸ Ibid s 9(2)(d).

⁹⁹ Ibid s 9(1).

¹⁰⁰ *Health Care Act 2008* (SA) 48B.

¹⁰¹ Ibid.

¹⁰² Ibid s 48F.

¹⁰³ Ibid s 48D.

¹⁰⁴ Ibid s 48C.

¹⁰⁵ Ibid s 48D(2).

5.2.6 Western Australia

Western Australia does not currently have any legislation that establishes the existence of safe access zones. The *Public Health Amendment (Safe Access Zones) Bill 2020* has, however, been proposed. The Bill provides for a safe access zone which will include the protected premises, and any area within 150 metres outside the boundary of the premises. Within those zones, it is an offence to engage in the following prohibited behaviour:

- besets, harasses, intimidates, interferes with, threatens, hinders, obstructs or impedes a person accessing, attempting to access or leaving premises at which abortions are provided;¹⁰⁶
- communicates by any means in relation to abortion in a manner that is able to be seen or heard by a person accessing, attempting to access or leaving premises at which abortions are provided, and reasonably likely to cause distress or anxiety.¹⁰⁷ This provision does not apply if the person communicating in relation to abortion is an employee or other person who provides services at the premises.¹⁰⁸
- without reasonable excuse, interferes with or impedes a footpath, road or vehicle in relation to abortion;¹⁰⁹
- without reasonable excuse, makes a recording by any means of another person accessing, attempting to access or leaving premises at which abortions are provided, without the other person's consent;¹¹⁰ or
- without consent of another person or without reasonable excuse, publish or distribute a recording of the other person accessing, attempting to access or leaving premises at which abortions are provided, if the recording contains particulars that are likely to lead to the identification of the other person, and the other person as a person accessing premises at which abortions are provided.¹¹¹
- engages in any other behaviour prescribed by the regulations.¹¹²

To do so would be an offence.¹¹³

5.2.7 Northern Territory

In the Northern Territory, under the *Termination of Pregnancy Law Reform Act 2017*, safe access zones are established within 150 metres outside the boundary of premises for

¹⁰⁶ Public Health Amendment (Safe Access Zones) Bill 2020 (WA) s 202P(2)(a).

¹⁰⁷ Ibid s 202P(2)(b).

¹⁰⁸ Ibid s 202P(3).

¹⁰⁹ Ibid s 202P(2)(c).

¹¹⁰ Ibid s 202P(2)(d).

¹¹¹ Ibid s 202Q.

¹¹² Ibid s 202P(2)(e).

¹¹³ Ibid s 202P(1), 202Q.

performing terminations.¹¹⁴ The following behaviour is prohibited within a safe access zone if it is done intentionally, and the person is reckless in relation to that circumstance:

- harassing, hindering, intimidating, interfering with, threatening or obstructing a person, including by recording the person by any means without the person's consent and without a reasonable excuse, that may result in deterring the person from entering or leaving premises for performing terminations, or performing, or receiving, a termination at premises for performing terminations.¹¹⁵
- an act that could be seen or heard by a person in the vicinity of premises for performing terminations, that may result in deterring the person or another person from entering or leaving the premises, or performing a termination, or receiving a termination at the premises.¹¹⁶ These provisions do not apply if the person is a police officer acting in the duties of law enforcement and the conduct of the police officer is reasonable in the circumstances for the performance of those duties, or the person is employed at premises for performing terminations and the conduct of the employee is reasonable in the circumstances;¹¹⁷
- the person intentionally publishes a recording of another person who is in a safe access zone, the recording was made without the other person's consent, the recording shows that the other person was entering or leaving, or attempting to enter or leave, premises for performing terminations, and the person is reckless in relation to the circumstances.¹¹⁸ This provision does not apply if the recording is published to a person who is authorised under a law in force in the Territory to receive the information in the recording.¹¹⁹ It is also a defence to a prosecution for an offence against this prohibited behaviour if the defendant has a reasonable excuse.¹²⁰

To do so is an offence.¹²¹

6. International Perspective

In examining the Religious Discrimination Bill 2019 (Cth) and its potentially negative consequences for reproductive rights, it is also necessary to view the Bill through the lens of international human rights law. Like most states, Australia has ratified a number of key international treaties which seek to identify and protect human rights. However, these treaties do not create rights enforceable by individuals until they are incorporated directly into domestic law. These include: the *Universal Declaration of Human Rights* (UDHR); the

¹¹⁴ Termination of Pregnancy Law Reform Act 2017 (NT) s 4.

¹¹⁵ Ibid s 14.

¹¹⁶ Ibid.

¹¹⁷ Ibid s 14(2).

¹¹⁸ Ibid s 15.

¹¹⁹ Ibid s 15(2).

¹²⁰ Ibid s 15(3).

¹²¹ Ibid s 14(1), 15(1).

International Covenant on Civil and Political Rights (ICCPR); the *International Covenant on Economic, Social and Cultural Rights* (CESCR) and the *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW).

While Queensland has a *Human Rights Act* (2019), it does not affect laws concerning termination of pregnancy.¹²² However, as aforementioned, the proposed Bill most likely encompasses conscientious objection in the context of terminations. Additionally, Queensland's *Termination of Pregnancy Act* (2018) arguably incorporates a number of human rights in its provisions, which will be discussed in the following sections.

Schedule 2 of the *Australian Human Rights Commission Act 1986* (Cth) defines human rights as including the rights and freedoms of the ICCPR. Specifically, it stipulates that "Everyone [has] the right to freedom of thought, conscience and religion" and that this can be manifested "in public or private", including "in practice".¹²³ It also provides that "Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others."¹²⁴

Although termination of pregnancy is not expressly mentioned, this is a clear demonstration of Australia's incorporation of the right to freedom of religion, conscience and thought and the right to health into federal legislation. As such, international human rights law does have a bearing on the matter at hand. In particular, it is important to understand how the right to freedom of religion, conscience and thought which grounds conscientious objection intersects with the right to health, specifically reproductive health. In addition to this, it is important to consider Australia's obligations to uphold and balance these components of international human rights law.

6.1 International Human Rights Potentially Engaged

6.1.1 Conscientious objection

The right to freedom of thought, conscience and religion provides a basis for the Bill's conscientious objection provisions. This is because it has been described as encompassing freedom of thought on all matters, including that of religion manifested publicly.¹²⁵ In assessing the bearing of these rights upon Australia's legislation and the way in which these rights should be interpreted, reference can be made to the documents produced by the independent expert bodies appointed to monitor the implementation of international human rights treaties.¹²⁶

¹²² *Human Rights Act* (2019) s 106.

¹²³ *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976) art 18 (1) ('ICCPR').

¹²⁴ *Ibid* art 18 (3).

¹²⁵ Judith Bueno de Mesquita and Louise Finer 'Conscientious Objection: Protecting Sexual and Reproductive Rights', *University of Essex Human Rights Centre* (Online Publication, 2008) [6] < <https://core.ac.uk/download/pdf/20607633.pdf> >. ('Conscientious Objection: Protecting Sexual and Reproductive Rights').

¹²⁶ *Ibid*.

For example, the Human Rights Committee which monitors the implementation of the ICCPR “has not recognised a self-standing right to conscientious objection, nor has it defended conscientious objection to sexual and reproductive healthcare services.”¹²⁷ As such, this freedom arises when medical practitioners refuse to perform an abortion due to their religious or moral beliefs.¹²⁸

Under international law, the right to freedom of thought, conscience and religion may not be limited. However, the freedom to manifest one’s religion or beliefs can be limited for the protection of health and the protection of the morals or rights of others.¹²⁹ Certain human rights bodies such as the European Court of Human Rights have recognised that these limitations can be applicable in the context of conscientious objection to the provision of reproductive healthcare services.¹³⁰ The Committee tasked with overseeing CEDAW has recommended that: ‘if health service providers refuse to perform such services based on conscientious objection, measures should be introduced to ensure that women are referred to alternative health providers.’¹³¹

6.1.2 Right to health (reproductive rights)

The right to health is a fundamental human right and is recognised in several treaties at an international level, including Articles 25.1 of the UDHR and 12(1) of the CESC. ¹³² It is not simply the right to be healthy physically and mentally, but the right to services, facilities, goods and conditions that facilitate the highest attainable standard of health.¹³³ This includes sexual and reproductive health services including termination of pregnancy.¹³⁴ It is important to note that international human rights law does not preclude abortion¹³⁵ nor does it guarantee a right to provision of abortion services beyond this general right to health.¹³⁶ However, the right to health can be interpreted and implemented progressively.¹³⁷ CEDAW is particularly important in this regard as it was ratified by Australia in 1983 and is the only human rights treaty which specifically affirms the reproductive rights of women.¹³⁸ The right to health includes the freedom to control one’s health and body.¹³⁹ This means that the exercise of conscientious objection by a health worker should not give rise to a denial of access to healthcare services or goods that in turn denies women the freedom to control their health and bodies.¹⁴⁰ Furthermore, the

¹²⁷ ‘Conscientious Objection: Protecting Sexual and Reproductive Rights’ (n 125) [5].

¹²⁸ Victorian Law Reform Commission, *Law of Abortion* (January 2008) Appendix D 170 (*‘Law of Abortion’*).

¹²⁹ ‘Conscientious objection: Protecting Sexual and Reproductive Rights’ (n 125) [6].

¹³⁰ *Ibid.*

¹³¹ CEDAW, General Recommendation 24: Women and Health, 20th sess, 1999, UN Doc A/54/38 at 5 (1999).

¹³² *Conscientious Objection: Protecting Sexual and Reproductive Rights* (n 125) [7].

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ *Law of Abortion* (n 128) 170.

¹³⁶ *Ibid.*

¹³⁷ *ICCPR*.

¹³⁸ *Ibid* arts 12(1), 14, 16(1)(e).

¹³⁹ *Conscientious Objection: Protecting Sexual and Reproductive Rights* (n 125) [9].

¹⁴⁰ <https://www.lawreform.vic.gov.au/content/appendix-d-human-rights-and-abortion-0#footnote-79309-106>

CEDAW Committee has made general recommendations regarding reproductive rights including a positive obligation on the part of states take measures to ensure women have equal access to health care services and are not forced to seek unsafe abortion owing to a lack in appropriate services.¹⁴¹

6.1.3 Freedom of expression (safe access zones)

As previously discussed, the *Religious Discrimination Bill 2019* (Cth) may adversely impact reproductive rights in Queensland through its freedom of speech protections, which potentially could be extended to limit safe access zones in Queensland. Specifically, it may allow individuals and group to claim an associated right to freedom of conscience in the context of protesting outside facilities which carry out terminations.¹⁴² However, on balance, the enlargement of freedom of expression in Queensland could risk the human right of liberty and security of the person and be construed as an unreasonable interference with a woman's 'liberty of action'.¹⁴³

6.2 Australia (and Queensland's) obligations

While United Nations treaty monitoring bodies (UN TMBs) have not yet expressly concluded whether states have a positive obligation under international human rights law to recognise conscientious objection in the provision of health care, having embedded international human rights law within its domestic legislation, it is arguable that Australia (and Queensland) need to ensure that these rights are implemented in a way that is consistent with that of what has been interpreted by treaty bodies.¹⁴⁴ This is because UN TMBs have recognised that where conscientious objection is permitted, states must establish and implement an effective regulatory framework guaranteeing that these refusals of care do not impede access to legal reproductive health care.¹⁴⁵

Moreover, to guarantee access to reproductive health care services (including termination) where conscientious objection is permitted, UN TMBs have outlined a list of minimum requirements of states, and it has been suggested that legislation which unreasonably restricts safe termination services would be unlikely to fulfil these criteria:¹⁴⁶

- Guarantee an adequate number and appropriate geographic dispersal of willing providers, in both public and private health facilities.¹⁴⁷

¹⁴¹ CEDAW, General Recommendation 19: Violence against Women, 11th sess 1992, UN Doc A/47/38 at 1 (1993).

¹⁴² <https://www.lawreform.vic.gov.au/content/appendix-d-human-rights-and-abortion-0#footnote-79309-106>

¹⁴³ <https://www.lawreform.vic.gov.au/content/appendix-d-human-rights-and-abortion-0#footnote-79309-106>

¹⁴⁴ Centre for Reproductive Rights, 'Law and Policy Guide: Conscientious Objection', (Web Page, 2021)

<https://maps.reproductiverights.org/law-and-policy-guide-conscientious-objection#footnote3_sfqc96c>.

¹⁴⁵ Ibid.

¹⁴⁶ Rebecca Cook and Bernard Dickens, 'Human Rights Dynamics of Abortion Law Reform' (2003) 1(29) *Human Rights Quarterly* 25.

¹⁴⁷ Centre for Reproductive Rights (n 144).

- Limit the invocation of conscientious objection to individuals and prohibit institutional refusals of care.¹⁴⁸
- Establish an effective referral system to ensure patients can access another medical professional who is willing and able to provide abortion care.¹⁴⁹
- Impose clear limits on the legality of refusals, such as ensuring they are not permitted in urgent or emergency situations.¹⁵⁰
- Implement adequate monitoring, oversight and enforcement mechanisms, including effective systems to monitor the number and location of refusing medical professionals and to oversee compliance with laws and policies regulating the practice of refusals. They must also establish and implement meaningful enforcement procedures to address, sanction, and prevent non-compliance.¹⁵¹

The UN Human Rights Committee which oversees the ICCPR has commented that states may not regulate the voluntary termination of pregnancy “in a manner that runs contrary to their duty to ensure that women and girls do not have to resort to unsafe abortions, and they should revise their abortion laws accordingly”.¹⁵² Furthermore, it has advised that States “should remove existing barriers to effective access...to safe and legal abortion, including barriers caused as a result of the exercise of conscientious objection by individual medical providers, and should not introduce new barriers.”¹⁵³

As the *Religious Discrimination Bill 2019* (Cth) compromises the balance struck by the current law between conscientious objection and the right to health, this leaves room for potential human rights violations, particularly in the context of women seeking terminations in rural Queensland where healthcare providers are fewer and farther between. This is because conscientious objection rights may limit the availability and accessibility of service providers which could present difficulties in ensuring an adequate number and the appropriate geographic dispersal of willing providers.¹⁵⁴ If termination services are denied on the grounds of conscientious objection and “alternatives are neither within safe physical reach nor affordable, this may constitute a violation of the right to health”.¹⁵⁵ This is because the inaccessibility of terminations as a result of conscientious objection being exercised by local service providers may lead to an increase in unsafe terminations.¹⁵⁶ This is particularly alarming given that unsafe abortion contributes to the death of 68,000 women annually.¹⁵⁷

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

¹⁵² Human Rights Committee, General Comment No. 36: on article 6 of the International Covenant on Civil and Political Rights, on the right to life, 23rd sess, UN Doc CCPR/C/23 at 2 (30 October 2018).

¹⁵³ Ibid.

¹⁵⁴ *Conscientious Objection: Protecting Sexual and Reproductive Rights* (n 125) [10].

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

7. Conclusion

7.1 Impact of Bill on Reproductive Rights in Queensland

As it stands, the *Religious Discrimination Bill 2019* (Cth) has no direct impact on the reproductive rights in Queensland, as enshrined under the *Termination of Pregnancy Act 2018* (Qld). There are two key areas in which the Bill has the potential to adversely impact reproductive rights: conscientious objector exemptions for health practitioners, and freedom of speech protections impacting safe access zones.

Both the *Religious Discrimination Bill 2019* (Cth) and *Termination of Pregnancy Act 2018* (Cth) allow health practitioners to refuse to provide, or participate in, a termination of pregnancy on the grounds of religious belief. However, the *Religious Discrimination Bill* provides a more stringent definition of who may constitute a conscientious objector, meaning it does not adversely impact the current conscientious objector exemptions in Queensland.

Regarding safe access zones, the *Religious Discrimination Bill 2019* (Cth) does nothing to alter the existing framework, under the *Termination of Pregnancy Act 2018* (Qld). This is because the *Religious Discrimination Bill 2019* (Cth) is silent on the matter of safe access zones, so does not alter the current framework.

Therefore, the current draft of the *Religious Discrimination Bill 2019* (Cth) does not harm reproductive rights in Queensland. To ensure that the *Termination of Pregnancy Act 2018* (Qld) and reproductive rights in Queensland are fully protected, it could be recommended that the *Religious Discrimination Bill 2019* (Cth) explicitly carve out existing State legislation regarding termination of pregnancy.

7.2 Impact of Bill on Reproductive Rights in Other Australian Jurisdictions

Similarly, the *Religious Discrimination Bill 2019* (Cth) currently has no direct impact on the reproductive rights in other Australian jurisdictions.

The protections provided to conscientious objectors within the Commonwealth bill are less protective than those provided in the state legislation, as it requires a conscientious objection on religious grounds to be reasonably considered to be in line with that religion's beliefs. In this respect, the standard is more difficult to satisfy than the standard provided for by the states, which does not require the existence of any supporting religious beliefs or any standard of proof to be met.

The only point in the Commonwealth bill that may prove problematic is in relation to the creation of rules or guidelines requiring conscientious objectors to participate in abortions despite their objections. The Commonwealth bill states that a condition, requirement, or practice requiring the participation of a conscientious objector in these circumstances must be reasonable. The person imposing this condition also bears the burden of proving the

condition's reasonableness.¹⁵⁸ Placing the burden of proof on the person imposing the condition may create difficulties in abortion access if the health practitioner is able to claim a conscientious objection without any challenge. The bill also allows for compliance in a situation where an abortion is required to avoid an unjustifiable adverse impact. This also may prove problematic as it is not made clear which adverse impacts are justifiable and unjustifiable, and more clarification is needed on this point to ascertain whether there would be any effect on reproductive rights in Australia's states.

Regarding safe access zones, the *Religious Discrimination Bill 2019* (Cth) does nothing to alter the existing respective frameworks for each state. This is because the *Religious Discrimination Bill 2019* (Cth) is silent on the matter of safe access zones, so does not alter the current framework.

Therefore, the current draft of the Commonwealth bill does not create further restrictions on reproductive rights and access to abortion in Australia's other jurisdictions in relation to the conscientious objector and safe access zone protections. In relation to situations where compliance is necessary by a conscientious objector despite their objections due to the existence of an unjustifiable adverse impact to the patient, more clarification is required on what would constitute a justifiable or unjustifiable adverse impact. Secondly, regarding the burden of proof issue, it may be reasonable to challenge the appropriateness of the person imposing such a rule carrying this burden.

7.3 Impact of International Human Rights Law on Bill

Schedule 2 of the *Australian Human Rights Commission Act 1986* (Cth) provides that "Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others", pursuant to the ICCPR.¹⁵⁹

While the *Religious Discrimination Bill 2019* (Cth) as it currently stands does not harm reproductive rights in Queensland, because it does allow conscientious objection, it is suggested that the state must ensure an effective regulatory framework guaranteeing that any refusals which arise out of its provisions do not impede access to legal reproductive health care, in line with the recommendation of UN TMBs.¹⁶⁰ This is particularly salient with respect to ensuring the efficacy of the *Termination of Pregnancy Act 2018* (Qld) and ensuring that reproductive rights are upheld through willing providers of terminations being appropriately geographically dispersed and available in adequate numbers.

¹⁵⁸ *Religious Discrimination Bill 2019* (Cth) s 8(8).

¹⁵⁹ ICCPR art 18 (3).

¹⁶⁰ Centre for Reproductive Rights (n 144).



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