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I urge then, first of all that petitions, prayers, intercessions and thanksgiving should be offered for everyone, for kings and others in authority, so that we may be able to live peaceful and quiet lives with all devotion and propriety.[1]

I. INTRODUCTION

Most Australian states and territories respect the freedom of conscience of health practitioners who have a conscientious objection to abortion.[2] However, Australia's two most populous states, Victoria

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1. 1 *Timothy* 2:1–2 (New Jerusalem Bible). Unless otherwise specified, all references to scripture in this Article will be to the New Jerusalem Bible (NJB).

2. *Health Act 1993* (ACT) s 84 (Austl.) ("(1) No-one is under a duty (by contract or by statutory or other legal requirement) to carry out or assist in carrying out an abortion. (2) A person is entitled to refuse to assist in carrying out an abortion."); *Criminal Law Consolidation Act 1935* (SA) s 82A(5)–(6) (Austl.) ("Subject to subsection (6), 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. (6) Nothing in subsection (5) affects 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."); *Health Act 1911* (WA) s 334(2) (Austl.) ("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."); *see also The Reproductive Health (Access to Terminations) Act 2013* (Tas) s 6(1)–(4) (Austl.) ("(1) Subject to subsection (2), no individual has a duty, whether by contract or by any statutory or other legal requirement, to participate in treatment authorized by section 4 or 5 of this Act if the individual has a conscientious objection to terminations. (2) Subsection (1) does not apply to an individual who has a duty set out in subsection (3) or (4). (3) A medical practitioner has a duty to perform a termination in an emergency if a termination is necessary to save the life of a pregnant woman or to prevent her serious physical injury. (4) A nurse or midwife has a duty to assist a medical practitioner in performing a termination in an emergency if a termination is necessary to save the life of a pregnant woman or to prevent her serious physical injury."); *Health (Abortion Law*

and New South Wales (NSW), impose restrictions on the freedom of conscience of health practitioners. In those states, health practitioners who have a conscientious objection to abortion are obliged to disclose the existence of their objection to their patient.[3] In Victoria, health practitioners who object to the procedure are obliged to then refer patients seeking an abortion to a health practitioner, in the same discipline, who they know does not share their conscientious objection.[4] In NSW, medical practitioners who are subject to the relevant policy are obliged to take every reasonable step to direct patients seeking that procedure to a health practitioner, in the same discipline, who the practitioner reasonably believes does not share that conscientious objection.[5]

Reform) Amendment Bill 2016 (Qld.) s 22 (Austl.) (proposed Aug. 17, 2016) (submissions to close Oct. 6, 2016) (proposing a statutory right, which would not be dependent on religious beliefs or conscience, to refuse "to perform or assist in performing an abortion") ("(1) No-one is under a duty (by contract or by statutory or other legal requirement) to perform or assist in performing an abortion. (2) A person is entitled to refuse to assist in performing an abortion. (3) However, a doctor has a duty to perform, and a registered nurse has a duty to assist a doctor in the performance of, an abortion on a woman in an emergency if the abortion is necessary to save the life of, or to prevent a serious physical injury to, the woman.").

3. *Abortion Law Reform Act 2008* (Vic) s 8 (Austl.); NSW MINISTRY OF HEALTH, POLICY DIRECTIVE: PREGNANCY–FRAMEWORK FOR TERMINATIONS IN NEW SOUTH WALES PUBLIC HEALTH ORGANIZATIONS 4.2 (July 2, 2014), http://www.health.nsw.gov.au/policies/pd/2014/pdf/PD2014_022.pdf. It is not clear that requiring health practitioners to disclose that they have a conscientious objection to abortion to their patients rather than, for example, indicating that they have never performed the procedure and do not provide it, necessarily assists the patients or the health practitioners. Requiring such a specific disclosure may prompt discussions between a patient and health practitioner as to the nature of the conscientious objection which would be avoided if such a disclosure were not required. It may also involve a breach of the health professional's right to privacy. *See also* Eva M Kibsgaard Nordberg, Helge Skirbekk & Morten Magelssen, *Conscientious Objection to Referrals for Abortion: Pragmatic Solution or Threat to Women's Rights?* BMC MED. ETHICS (2014), http://www.biomedcentral.com/1472-6939/15/15 (providing some insights of a Norwegian study of patient attitudes to being informed of their doctor's conscientious objection to abortion, finding that some patients considered it a burden to hear different views on abortion whilst others appreciated that their doctors have their own views and personality including consideration of the countervailing arguments for and against a disclosure obligation as a component of a referral or direction provision in relation to conscientious objection to abortion is beyond the scope of this Article).

4. *See Health Practitioner Regulation National Law (Victoria) Act 2009* (Vic) s 5, (Austl.) (citing the relevant obligations of registered health practitioners, which captures a very wide range of health workers, whether or not the registration of that person is general, specific, provisional, interim, or non-practicing).

5. The NSW Policy does not apply to all medical practitioners in NSW. Compliance with the NSW Policy is mandatory for Area Health Services/Chief Executive Governed Statutory

This Article examines the religious freedom implications of these obligations (the "Obligations").[6] It focuses, in particular, on the implications for Catholic health practitioners. It does so for two reasons. Firstly, because Catholics are the single largest religious denomination in Australia.[7] Secondly, because the Catholic Church has had a consistent and clear position against abortion with clear, official teachings on the subject. Part II of this Article describes the Obligations and their rationale. Part III looks at the religious composition of Australia and the prevailing attitudes toward abortion in Australia. Part III also specifically considers the teachings of the

Health Corporations, Board Governed Statutory Health Corporations, Affiliated Health Organizations—Non-Declared, Affiliated Health Organizations—Declared, and Divisions of General Practice and Public Hospitals NSW Department of Health. *See* NSW MINISTRY OF HEALTH, POLICY DIRECTIVE: NSW HEALTH POLICY DIRECTIVES AND OTHER POLICY DOCUMENTS, (May 17, 2016), http://www0.health.nsw.gov.au/policies/pd/2016/pdf/PD2016_014.pdf.

6. This Article considers the Obligations. It does not consider the obligations of health professionals in emergency cases, where an abortion is necessary to preserve the life of the pregnant woman. *See Abortion Law Reform Act 2008* (Vic) s 8(3) (Austl.); NSW MINISTRY OF HEALTH, *supra* note 3, at 4.2 (describing such emergencies as "rare"). Whether and when actions taken in an emergency to preserve the life of a mother are properly characterized as an abortion or not raises complex questions of direct and indirect intention, consequences and side effects and the ethical principle of double effect, as well as construction issues in relation to the expression used in the context of the Abortion Law Reform Act and the NSW Policy. For a discussion of these issues, see generally, GERMAIN GRISEZ & RUSSELL SHAW, FULFILLMENT IN CHRIST: A SUMMARY OF CHRISTIAN MORAL PRINCIPLES 146 (1991); PATRICK LEE, ABORTION AND UNBORN HUMAN LIFE 110–20, 124 (2d ed. 2010); Anne O'Rourke, Lachlan De Crespigny & Amanda Pyman, *Abortion and Conscientious Objection: The New Battleground*, 38 MONASH U. L. REV. 87, 98–100 (2012). These provisions also raise issues in relation to the meaning and application in context of the words "preserve the life of the pregnant woman." If the situation intended to be covered is indeed "rare," these words could not be intended to be construed as broadly as the same words were construed in *Rex v Bourne* [1939] 1 K.B. 687, 693–94 (Austl.). The provisions also raise issues as to what constitutes an "emergency" in this context. *See generally* Christian Fiala & Joyce H. Arthur, *"Dishonourable Disobedience"–Why Refusal to Treat in Reproduction Healthcare is Not Conscientious Objection*, 1 WOMAN–PSYCHOSOMATIC GYNAECOLOGY & OBSTECTRICS, 12, 14, 20 (2014); Rachael Wong, Professional Conscientious Objection and Referrals in Medicine (Aug. 10, 2015) (unpublished LLM dissertation, University of Otago) (on file with author). An examination of emergency issues is beyond the scope of this Article.

7. According to census data, 27% of the population identified as Catholic in 2001 and 25% of the population did so in 2011. *See Cultural Diversity in Australia Reflecting a Nation: Stories from the 2011 Census, 2012–2013*, AUSTL. BUREAU STATSISTICS (Apr. 16, 2013), http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features902012-2013.

Catholic Church in relation to abortion[8] and the role of conscientious objection in a pluralist, multi-faith, and multi-ethnic society. Part IV considers the implications of the Obligations on Catholic health practitioners and argues that the Obligations operate to deny religious freedom to Catholic health practitioners who seek to abide by the official teachings of their Church. Part IV also considers an example of the operation of the Victorian Abortion Law obligations to demonstrate their impact, examines the extent of any relevant protections of religious freedom under Australian law, and considers whether the Obligations may breach those protections. The Article concludes that due to the lack of protection of religious freedom for health practitioners in Victoria and the uncertainty around the level of protection of religious freedom in NSW, urgent reform is needed to remove the Obligations.

Before considering the relevant laws of Victoria and NSW, it is first necessary to note that Australia is a federation of former British colonies, which is part of the common law tradition. The federation was established by an act passed by the British Parliament that contained the Australian Constitution.[9] As a federation of states, each with its own written constitution, Australia's legislatures include the Commonwealth, or Federal Parliament, and state and territory parliaments. In Australia, whilst the federal government provides funding for abortion procedures, abortion is primarily governed by state or territory laws.[10] Over the last few decades all states and territories in Australia have either enacted legislation to liberalize access to or to decriminalize abortion, or liberalization of access has occurred through judicial interpretation and enforcement approaches to the law.[11] This Article confines its attention to the position in

8. In concentrating on the teachings of the Catholic Church on this topic, this Article is not seeking to suggest that other faiths do not have teachings on the topic, that the teachings of the Catholic Church ought be preferenced in some way, that Catholic health professionals may not have grounds for objection to abortion based on grounds other than their faith, or that there are not arguments for and against the morality of the intentional termination of pregnancy which are not founded on Catholic or any other form of religious belief. An examination of the multiplicity of arguments in relation to abortion is beyond the scope of this Article.

9. Commonwealth of Australia Act, 1900 (Imp), 63 & 64 Victoria, c. 12, § 9 (U.K.).

10. NAT'L HEALTH & MED. RES. COUNCIL, AN INFORMATION PAPER ON TERMINATION OF PREGNANCY IN AUSTRALIA, COMMONWEALTH OF AUSTRALIA 9 [1.2.6] (1996).

11. LOANE SKENE, LAW AND MED. PRACTICE: RIGHTS, DUTIES, CLAIMS AND DEFENSES 369–97 §§ 12.1–12.45 (2008) (see especially 398 § 12.1 and 397 §12.45). Since that text was

Victoria and NSW, as these are the only Australian states that have modified conscientious objection protections to date.[12]

II. THE OBLIGATIONS

A. The Victorian Referral Obligations

As some have argued for the Victorian approach to be adopted nationally, it warrants particular attention.[13] The Victorian Abortion Law was passed following a review conducted by the Victorian Law Reform Commission (the "Review").[14] Under the Victorian Abortion Law, a medical practitioner may perform an abortion up until twenty-four weeks gestation at the request of a patient.[15] Abortions may also be performed after twenty-four weeks if the practitioner reasonably believes the abortion is appropriate under the circumstances and consults at least one other registered medical practitioner who shares that belief.[16] The practitioner is required to consider all relevant medical circumstances, including the woman's current and future physical, psychological, and social circumstances (the "Circumstances").[17] Similarly, a pharmacist or nurse may administer or

written, abortion laws have been further liberalized with the passing of the *Abortion Law Reform Act 2008* (Vic) (Austl.), in Victoria, the *Reproductive Health (Access to Terminations) Act 2013* (Tas) (Austl.), in Tasmania, and the *Acts Amendment (Abortion) Act 1998* (WA) (Austl.), in Western Australia. Whilst some states and territories do seek to override conscience in an emergency situation, as explained in note 6 above, those situations are beyond the scope of this Article.

12. *Abortion Law Reform Act 2008* (Vic) s 8 (Austl.); NSW MINISTRY OF HEALTH, *supra* note 3, at 4.2; *see generally* Brigid McKenna, *Conscience and the Healthcare Professional*, *in* FOUNDATIONS OF HEALTHCARE ETHICS: THEORY TO PRACTICE 174, 178 (Jānis T. Ozoliņš & Joanne Grainger eds., 2015).

13. *E.g.*, Caroline M de Costa & Heather Douglas, *Abortion Law in Australia: It's Time for National Consistency and Decriminalisation*, 203 MED. J. AUSTL. 349, 350 (2015).

14. VICTORIAN LAW REFORM COMM'N, LAW OF ABORTION FINAL REPORT (2008), http://www.lawreform.vic.gov.au/sites/default/files/VLRC_Abortion_Report.pdf. The Report followed a request for advice on options for reforming abortion law in Victoria made by the Attorney General of Victoria in September 2007. This request was made following that government committing to the decriminalization and modernization of abortion law in Victoria. Reports of such commissions are not binding on governments but form part of the materials that governments consider in deciding on whether laws should be reformed and how any such law reform might best be structured and implemented.

15. *Abortion Law Reform Act 2008* s 4.

16. *Id.* s 5.

17. *Id.*

supply drugs to cause an abortion up to twenty-four weeks gestation.[18] A medical practitioner may direct a pharmacist or nurse to administer or supply drugs to cause an abortion in a woman who is more than twenty-four weeks pregnant if the medical practitioner reasonably believes that the abortion is appropriate in the Circumstances[19] and consults at least one other registered medical practitioner who shares that belief.[20]

The Victorian Abortion Law deals with conscientious objection in the following manner: if a woman requests a health practitioner who has a conscientious objection to abortion to advise on a proposed abortion, or to perform, direct, authorize, or supervise her abortion, the practitioner must inform the woman of his or her conscientious objection and refer the woman to another registered health practitioner who the practitioner knows does not have a conscientious objection to abortion.[21] The Victorian Abortion Law also provides that, despite any conscientious objection to abortion, a registered health practitioner is under a duty to perform an abortion in an emergency.[22] The Victorian Abortion Law has a similar operation in relation to nurses who have a conscientious objection to abortion.[23] Consequentially, the Victorian Abortion Law requires Catholics and others who have a conscientious objection to abortion to refer their patients, and thus participate in the procuring of abortions.[24] Should a health practitioner refuse to disclose and refer, penalties can include the loss of his or her medical registration.[25] This would prevent a doctor from practicing anywhere in Australia.[26]

18. *Id.* s 6.

19. *Id.* s 7(2).

20. *Id.* s 7(1)(b).

21. *Id.* s 8(1).

22. *Id.* s 8(3). As noted, this paper is confined to a consideration of non-emergency procedures. *See supra* note 6.

23. *Abortion Law Reform Act* s 8(4) (providing that, despite any conscientious objection to abortion, a registered nurse is under a duty to assist a registered medical practitioner in performing an abortion in an emergency).

24. *See supra* note 21.

25. *Possible outcomes*, AUSTL. HEALTH PRACTITIONER REGULATORY AGENCY, http://www.ahpra.gov.au/Notifications/Find-out-about-the-complaints-process/Possible-outcomes.aspx (last visited Oct. 2, 2016).

26. *Id.*

B. The Rationale for the Victorian Referral Obligation

Doctors are usually free to decline to perform elective surgical procedures.[27] The Review specifically recommended the passage of the Victorian disclosure and referral obligations.[28] The Review also identified some concerns about the availability of medical staff to provide abortion services in Victoria,[29] particularly in rural and regional areas.[30] The Review specifically considered the reasons for this circumstance. It observed that several factors contributed to the lack of availability of abortion services in Victoria: the aging of doctors providing abortion services,[31] the then uncertain legal environment in relation to abortion in Victoria,[32] the lack of government policies to ensure access to abortions (said to possibly result from the then uncertain legal environment in Victoria),[33] the lack of training of the

27. Frank Brennan, *Totalitarian abortion law requires conscientious disobedience*, EUREKASTREET.COM.AU (Sept. 24, 2008), http://www.eurekastreet.com.au/article.aspx?aeid=9155#.V_DJGmVlkXo; *see also 250 Medical Practitioners Call For Change*, CHRISTINE CAMPBELL (Nov. 26, 2013) (on file with author) (setting out 4 examples said to have been provided by Victorian doctors of circumstances, other than in relation to the termination of pregnancy, in which they had previously exercised conscientious objections, including: refusing to provide support for the renewal of a driver's license, refusing to conduct a hysterectomy, refusing to conduct a female circumcision, and refusing to prescribe or administer drugs). *But see* VICTORIAN LAW REFORM COMM'N, *supra* note 14, at s 8.2, § 8.2 n.1 (2008) http://www.lawreform.vic.gov.au/sites/default/files/VLRC_Abortion_Report.pdf (stating "there is a general expectation that practitioners will provide medical services" despite the fact that it relied on the Australian Medical Association Code of Ethics, which does not support that proposition. The footnote reads "The AMA Code of Ethics states a practitioner 'may decline to enter into a therapeutic relationship where an alternative health care provider is available, and the situation is not an emergency.'") (quoting *Code of Ethics (2004)*, AUSTL. MED. ASS'N, (Nov. 20, 2006), https://ama.com.au/position-statement/ama-code-ethics-2004-editorially-revised-2006); Nordberg, Skirbekk & Magelssen, *supra* note 3, at 6 (noting the necessity for health practitioners to decline patients' requests for certain diagnostic procedures, referrals or inappropriately requested sick leave certificates).

28. VICTORIAN LAW REFORM COMM'N *supra* note 14, at 115 recommendation 3 (2008) http://www.lawreform.vic.gov.au/sites/default/files/VLRC_Abortion_Report.pdf.

29. *Id*. at 48 §§ 3.104–3.112.

30. *Id*. at 47–48 §§ 3.100–3.110, 114 § 8.28.

31. *Id*. at 48 § 3.104 (suggesting that older doctors had first-hand knowledge or experience of the period before safe, legal abortions became available and saw abortion as an essential women's health service).

32. *Id*. at 48 § 3.06 (note that this was resolved by the amendments to the Victorian Abortion Law recommended by the Review and discussed above).

33. *Id*. at 48 § 3.107.

procedures in some major medical schools[34] and the then restricted access to non-surgical abortion.[35]

In support of its recommendations, the Review referred to a report of the interplay of conscientious objection and access in rural and remote areas, which had been conducted in Western Australia.[36] This review did not result in the introduction of any disclosure and referral obligations in that state.[37] In support of the inclusion of the referral obligation, the Review referred to a paper, released by the National Health and Medical Research Council, which specifically did not endorse recommendations for the inclusion of a referral obligation.[38] The Review did not refer to any detailed evidence that, in Victoria, conscientious objection was the cause of, or even a significant contributor to, any lack of availability of abortion services.[39] It did refer to a Women's Health Australia submission that referred to reasons for access problems in rural and regional Victoria.[40] These reasons included difficulties in attracting medical practitioners to rural areas and the then indeterminate legal status of abortion in Victoria.[41] It also asserted that "women living in rural and regional areas are more likely to experience anti-choice attitudes by medical practitioners."[42]

The terms of reference for the Review required the Commission to "ensure the maintenance of current clinical practice standards."[43]

34. *Id*. at 48 § 3.108.

35. *Id*. at 49–50 §§ 3.113–3.120; *see RU 486: the facts,* AUSTL. MED. ASS'N VICT, http://amavic.com.au/page/Member_Services/Publications__Communications/vicdoc/vicdoc_Features/RU486_the_facts/ (last visited Oct. 7, 2016) ("Although Mifepristone has been available in Australia since 2006 through the [Therapeutic Goods Administration] Authorised Prescriber Scheme, its inclusion on the Australian Register of Therapeutic Goods (ARTG) [on August 29, 2015] means that medical termination will now be available to a wider group of women, including those in regional and rural areas.").

36. VICTORIAN LAW REFORM COMM'N, *supra* note 14, at 114 § 8.28.

37. *Id*. at 115 n.38; *see also Western Australia the Health Act 1911* (WA) (showing that no disclosure and referral obligations exist in Western Australia).

38. VICTORIAN LAW REFORM COMM'N, *supra* note 14, at 115 n.44.

39. Wendy Chavkin, Liddy Leitman & Kate Polin, *Conscientious Objection and Refusal to Provide Reproductive Healthcare: A White Paper Examining Prevalence, Health Consequences, and Policy Responses*, 123 INT'L J. GYNECOLOGY & OBSTETRICS S41, S43 (2013) (identifying the lack of empirical evidence considering this issue).

40. VICTORIAN LAW REFORM COMM'N, *supra* note 14, at 47 § 3.102.

41. *Id*.

42. *Id*.

43. *Id*. at 115 § 8.38.

The Review referred to the Australian Medical Association *Code of Ethics*[44] ("the Code") in support of its recommendation. The Code "articulates and promotes a body of ethical principles to guide doctors' conduct in their relationships with patients, colleagues and society."[45] The Code expressly preserves a doctor's right to decline to recommend a form of therapy on the grounds of personal moral judgment or religious belief. In those circumstances, it requires doctors to inform the patient of their objection.[46] Besides emergency situations, the Code also recognizes a doctor's right to decline a patient relationship or to discontinue a patient relationship where alternative health care is available, but includes no referral or direction obligation.[47]

Whilst the Review recommended the introduction of a referral obligation, it made no reference to the fact that abortion was already widely available in Victoria without the need for a referral[48] and contained no analysis of the means by which patients access information about abortion providers.[49] It did not discuss the ready availability of information about abortion services via the use of internet search engines, other electronic and print media, or telephone books. It did not, for example, recommend introducing women to any additional portals or other sources of information in relation to abortion providers and services as part of its consideration of the need to require health professionals with a conscientious objection to abortion to refer. Yet information about abortion providers is readily available.[50]

44. *AMA Code of Ethics,* AUSTL. MED. ASS'N (Nov. 20, 2006), https://ama.com.au/position-statement/ama-code-ethics-2004-editorially-revised-2006.

45. *Id*. at pmbl.

46. *Id*. at 1.1(p) ("When a personal moral judgement or religious belief alone prevents you from recommending some form of therapy, inform your patient so that they may seek care elsewhere.").

47. *Id*. at 1.1(q) ("Recognise that you may decline to enter into a therapeutic relationship where an alternative health care provider is available, and the situation is not an emergency one."); *id*. at 1.1(r) ("Recognise that you may decline to continue a therapeutic relationship. Under such circumstances, you can discontinue the relationship only if an alternative health care provider is available and the situation is not an emergency one. You must inform your patient so that they may seek care elsewhere.").

48. McKenna, *supra* note 12, at 187.

49. Wong, *supra* note 6, at 58.

50. For example, a Google search of "Where can I get an abortion in Victoria" conducted by the author on November 3, 2015, produced 51,600,000 hits, including Marie Stopes

A referral obligation is significant. To a health professional's patient, a referral indicates more than a name of a health professional who might carry out the procedure—it brings with it an expectation that the professional recommends the health professional to whom the patient is referred. As one Victorian doctor has observed, "When we refer a patient to a doctor we accept responsibility for that referral and we don't send our patients to doctors whose capabilities are unknown to us for indeed we can be held professionally liable for poor referring."[51]

In passing the Victorian Abortion Law, it is evident that the Parliament intended referrals to be of this type. As Maxine Morand, Minister for Women's Affairs, explained during the second reading speech of the bill in the Victorian Parliament, "The purpose of requiring the health practitioner to refer the woman to another comparable registered health practitioner promotes the woman's right to make decisions about her own health care, and to receive the highest attainable standard of health care."[52]

It is evident from the second reading speeches that those proposing the referral requirement did not appreciate the seriousness of the difficulties it would present to some health practitioners. The Minister expressed the requirement in this way:

> It is expected that practitioners will, in general, already be aware of practitioners in their regulated profession who do not have a conscientious objection to abortion. However, if they do not have this information, it will be a *simple* matter for them to consult their

International (http://www.mariestopes.org.au/), Family Planning Victoria (http://www.fpv.org.au/sexual-health-info/sex-and-the-law/abortion-in-victoria/), The Women's Clinic (http://womensclinic.com.au/abortionfaq.php), Children By Choice (http://www.childrenbychoice.org.au/if-youre-pregnant/im-considering-an-abortion/clinics-interstate), Fertility Control Clinic (http://fcc.com.au/faq.php), and Pro Choice Action Network (http://www. prochoiceactionnetwork-canada.org/abortioninfo/bc.shtml).

51. Media Release, Christine Campbell MP, Member for Pascoe Vale, Vict., 250 Medical Practitioners Call for Change (Nov. 26, 2013), http://www.christinecampbell.com.au/media-releases/250-medical-practitioners-call-for-change/ (quoting Dr. Bruce Shepherd AM, founder of The Shepherd Centre), http://www.christinecampbell.com.au/media-releases/250-medical-practitioners-call-for-change/.

52. Victoria, *Parliamentary Debates*, Legislative Assembly 2953–54 (Aug. 19, 2008) (statement of Maxine Morand, Minister for Women's Affairs).

> peers before referral, as would commonly be the case in relation to other kinds of referral.[53]

As will be explained in Part III and as McKenna observes, "For many conscientious objectors, though, the simple act of referral is held to be morally unacceptable cooperation in the wrongdoing of others; in this sense, referral renders them complicit in the objectionable procedure."[54]

C. The NSW Obligations to Direct

In NSW, the Crimes Act 1900 ("Crimes Act") proscribes "unlawful" abortion.[55] Whilst that Act has not been legislatively amended and so continues, on its face, to prohibit the unlawful procuring of an abortion, the word "unlawful" has been interpreted by the Courts and subsequently enforced in such a way that abortion

53. *Id.* at 2953 (emphasis added). It is clear from this speech that Parliament intended that the referral obligation required a specific referral to a specific health practitioner rather than what Julian Burnside has referred to as "an uncomplicated effective referral" "to a public hospital or to a recognised independent pregnancy service." O'Rourke, De Crespigny & Pyman, *supra* note 6, at 108 (quoting Letter from Julian Burnside to Members of the Legislative Council (Oct. 8, 2008) (on file with authors)).

54. McKenna, *supra* note 12, at 185.

55. *Crimes Act 1900* (NSW) pt III div 12 (Austl.). The relevant provisions of the Crimes Act, subdivisions 82 to 84, provide the following:

> 82 . . . Whosoever, being a woman with child, unlawfully administers to herself any drug or noxious thing, or unlawfully uses any instrument or other means, with intent in any such case to procure her miscarriage, shall be liable to imprisonment for ten years.
>
> 83 . . . Whosoever[ ] unlawfully administers to, or causes to be taken by, any woman, whether with child or not, any drug or noxious thing, or unlawfully uses any instrument or other means, with intent in any such case to procure her miscarriage, shall be liable to imprisonment for ten years.
>
> 84 . . . Whosoever unlawfully supplies or procures any drug or noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used with intent to procure the miscarriage of any woman, whether with child or not, shall be liable to imprisonment for five years.

Id.

is readily accessible in NSW.[56] The object of the relevant sections is not set out expressly in the Crimes Act.[57]

The interpretation of the term "unlawful" in this legislation arose for consideration for the first time in NSW in 1971. In *R v Wald*, the NSW District Court ruled that abortion would not be unlawful if a doctor formed an honest and reasonable belief that there was any economic, social, or medical reason upon which an abortion was required to avoid a serious danger to the pregnant woman's life or her physical or mental health which existed at the time of consultation or which could be reasonably be expected to arise during the pregnancy if not terminated ("the *Wald* test").[58]

56. *See CES v Superclinics Pty Ltd* [1995] 38 NSWLR 47, 70 (Austl.); *R v Wald* [1971] 3 NSWDCR 25 (Austl.); SIMON BRONITT & BERNADETTE MCSHERRY, PRINCIPLES OF CRIMINAL LAW 549 § 9.210 (Thompson Reuters 3d ed. 2010) (2001); COMMON GROUND? SEEKING AN AUSTRALIAN CONSENSUS ON ABORTION AND SEX EDUCATION 15 ¶ 1.2, 17–18 ¶ 1.4, 26 ¶ 1.5.3 (John Fleming & Nicholas Tonti-Filippinni eds., 2007) [hereinafter Fleming]; SKENE, *supra* note 11, at 372–73 § 12.4, 388–89 § 12.24.

57. VICTORIAN LAW REFORM COMM'N, *supra* note 14, at 143–44, 145 n.27. The Commission suggests that the inclusion of the word "unlawful" in the Offences Against the Person Act 1861, 24 & 25 Vict. c. 100, § 58 (UK), on which the *Crimes Act 1900* (NSW) was based, rather than setting out the intended circumstances in which an abortion may be lawful, "suggests parliament may have meant to delegate the determination of the circumstances in which abortion is lawful to the judiciary." VICTORIAN LAW REFORM COMM'N, *supra* note 14, at 145 n.27. It is at least equally arguable that the word "unlawful" was included as a shorthand means of referencing the common law exception to the proscriptions on abortion where the procedure was conducted "in good faith for the purposes only of preserving the life of the mother." R v Bourne [1938] 1 K.B. 687 691 (Austl.) (Macnaghten, J). Whilst the direction that Justice Macnaghten gave to the jury might properly be described as "creative[]," VICTORIAN LAW REFORM COMM'N, *supra* note 14, § A.15, at 143–44, or as "some judicial, and possibly judicious, legislation," *Recent Cases-Notes and Comments: Criminal Law-Abortion-For the Purpose only of Preserving Life* 12 AUSTRALIAN L.J. 212 (1938), his earlier statement of the meaning of the word "unlawful" as used in the Offences Against the Person Act 1861 may well be accurate.

58. *Wald* 3 NSWDCR at 29. His Honour proposed the following test:

> It would be for the jury to decide whether there existed in the case of each woman any economic, social or medical ground or reason which in their view could constitute reasonable grounds upon which an accused could honestly and reasonably believe there would result a serious danger to her physical or mental health . . . . It may be that an honest belief be held that the woman's mental health was in serious danger as at the very time when she was interviewed by a doctor, or that her mental health, although not then in serious danger, could reasonably be expected to be seriously endangered at some time during the currency of the pregnancy, if uninterrupted. In either case such a conscientious belief on reasonable grounds would have to be negatived before an offence under s 83 of the Act could be proved.

Id.

Under the *Wald* test, the relevant danger might arise at any time during the pregnancy, and, if it did, abortion would apparently be permissible at any stage of pregnancy. The meaning of "unlawful" in these provisions arose for consideration again in 1995 in the NSW Court of Appeal in *Superclinics*.[59] In this case, Acting Chief Justice Kirby sought to expand the *Wald* test. He held that a doctor assessing the lawfulness of an abortion in NSW could consider the economic and social circumstances in which the pregnant woman would probably find herself, not only during but also after the birth, if she were unable to procure an abortion.[60] Since neither party in the case, nor the two judges in the case who applied the *Wald* in its original form argued for an expansion of the *Wald* test there is doubt about the precedential value of the Kirby test.[61]

The key judicial decisions in NSW do not refer to any stage of development of the fetus. Instead, policy directives and other policy documents have been issued by the NSW Ministry of Health containing mandatory requirements that apply to a large range of medical facilities.[62] In July 2014, the Ministry issued the NSW Policy, which is its most recent policy directive in relation to the termination of pregnancies.[63] Compliance with the NSW Policy is mandatory and a condition of subsidy for public health organizations.[64] The NSW Policy provides for different levels of consultation by the treating practitioner with other practitioners and specialists depending upon

59. *Superclinics* 38 NSWLR at 47.

60. *Id*. at 60.

61. *See* SKENE, *supra* note 11, at 396–97 ¶ 12.45.

62. NSW MINISTRY OF HEALTH, *supra* note 5.

63. The 2014 NSW Policy replaced a prior NSW Ministry of Health policy that dealt with conscientious objection in a manner that did not require individual staff members with a conscientious objection to provide personal direction. The 2005 policy provided the following:

> In the circumstances where staff have a conscientious objection to participate in terminations of pregnancy or administer any abortifacient agents there is an obligation to transfer the care of the patient to another medical specialist (or health professional) on site or at another AHS facility. All staff that have concerns should contact their manager.

NSW MINISTRY OF HEALTH, PREGNANCY—FRAMEWORK FOR TERMINATIONS IN NEW SOUTH WALES PUBLIC HEALTH ORGANISATIONS (May 25, 2005), http://www.health.nsw.gov.au/archive/policies/pd/2005/pdf/PD2005_587.pdf.

64. The 2014 NSW Policy requires all public health organizations which manage facilities where terminations occur to introduce policies consistent with the NSW Policy. NSW MINISTRY OF HEALTH, *supra* note 5, § 1.1.

the stage of gestation.[65] Whilst there have been no legislative provisions enacted by the NSW Parliament to remove medical practitioners' freedom of conscience rights, the NSW Policy includes the following disclosure and direction obligations:

> Any medical practitioner who is asked to advise a woman about termination of pregnancy, or perform, direct, authorize or supervise a termination of pregnancy, and who has a conscientious objection to termination of pregnancy must:
>
> 1. Inform the woman that they have a conscientious objection and that other practitioners may be prepared to provide the health service she seeks; and
>
> 2. Take every reasonable step to direct the woman to another health practitioner, in the same profession, who the practitioner reasonably believes does not have a conscientious objection to termination of pregnancy.
>
> The term 'direct' is to be understood in its ordinary sense, that is, to direct or point to another source, rather than the requirement of a written referral as part of an ongoing working relationship. It may be as simple as directing the woman to another practitioner who they know has no such objection. This is to ensure that women receive timely, accurate information from a professional who does not hold an objection to the health service she seeks.
>
> Any health practitioner having a conscientious objection to termination of pregnancy should notify their manager in a timely manner of his/her conscientious objection. Public health organizations must ensure that no staff member is disadvantaged because of a conscientious objection to termination of pregnancy.
>
> The exception to this is termination of pregnancy in emergency situations. Medical practitioners, midwives and nurses must perform a termination of pregnancy in those rare emergency cases where it is necessary to preserve the life of the pregnant woman, regardless of their objection to abortion.[66]

The NSW Policy thus creates an obligation when a request for an abortion is made to "[t]ake every reasonable step to direct a patient to another health practitioner, in the same profession, who the

65. *Id.* § 3.2.
66. *Id.* ¶ 4.2.

practitioner reasonably believes does not have a conscientious objection to termination of pregnancy."

Whilst the NSW Policy requires the taking of "every reasonable step" rather than the taking of "every step," conscientious objectors should not take any comfort in the inclusion of the word "reasonable." Since the NSW Policy is specifically intended to apply in cases of "conscientious objection to termination of pregnancy," it is unlikely that it would be found to be reasonable for a practitioner to take no such step solely because of a conscientious objection. Although the NSW Policy does not use the word "referral" and expressly provides that a written referral is not required to satisfy this obligation, the requirement to "direct the woman to another health practitioner, in the same profession, who the practitioner reasonably believes does not have a conscientious objection to termination of pregnancy"[67] clearly goes beyond informing the patient "that other practitioners may be prepared to provide the health service she seeks,"[68] because that is a separate express obligation. The additional explanation of the meaning of the word "direct" given by the NSW Policy suggests that the nature of the "reasonable belief" required is a high standard—practitioners are expected to direct "the woman to another practitioner who they *know* has no such objection" (emphasis added). Thus, the NSW Policy requires Catholics and others who have a conscientious objection to abortion to direct their patients to a practitioner they reasonably believe, or know, has no conscientious objection. By so requiring, the Policy effectively requires the objecting physicians to participate in the procuring of abortions.[69]

The introduction of this direction obligation into the NSW Policy was effected by a statutory health corporation: NSW Kids and Families.[70] Policy documents, such as the NSW Policy, that are not legislative but mandated and intended to be complied with are often referred to as "soft law."[71] However, there is nothing "soft" about the risk of removing funding and the risk of making a complaint against a

67. NSW MINISTRY OF HEALTH, *supra* note 3, ¶ 4.2.[2].

68. *Id.* ¶ 4.2.[1].

69. *See infra* Part III.

70. NSW MINISTRY OF HEALTH, *supra* note 5, ¶ 1.

71. DENNIS C. PEARCE & ROBERT S. GEDDES, STATUTORY INTERPRETATION IN AUSTRALIA 2 ¶ 1.1 (LexisNexis Butterworths, 8th ed. 2014); *see also* Robin Creyke, '*Soft Law' and Administrative Law: A New Challenge*, 61 AIAL FORUM 15 (2010).

health professional under the Health Care Complaints Act 1993[72] in relation to an alleged non-compliance with the NSW Policy.[73] Whilst the obligation to disclose and direct is currently not legislative, a Greens member of the NSW Legislative Council introduced the Abortion Law Reform (Miscellaneous Acts Amendment) Bill 2016 into the Legislative Council on 11 August 2016. If this bill became law, a medical practitioner with a conscientious objection to abortion would be required to inform a person seeking information about abortion of that objection and to refer that person to a local women's health center or another health practitioner whom the health practitioner reasonably believes does not have a conscientious objection to abortion.[74] A consideration of the potential impact of this Bill if it becomes law is beyond the scope of this Article.[75]

D. The Rationale for the NSW Direction Obligation

The rationale for the amendments to the NSW Policy in July 2014 is not publicly available. In response to an application under the Government Information (Public Access) Act 2009,[76] the NSW Ministry of Health produced some materials relating to the decision-

72. A complaint may be made concerning "the professional conduct of a health practitioner." *Health Care Complaints Act 1993* (NSW) pt 2 div 1 sub-div 7(1)(a) (Austl.).

73. *See NSW Health Policy*, *supra* note 5, ¶ 2.1.

74. Abortion Law Reform (Miscellaneous Acts Amendment) Bill 2016 (NSW) sch 1.3 (Austl.).

75. At the time of writing it is not possible to predict the likelihood of this Bill becoming law and it is beyond the scope of this article to consider whether the form of this legislation would ameliorate some of the religious liberty concerns of Catholic health professionals in NSW addressed in this Paper. One of the issues that would require consideration is the extent to which a local Women's Health Centre would be likely to refer for abortion services or whether any such Centres presently or in future may provide such services themselves. Issues in relation to the need for any such provision would remain. If passed this legislation would apply to all health professionals in NSW rather than to the more limited class of persons to which the NSW Policy applies. Health professionals whose religious beliefs prevent them from complying with the legislation could then no longer opt out of working in organisations within which the NSW Policy applies.

76. The Honorable Greg Donnelly, a member of the NSW Parliament Legislative Council (MLC), made this application for "a copy of all the meeting minutes from the relevant committee/subcommittee/working group etc. that was tasked with the preparation of [the NSW Policy]." The words of his request are quoted in the response made to it in Letter from Tim Jap, Senior External Relations Office, NSW Ministry of Health, to The Hon. Greg Donnelly MLC (June 9, 2015) (on file with author).

making process.[77] Those materials disclose that a Clinical Ethics Advisory Panel[78] met, reviewed the NSW Policy on July 5, 2012,[79] and identified a need to "explore and clarify 'conscientious objection'" in the context of conscientious objections by staff to participate in late-term abortions at various levels of organizations.[80] The materials also disclose that, on November 6, 2013, a maternal and perinatal health priority task force meeting involved "significant discussion in regards to section 4.2 conscientious objection. Further discussion clarified some key issues."[81] The materials do not disclose what those "key issues" were or how they were clarified. The disclosure and direct obligations contained in the NSW Policy apply to all terminations of pregnancy and make no reference to late-term abortions.

Given the paucity of explanatory materials, it is not possible to examine the extent to which, if at all, the issues faced by conscientious objectors—particularly Catholic conscientious objectors—were taken into account in the considerations that led to the introduction of the NSW Policy. The issues discussed in this Article would suggest that the Panel did not take these issues into account. If the change in policy was intended to address shortages in staff that are willing to assist in late-term abortions, the materials do not disclose what options were considered to address this issue or how the new policy might ameliorate this issue. It would appear that those involved considered the objections of conscientious objectors to the referral obligations in the Victorian Abortion Law to relate to an interpretation of that Act as requiring a formal written referral rather than a less-formal oral referral. This may explain the use of the word *direct* in the NSW Policy rather than the word *refer*. However, as noted in Section II.B, although a written referral is not mandated, the obligation to "direct" raises essentially the same difficulties for conscientious objectors. While the NSW Policy asserts that the obligation to direct "may be as

77. *Id.*

78. The Clinical Ethics Advisory Panel "is a multi-disciplinary panel with expertise in clinical ethics, clinical practice, consumer concerns, community issues related to health care, law and philosophy" that provides advice to the NSW Ministry of Health. *NSW Health Clinical Ethics Advisory Panel (CEAP)*, NSW MINISTRY HEALTH, http://www.health.nsw.gov.au/clinicalethics/Pages/clinical-ethics-advisory-panel.aspx (last visited Aug. 27, 2016).

79. Maternal and Perinatal Health Priority Taskforce, Minutes of Meeting (Nov. 5, 2013).

80. Clinics Ethics Advisory Panel, Minutes of Meeting (July 5, 2012).

81. *Id.*

simple as directing the woman to another practitioner who they know has no such objection,"[82], for conscientious objectors, particularly Catholic medical practitioners seeking to live their faith, this may be far from simple.[83]

III. RELIGIOUS COMPOSITION AND ATTITUDES

A. Religious Background and Attitudes Toward Abortion in Australia

With that background, this Article now considers whether and how the Obligations might adversely impact those who have a conscientious objection to abortion pursuant to their religious faith. Because in Australia, Catholicism is the single largest religious denomination and the most constant and vocal opponent of abortion,[84] this Article will consider whether these provisions might adversely impact Catholic health practitioners. In particular, this section will consider the religious makeup of Australia by identifying the proportion of the population that identify as Catholic and explaining the official position of the Catholic Church in relation to abortion.

Australia is a pluralist, multi-faith, multi-racial society.[85] The religious landscape of Australia is a constantly evolving one, but Australia has deep historical Christian roots.[86] From the first census in 1911, "the majority of Australians have reported an affiliation with a Christian religion."[87] Even though this affiliation has been declining "from 96% in 1911 to 61% in 2011," the Christian faith traditions continue to dominate in Australia, with Catholicism being the largest

82. NSW MINISTRY OF HEALTH, *supra* note 3, ¶ 4.2 (emphasis added).

83. *See generally* McKenna, *supra* note 12, at 185.

84. VICTORIAN LAW REFORM COMM'N, *supra* note 14, at 149 ¶ 8.17.

85. *See* ROY WILLIAMS, POST-GOD NATION? 114 (2015); *Cultural Diversity in Australia Reflecting a Nation*, *supra* note 7. The varied religious demographics of Australia have also been recognized by a number of Australian courts. *See, e.g.*, *Canterbury Mun Council v Moslem Alawy Soc'y, LTD* (1985) 55 LGRA 318 (Austl.) (discussing public worship in Islam and Christian religious ceremonies*); Christian Youth Camps Ltd. v Cobaw Cmty Health Servs Ltd.* [2014] VSCA 75 at ¶ 560 (Austl.) (Redlich, JA) (emphasizing "the width of activities to which the religious belief may extend").

86. A detailed examination of the influence of Christianity is well beyond the scope of this Paper, but a satisfactory survey can be found in WILLIAMS, *supra* note 85, at 1–141.

87. *Cultural Diversity in Australia Reflecting a Nation*, *supra* note 7.

single religious denomination.[88] Although statistics showing the religious affiliation of health practitioners in Australia are not available, if the percentage of Catholic health practitioners replicates the general trend indicated by the census data, about one-quarter of health practitioners in Australia have an affiliation to Catholicism.

The European Court of Human Rights (the "ECHR") has observed that maintaining pluralism is dependent on maintaining freedom of religion.[89] This may explain Australia's strong tradition of respecting conscientious objection in Parliament.[90] For example, while members of the Australian Labor Party are normally required to vote along party lines, its members of Parliament have the right to vote according to their conscience in relation to issues such as abortion.[91] Members of Parliament from the other major political party in Australia, the Liberal Party, are not bound by a caucus vote on any issue.[92] This support for conscience voting, in relation to abortion matters, also seems to have majority support. One survey found that a substantial majority of Victorians support doctors and nurses having

88. *Id*. From 2001 to 2011, the proportion of the Australian population identifying with a Christian faith tradition fell "from 68% in 2001 to 61% in 2011," and this trend was also evident in the two most commonly reported denominations: Catholicism and Anglicanism. *Id*. "In 2001, 27% of the population reported an affiliation to Catholicism. This decreased to 25% of the population in 2011." *Id*.

89. *See* Eweida v. U.K., App. No. 48420/10, 59842/10, 51671/10, at 30 (2013), http://hudoc.echr.coe.int/eng?i=001-115881 ("The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on [religious freedom].") (last visited Oct. 5, 2016) (alteration in original).

90. *See* Fleming, *supra* note 56, at 9.

91. The Australian Labor Party decided in 1984 that "the matter of abortion can be freely debated at any state or federal forum of the Australian Labor Party, but any decision reached is not binding on any member of the Party." ALP NAT'L CONST. 29 (2015), https://cdn.australianlabor.com.au/documents/ALP_National_Constitution.pdf.https://d3n8a8pro7vhmx.cloudfront.net/australianlaborparty/pages/121/attachments/original/1439953357/ALP_National_Platform___Constitution.pdf?1439953357.

92. DEIRDRE MCKEOWN & ROB LUNDIE, INFO. & RES. SERVS., FREE VOTES IN AUSTRALIAN AND SOME OVERSEAS PARLIAMENTS 8 (2002) ("The Liberal Party does not have a pledge which binds members to a party line."); Gerard Henderson, *How Menzies would have dealt with conscience votes is guesswork*, SYDNEY INST. (Aug. 22, 2015), http://thesydneyinstitute.com.au/blog/2015/08/22/how-menzies-would-have-dealt-with-conscience-votes-is-guesswork/ ("Liberal Party MPs were given a conscience vote on all pieces of legislation.").

the right to opt out of performing the procedure if they conscientiously object.[93]

Since abortion is readily accessible in Australia,[94] as might be expected in a pluralist, multi-faith, and multi-racial society, Australians have a range of views on the issue.[95] As the then Acting Chief Justice Kirby observed, abortion "is a subject which is prone to engender very strong feelings."[96] Some commentators on abortion and conscientious objection seem to equate legality with right, but, as Margaret Somerville has explained, "[b]ecause abortion is legal does not mean that it is right, in the sense of ethically and morally right, in all circumstances."[97] Members of the Australian community take different views; as Acting Chief Justice Kirby has observed:

> Some, for reasons of religious instruction or personal conscience, could not conceive of *any* circumstances where termination would be necessary or proportionate. But even in institutions and among medical practitioners (probably the majority) who do not take this strict view, variations will occur.[98]

Although there is less support for abortion among Australians with religious belief, the majority of Australians with religious belief and the majority of Australians overall support the view that a woman has a right to choose to have an abortion.[99] Some Australians strongly support abortion at any and all stages of fetal development.[100] Two large-scale surveys provide reasonable evidence for the view that "no

93. VICTORIAN LAW REFORM COMM'N, *supra* note 14, at 115 n.31 (citing AUSTL. FED'N RIGHT LIFE ASS'N, WHAT AUSTRALIANS REALLY THINK ABOUT ABORTION: A REPORT ON COMPREHENSIVE INDEPENDENT MARKET RESEARCH 20 (2006)) ("[S]urvey data . . . found that 62.7% of Victorians 'support conscientious objection to allow doctors and nurses to opt out.'").

94. *See* AMA *supra* note 44; Google search results, *supra* note 50.

95. VICTORIAN LAW REFORM COMM'N, *supra* note 14, at 58–68; Fleming, *supra* note 56, at 48–91.

96. *CES v Superclinics PTY LTD* (1995) 38 NSWLR 47, 70 (Austl.).

97. MARGARET SOMERVILLE, THE ETHICAL CANARY: SCIENCE, SOCIETY AND THE HUMAN SPIRIT 31 (2004).

98. *Superclinics*, 38 NSWLR at 66 (Austl.).

99. VICTORIAN LAW REFORM COMM'N, *supra* note 14, at 68; Fleming, *supra* note 56, at 53–55.

100. VICTORIAN LAW REFORM COMM'N, *supra* note 14, at 67; Fleming, *supra* note 56, at 53–55.

more than 10% of the Australian population oppose abortion outright."[101]

Whilst "estimates of prevalence [of conscientious objection to abortion among healthcare providers] are difficult to obtain,"[102] Australian health practitioners are also likely to have a wide range of views on the topic.[103] Surveys taken in the United States and the UK suggest that conscientious objectors are more likely to self-identify as religious.[104] According to one random sample taken in the UK, ten percent of consultant obstetricians and gynecologists would describe themselves as conscientious objectors, but the majority of that ten percent would support abortion for severe fetal abnormality.[105] If Australian doctors have similar views, about ten percent of Australian health practitioners might be expected to be conscientious objectors other than in the case of fetal abnormality. In that circumstance, less than five percent might be expected to have a conscientious objection to abortion.

There are Australian women who seek termination in the event of unexpected and unwanted pregnancies and who will seek the services of doctors who provide that service. There are also Australian women who would never contemplate an abortion under any circumstances,[106]

101. VICTORIAN LAW REFORM COMM'N, *supra* note 14, at 67.

102. Chavkin et al., *supra* note 39, at S43.

103. *See* Brennan, *supra* note 27 ("Some doctors think abortion is almost always wrong; others think it is almost never wrong.").

104. Chavkin et al., *supra* note 39, at S44 (citing several survey results, including a random sample of UK general practitioners, another study of licensed Idaho nurses, and a study of obstetricians and gynecologists in a New York hospital). Note, however, that a 2012 survey of medical students found a greater percentage of conscientious objections to be for non-religious grounds. *See* McKenna, *supra* note 12, at 176.

105. Chavkin et al., *supra* note 39, at S42 (citing Josephine M. Green, *Obstetricians' View on Prenatal Diagnosis and Termination of Pregnancy: 1980 Compared with 1993,* 102 BRIT. J. OBSTETRICS & GYNAECOLOGY 228, 229 (1995)).

106. The surveys discussed by the Victorian Law Reform Commission produced wide variation in their results, with 7% (women aged 18–49 years) disagreeing with the proposition that women should have right to choose whether or not to have an abortion and 32% (men and women aged 18–34 years) opposing abortion in any circumstances and a smaller proportion of women than men supporting abortions after 13 and 20 weeks' gestation. VICTORIAN LAW REFORM COMM'N, *supra* note 14, at 65; *see also What Women Want: When Faced with an Unplanned Pregnancy,* MARIE STOPES INT'L 13 (Nov. 2006), http://www.mariestopes.org.au/wpcontent/uploads/2014/07/DetailedFindingsWhatWomenWant.pdf (discussing a survey of women who had faced an unwanted pregnancy, finding that 3% believed

or only in very limited circumstances, and who would be very upset if their doctors sought to persuade them to terminate their pregnancy. These women want health practitioners to support their decision to carry their baby to term whether it is healthy or not, and some want that support regardless of the impact to their own health.[107]

B. The Role of Conscientious Objection in a Multi-Faith, Multi-Racial, Pluralist Society

This Article now considers the role of conscientious objection in healthcare in a multi-faith, multi-ethnic, and pluralist society like Australia. Fiala and Arthur argue that all rights of conscientious objection should be removed.[108] They describe conscientious objectors as "anti-choice"[109] and observe that "objectors often see no moral difference between doing an act and allowing it."[110] As a result, they conclude that "[s]ince objectors often view a referral as equivalent to doing the procedure themselves, limited [conscientious objection] is inherently contradictory and therefore unworkable."[111] Instead, they argue for the removal of all rights of conscientious

that an abortion should never be allowed under any circumstance, with 7% saying they did not know or were unsure of their viewpoint).

107. When O'Rourke et al., argue that women may be deprived of choice if their doctor "presents information in a way that deprives the patient of choice," they—without justification—limit their consideration to doctors who believe that abortion is morally wrong. O'Rourke et al., *supra* note 6, at 116. Wong notes that pregnant women who do not countenance abortion should have the opportunity to attend a health practitioner who shares their views on this topic. Wong, *supra* note 6, at 36; *see also* Jenny Awford, *'It hurts my heart': Bridget Jones Actress Sally Phillips Whose Son Has Down's Syndrome Says Pregnant Women Are Being Pressured to Abort Babies with the Condition*, DAILY MAIL (Sept. 28, 2016), http://www.dailymail.co.uk/news/article-3809953/Sally-Phillips-says-pregnant-women-pressured-abort-babies-s-syndrome.html.

108. Fiala & Arthur, *supra* note 6, at 20. Others have expressed similar views. *See* Julie D. Cantor, *Conscientious Objection Gone Awry—Restoring Selfless Professionalism in Medicine*, 360 NEW ENG. J. MED. 1484, 1485 (2009); Julian Savulescu, *Conscientious Objection in Medicine*, 332 BMJ 294, 294 (2006); Jay Michaelson, *Redefining Religious Liberty: The Covert Campaign Against Civil Rights*, POL. RES. ASSOCIATES 27 (Mar. 2013), http://www.politicalresearch.org/wp-content/uploads/downlaods/2013/04/PRA_Redefining-religious-Liberty_March 2013_PUBLISH.pdf; *see also* O'Rourke, et al., *supra* note 6, at 116–18. *But see* McKenna, *supra* note 12, at 180–83; Douglas Laycock, *Religious Liberty and the Culture Wars*, 63 U. ILL. L. REV. 839, 872–73 (2014); Wong, *supra* note 6, at 12.

109. Fiala & Arthur, *supra* note 6, at 13, 17.

110. *Id*. at 14.

111. *Id*.

objection on the basis that healthcare professionals choose their profession "knowing in advance the full range of duties they will be expected to perform,"[112] including the provision of abortion.

One flaw in this argument is that in Victoria and NSW, the Obligations do not apply to health practitioners in only maternity or gynecology. This approach also presumes that health practitioners enter their profession knowing that there will be inadequate protections afforded to their conscience and that their conscience and religious beliefs remain constant throughout their professional lives.[113] Fiala and Arthur assert that those entering the medical profession "are expected to subordinate their own interests and beliefs in order to serve others, even those they dislike or disagree with."[114]

At root, arguments of this kind emphasize patient autonomy and the obligations owed by medical practitioners to society said to arise from their monopoly position. The arguments expose differences of opinion regarding the nature of the doctor/patient relationship and a health professional's understanding of acting in the best interest of patients and society.[115] The arguments tend to be limited to views about mandating the provision of abortion services because few argue that health practitioners ought to subjugate their own interests entirely to those of their patients. It is not argued that health practitioners must, for example, carry out operations or dispense medications which they consider to be unnecessary or harmful, or that they provide referrals or directions to any other practitioner who they know would be willing so to do. Similarly it is not argued that health practitioner must work for free, visit their patients at home or cancel their holidays whenever a patient requests that they do so.[116] It was

112. *Id.* at 15.

113. Conscience, particularly of health practitioners, develops with experience. McKenna, *supra* note 12, at 182. The argument also ignores the right to adopt a religion contained in the International Covenant on Civil and Political Rights. *See* G.A. Res. 2200 (XXI) A, art. 18, International Covenant on Civil and Political Rights (Dec. 16, 1966).

114. Fiala & Arthur, *supra* note 6, at 15 (citing Bernard M. Dickens, *Unethical Protection of Conscience: Defending the Powerful Against the Weak*, 11 AM. MED. ASS'N J. ETHICS 725, 725–29 (2009)); *see also* Fiala & Arthur, *supra* note 6, at 20.

115. *See* McKenna, *supra* note 12, at 182–83.

116. *See id.* at 183–87; Wong, *supra* note 6, at 31–34; *see also* Bridget Campion, *The Health Care Professional as Person: The Place of Conscience*, 14 CAN. CATH. BIOETHICS INST., no. 2, Mar. 2016, at 1–4; Paul Litton, *Physician Participation in Executions, the Morality of Capital*

not argued that euthanasia services or referrals for the same must be provided by all health practitioners during the brief period of legalized euthanasia in the Northern Territory.[117] Nor is it argued that health practitioners must participate in capital punishment in those U.S. states where capital punishment is effected by lethal injection. The interests of the state and the interests of the condemned, being executed as humanely as possible, are not argued against conscientious objection in the context of capital punishment.[118]

Punishment, and the Practical Implications of Their Relationship, 41 J. L., MED. & ETHICS 333, 340–41 (2013).

117. *Rights of the Terminally Ill Act 1995* (NTLR) (Austl.). The *Rights of the Terminally Ill Act 1995* commenced operation on July 1, 1996, and operated for nine months before being overridden by the Commonwealth Parliament by amendments to the *Northern Territory (Self-Government) Act 1978* (NTR) (Austl.). *See* Patrick Quirk, *Euthanasia in the Commonwealth of Australia*, 13 ISSUES L. & MED. 425 (1998) (providing a history of the legislation and its operation); Ged Williams, *Voluntary Euthanasia Legislation: Practicalities of the Northern Territory's Rights of the Terminally Ill Act 1995*, 9 AUSTRALIAN CRITICAL CARE 92, 92–93 (1996); Assisted Dying for the Terminally Ill Bill—First Report 2004–05, HL Bill [21] (Gr. Brit.), http://www.publications.parliament.uk/pa/ld200405/ldselect/ldasdy/86/8602.htm. Note, that in Canada, a number of recommendations have been made to oblige doctors with a conscientious objection to euthanasia to act against their conscience by referring their patients to a doctor who they know does not share their objection. *See also, e.g.*, PROVINCIAL-TERR. EXPERT ADVISORY GRP., ON PHYSICIAN-ASSISTED DYING, FINAL REPORT 43–45 (2015) (putting Canadian doctors with a conscientious objection to euthanasia in the same position as health practitioners with a conscientious objection to abortion who are subject to the obligations); COLL. PHYSICIANS & SURGEONS ONT., INTERIM GUIDANCE ON PHYSICIAN-ASSISTED DEATH 4–6 (2015) (this draft document provides interim guidance for the profession in the absence of a governing framework).

118. In fact, doctors are proscribed from participating in capital punishment by every large humanitarian and medical organization that has considered the issue, including the American Medical Association, World Medical Association, General Assembly, American College of Physicians, American Public Health Association, American Society of Anesthesiologists, and Physicians for Human Rights. *See* AMNESTY INT'L, WHEN THE STATE KILLS . . . THE DEATH PENALTY: A HUMAN RIGHTS ISSUE 77–82 (1989); Daniel J. Cobaugh, *Opposing Pharmacists' Participation in Capital Punishment: The Right Thing to Do*, 72 AM. J. HEALTH SYS. PHARMACISTS 1355, 1355 (2015); Litton, *supra* note 116, at 335–36; Robert D Truog & Troyen A. Brennan, *Participation of Physicians in Capital Punishment*, 329 NEW ENG. J. MED. 1346, 1347 (1993); *see also, e.g.*, the American Medical Association's opinion on capital punishment, which contains the following proscription of doctor participation in capital punishment:

> An individual's opinion on capital punishment is the personal moral decision of the individual. A physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution. Physician participation in execution is defined generally as actions which would fall into one or more of the following categories: (1) an action which would directly cause the death of the condemned; (2) an action which would assist, supervise, or contribute

If Fiala and Arthur's view that abortion is "highly ethical,"[119] and that "a gestational sac or foetus . . . [that] has only the potential to become a person . . . and [is] not an individual human being"[120] is correct, their view that all healthcare practitioners should provide abortion services may be perfectly sound. As has been noted, Australia is a multi-ethnic, multi-faith, and pluralist society. Whilst many Australians and many health practitioners may share Fiala and Arthur's view on abortion, it is not uniformly held.[121] Some Australians, including some health practitioners, regard the fetus as an individual and as a second patient that also has interests to be protected.[122] Some, including some health practitioners, share the Catholic Church's view that abortion is not good for society.[123] This situation is not likely to change and is a characteristic of a multi-racial, multi-faith, and pluralist society.

Australian courts have recognized that the relationship between patient and health professional is an intimate and private one,[124] and

> to the ability of another individual to directly cause the death of the condemned; (3) an action which could automatically cause an execution to be carried out on a condemned prisoner.

E-2.06 Capital Punishment, AM. MED. ASS'N, http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics.page (last updated Aug. 15, 2005) (illustrating how the interests of the state are not argued against conscientious objection in other contexts).

119. Fiala & Arthur, *supra* note 6, at 16.

120. *Id*. at 15.

121. Reporting on the quantitative survey conducted by Sexton Marketing Group in 2004, John Fleming observed that according to that study "[o]nly 42 percent of the [Australian] community agrees with the proposition that the foetus is not a person." Fleming, *supra* note 56, at 65. The more recent study conducted in Queensland by Galaxy Research and released in May 2016 found that 55% of all voters in that state believed that abortion involved the taking of a human life, with that view being most commonly held by women (56%). *See What Queenslanders Really Think About Abortion*, ABORTION RETHINK ET AL, (May 2016), http://abortionrethink.org/images/What_Qlders_Really_Think_About_Abortion.pdf. *See also* VICTORIAN LAW REFORM COMM'N, *supra* note 14, at 68; Fleming, *supra* note 56, at 52–55.

122. McKenna, *supra* note 12, at 183.

123. Encyclical Letter, Pope Saint John Paul II, Evangelium Vitae (Gospel of Life) § 101 (Mar. 25, 1995), http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae.html; *see id.* §§ 59, 71; *see also* Encyclical Letter, Pope Francis, Laudato Si' §§ 120, 123 (May 24, 2015), http://w2.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html.

124. *Breen v Williams* [1996] 186 CLR 71, 107 (Austl.); *Rogers v Whittaker* [1992] 175 CLR 479 (Austl.).

are generally loath to interfere with medical judgments made by a doctor.[125] The intimacy and privacy of the relationship between patient and doctor may never be more intimate or more private than in the context of pregnancy, whether planned or unplanned. In a pluralist society, women ought to be able to seek medical attention from a variety of medical professionals who are expert and experienced in providing the medical services sought, and from those who will support them and provide them with excellent medical attention.[126] It is therefore important that health practitioners come from a range of backgrounds and viewpoints, and in the context of abortion this necessitates the recognition and protection of religious freedom and conscientious objection.[127] The alternative would be state imposition of an orthodox position on abortion[128] and the injustice of patients denied access to doctors who share their views.[129]

As the Victorian Abortion Law and the NSW Policy apply not only to health practitioners working in reproductive health, they pose a real and present threat to the maintenance of a healthcare system representing Australia's multi-racial, multi-faith, and pluralist society. They discourage Catholics who wish to live by the teachings of their church and other conscientious objectors from seeking to become and remain health practitioners in those states.

125. As the *TS & DS v Sydney Child Hosp Network* court explained,

> [I]t is not the role of the court to interfere in such a professional relationship and to compel action by an unwilling participant which would have the consequence of placing that individual in the position, in good conscience, of choosing between compliance with a court order and compliance with their professional obligations.

[2012] NSWSC 1609 ¶ 93 (Austl.).

126. *See* *supra* note 106 and accompanying text.

127. The argument that all medical professionals involved in the field of reproductive healthcare must provide all services including those with which they personally disagree, as advocated by Fiala & Arthur, among others, should be rejected. *See, e.g.*, Fiala & Arthur, *supra* note 6, at 20–21. It is, in any event, no answer to the obligations that are not specific to a health practitioner's training or area of expertise.

128. Justice Jackson warned against this in W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943), when he said, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

129. Wong, *supra* note 6, at 36.

C. The Catholic Church's Position on Abortion

This Article will now briefly consider the Catholic Church's position in relation to abortion[130] to assist readers in understanding the particular dilemma faced by Catholic health practitioners who seek to live in accordance with official Catholic teachings. [131]

The significance of humanity and the human body is critical to understanding Catholic theology.[132] In this theology, God created man and woman in his own image;[133] God became a human being in the

130. I base my description of the Catholic Church's position on scripture, tradition, and the magisterium, or official teachings of the Church, for example, CATECHISM OF THE CATHOLIC CHURCH ¶ 81 (U.S. Catholic Conference, Inc.—Libreria Editrice Vaticana trans., The Liturgical Press 1994) [hereinafter *CCC*]. Apostolic Constitution, John Paul II, Fidei Depositum 3 (Oct 11, 1992), http://w2.vatican.va/content/john-paul-ii/en/apost_constitutions/documents/hf_jp-ii_apc_19921011_fidei-depositum.html (describing the *CCC* as an accurate compilation of the official teachings of the church).

131. Whilst this paper will limit itself to discussing teachings of the Catholic Church, it is important to note that in the Catholic intellectual tradition, "there can never be any real discrepancy between faith and reason." *CCC*, *supra* note 130, ¶ 159 (internal citation omitted). This means that Catholic health practitioners, like Dr. Mark Hobart, see *infra* note 170, may base their conscientious objections to abortion on both faith and reason without any conflict. As well as considering the interests of the fetus or embryo in addition to the interests of the woman consulting them, Catholic health practitioners may, for example, place considerable emphasis on the physical and psychological harm suffered by some women who undergo the procedure. *See, e.g.*, Wong, *supra* note 6, at 39–40; Nicholas Tonti-Filipina, *Public Policy and Abortion: Bad but Better Law*, *in* COMMON GROUND?: SEEKING AN AUSTRALIAN CONSENSUS ON ABORTION & SEX EDUCATION, 350 (John Irving Fleming & Nicholas Tonti-Filipina eds. 2007); ANNE R. LASTMAN, REDEEMING GRIEF 14–19 (2d ed. 2013).

132. The human body is fundamental to God's plan as revealed in the scriptures. *See CCC*, *supra* note 130, ¶¶ 101, 128–129. God's plan, at its most basic level, starts with the creation of the universe and of man and woman, proceeds to God entering the world in the form of a human person, Jesus Christ, and culminates in the Parousia. *See generally* SOFIA CAVALLETTI & PATRICIA COULTER, WAYS TO NURTURE THE RELATIONSHIP WITH GOD (2010); *CCC*, *supra* note 130, ¶ 766. According to Catholic theology, the Parousia is the conclusion of history when the saved will be raised, body and soul, from the dead. *Cf. Revelations* 19:5–10, 21:2–3. The Parousia will be the completion of history when God will grant incorruptible life to our bodies by reuniting them with our souls. *CCC*, *supra* note 130, ¶ 997. "God may be all in all." *1 Corinthians* 15:28. S*ee CCC*, *supra* note 130, ¶ 1001.

133. "God said, 'Let us make man in our own image, in the likeness of ourselves.'" *Genesis* 1:26. Likewise, "[the Lord] God shaped man from the soil of the ground and blew the breath of life into his nostrils, and man became a living being." *Gen*esis 2:7. Accordingly,

> [The Lord] God made the man fall into a deep sleep. And while he was asleep, he took one of his ribs and closed the flesh up again forthwith. [The Lord] God fashioned the rib he had taken from the man into a woman, and brought her to the man.

person of Jesus Christ, who saved humanity; and, God raises those saved, body and soul. This means that every human being is vitally important and deserving of love and respect.[134]

According to Catholic theology, as God is love, he is creative.[135] Through procreation, humanity shares in this creative power.[136] If human life begins at conception, abortion, at any time, would appear to offend the commandment "You shall not kill."[137] Whilst there are no passages in scripture that expressly proscribe abortion,[138] there are

Genesis 2:21–23. Further, "God created man in the image of himself, in the image of God he created him, male and female he created them." *Genesis* 1:27–28. According to this view, every person, male and female, is made in the image of God himself.

134. These passages allow for the inference that, not only is every single person made in the image of God, but God himself became a human person. When God entered the world, He could have done so at any time and place and in any way that He chose. His decision to enter the world in the particular way that he did is significant for Catholics. After first receiving her consent, God impregnated Mary—a betrothed but unmarried woman—with His son. This reinforces the view that every individual deserves our love and respect. It also means that, in Catholic theology, all mothers—married or unmarried—deserve special respect.

135. Father Anthony Percy has described the love between the Father and the Son as "so intense and real that this love is, in fact, another person—the Holy Spirit." ANTHONY PERCY, THEOLOGY OF THE BODY MADE SIMPLE 23 (2006). In Catholic theology, the creative force of God's love is seen in the Trinity, in all of creation, and, most importantly, in each person. As St. Thomas Aquinas put it: "Creatures came into existence when the key of love opened his [God's] hand." *CCC*, *supra* note 130, ¶ 293 (internal citation omitted).

136. *See Genesis* 1:28 (blessing man to "[b]e fruitful, multiply"). He wanted to use love to bring new human beings into the world and to increase the body of the church. *See CCC*, *supra* note 130, ¶ 1604. As Abad and Fenoy put it: "God has . . . placed in our body the power to generate, which is a participation in his own creative power." JAVIER ABAD & EUGENIO FENOY, MARRIAGE: A PATH TO SANCTITY 46–47 (Sinag-Tala Publishers trans., 2d ed. 2002). For this reason, God blessed the first married couple, saying to them "[b]e fruitful, multiply, fill the earth and conquer it." *Genesis* 1:28; *cf.* SCOTT HAHN & KIMBERLY HAHN, ROME SWEET ROME: OUR JOURNEY TO CATHOLICISM 34–36 (1993).

137. The Gospel according to Matthew records Jesus repeating this commandment:

> And now a man came to him and asked, "Master, what good deed must I do to possess eternal life?" Jesus said to him, "Why do you ask me about what is good? There is one alone who is good. But if you wish to enter into life, keep the commandments." He said, "Which ones?" Jesus replied, "[t]hese: You shall not kill. You shall not commit adultery. You shall not steal. You shall not give false witness. Honour your father and your mother. You shall love your neighbour as yourself.

Matthew 19:16–19. This passage has obvious relevance to the abortion issue, but the relevance depends on the view that is taken of when human life begins.

138. Note that some find such a proscription in *Exodus* 21:22–25.

> If people, when brawling, hurt a pregnant woman and she suffers a miscarriage but no further harm is done, the person responsible will pay compensation as fixed by the woman's master, paying as much as the judges decide. But if further harm is done

a number of passages in scripture that are relied on that support such a proscription.[139] For a Catholic, in addition to scripture, tradition provides guidance on moral issues, as does the Magisterium of church doctrine—the official teachings of the Catholic Church. Both have consistently opposed abortion.[140] This prohibition on abortion is set out in the official teachings of the Catholic Church: the Catechism.[141]

Not everyone who identifies as Catholic will necessarily know very much about, have read, or necessarily agree with everything that the Catechism says. There are, however, many Catholics who accept the Catechism as a binding and correct statement of the doctrines of their faith.

> however you will award life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stroke for stroke.

Exodus 21:22–25; *see* John Paul II, *supra* note 123, ¶ 61.

139. These passages suggest that human life begins prior to birth. *See, e.g.*, *Jeremiah* 1:5 ("Before I formed you in the womb I knew you; before you came to birth I consecrated you"); *Luke* 1:40–45 ("Now it happened that as soon as Elizabeth heard Mary's greeting, the child leapt in her womb and Elizabeth was filled with the Holy Spirit. She gave a loud cry and said, 'Of all women you are the most blessed, and blessed is the fruit of your womb. Why should I be honoured with a visit from the mother of my Lord? Look, the moment your greeting reached my ears, the child in my womb leapt for joy.'"); *Psalm* 22:9–10 ("It was you who drew me from the womb and soothed me on my mother's breast. On you was I cast from my birth, from the womb I have belonged to you."); *Psalm* 139:13 ("You created my inmost self, knit me together in my mother's womb. For so many marvels I thank you; a wonder am I, and all your works are wonders You knew me through and through, my being held no secrets from you, when I was being formed in secret, textured in the depths of the earth. Your eyes could see my embryo. In your book all my days were inscribed, every one that was fixed is there."). Also relevant are those passages which discuss children as a blessing. *See, e.g.*, *Genesis* 1:28; *James* 1:17; *John* 16:21; *Mark* 10:14; *Matthew* 18:10; *Proverbs* 17:6; *Proverbs* 22:6; *Psalm* 127:1–5.

140. Ivereigh has described the Catholic Church's position on abortion in this way:

> The Church has always opposed abortion, in spite of debate in the early and medieval Church about when human beings acquired souls ('ensoulment'). Even in the Middle Ages, when most Western Christians did not see the early embryo as fully human, it was believed the human embryo should never be attacked deliberately, however extreme the circumstances.
>
> This condemnation of abortion was anchored in the Church's reflection on the Scripture. In the Old Testament, Exodus and the Psalms, among other books, reveal a God who knows his creatures even before they are born, and who forms, names, and loves the child in the womb. At the heart of the Church's advocacy is this knowledge of God as the author of our being.

AUSTEN IVEREIGH & JOHN NORTON, HOW TO DEFEND THE FAITH WITHOUT RAISING YOUR VOICE: CIVIL RESPONSES TO CATHOLIC HOT-BUTTON ISSUES 93 (2012).

141. *See* John Paul II, *supra* note 130, at 3.

The Catechism makes it clear that human life must be respected and protected from conception[142] and that direct abortion is gravely immoral.[143] The official teaching of the Catholic Church might be summarized in this way: every human person is created in the image of God;[144] God himself became human;[145] human life is vitally important;[146] having children is a participation in God's creative power;[147] human life exists from the moment of conception;[148] a human life in the womb is equally deserving of respect and protection as a human life outside the womb;[149] it is wrong to take innocent life;[150] and, deliberate abortion is intrinsically evil.[151]

The Catholic Church distinguishes between 'formal" and "material" cooperation in immoral acts.[152] Formal cooperation occurs when a person makes the immoral action of another person their own action. For example, a nurse will formally cooperate with an abortion

142. The following two passages support this notion.

> *Human life is sacred* because from its beginning it involves the creative action of God and it remains forever in a special relationship with the Creator, who is its sole end. God alone is the Lord of life from its beginning until its end: no one can under any circumstance claim for himself the right directly to destroy an innocent human being.

CCC, *supra* note 130, ¶ 2258. "Human life must be respected and protected absolutely from the moment of conception. From the first moment of his existence, a human being must be recognized as having the rights of a person—among which is the inviolable right of every innocent being to life." *Id.* ¶ 2270.

143. *Id.* ¶ 2271 ("Since the first century the Church has affirmed the moral evil of every procured abortion. This teaching has not changed and remains unchangeable. Direct abortion, that is to say, abortion willed either as an end or a means, is gravely contrary to the moral law: 'You shall not kill the embryo by abortion and shall not cause the newborn to perish.'").

144. *Id.* ¶¶ 355, 369; *see also* Pope Francis, *supra* note 123, ¶ 65.

145. *CCC*, *supra* note 130, ¶ 423.

146. *Id.* ¶ 2270; *see also* Pope Francis, *supra* 123, ¶ 65.

147. *CCC*, *supra* note 130, ¶ 1652; *Genesis* 1:28.

148. *CCC*, *supra* note 130, ¶ 2274.

149. *Id.* ¶ 2271; *see also* Pope John Paul II, *supra* note 123, ¶ 62; Pope Francis, *supra* note 123, at 136 ("[T]he inalienable worth of a human being transcends his or her degree of development.").

150. *CCC*, *supra* note 130, ¶ 2273.

151. *Id.* ¶ 2271. Intrinsically evil acts are "acts which *per se* and *in* themselves, independently of circumstances, are always seriously wrong by reason of their object." John Paul II, *supra* note 123, ¶ 80 (internal citation omitted).

152. GRISEZ & SHAW, *supra* note 6, at 147. Formal cooperation can occur when someone participates in an abortion—even where they are disgusted by it and disapproving of it—wanting, even reluctantly, for it to occur.

where he or she assists in an abortion and intends it to happen.[153] Formal cooperation in an abortion is a grave offence and includes all those without whose help the abortion would not have taken place.[154] It attracts the most severe ecclesiastical penalty of the Catholic Church: automatic excommunication.[155] Material cooperation occurs where a person's acts do not make the immoral act his or her own but assist the occurrence of the immoral act. An example might be an orderly who works in an abortion unit or a nurse who prepares patients to undergo the procedure.[156] Material cooperation may be immoral and a person in such a situation may feel morally obliged in conscience to find another job.[157]

The Church asserts that its teaching in relation to abortion seeks to promote "the most precious and essential goods of society"[158] for "the true good of the whole of human society."[159] It teaches that a civil law permitting abortion is "an intrinsically unjust law,"[160] that it

153. Grisez and Shaw also give the example of an intern who participates in an abortion, as a requirement of the completion of medical training. *Id.* at 147–148. The participation is formal because the intern actually intends the abortion to take place, even if with great reluctance. *Id.*

154. *See* John Paul II, *supra* note 123, ¶ 62.

155. *CCC*, *supra* note 130, ¶ 2272; CODE OF CANON LAW ANNOTATED 1398, 1329.2 (E. Caparros et al. eds, 1993); *see* John Paul II, *supra* note 123, ¶ 62. This precludes the reception of the sacraments (including communion, reconciliation, confirmation, marriage, anointing of the sick and Holy Orders). It can only be absolved, according to Canon law, by the Pope, the bishop of the relevant place or by priests with their authority: *CCC*, *supra* note 130, ¶ 1463. An example of the operation of the Code of Canon Law in this regard occurred in 2010 where Sister Margaret Mary McBride participated in an ethics committee decision to approve an abortion resulting in her automatic excommunication from the Catholic Church. *See Nun Excommunicated, Loses Hospital Post Over Decision on Abortion*, CATH. REV. (May 18, 2010), http://www.catholicreview.org/article/life/nun-excommunicated-loses-hospital-post-over-decision-on-abortion#sthash.JKU1UkSv.dpuf. Note that on September 1, 2015 in his *Letter of His Holiness Pope Francis According to Which an Indulgence is Granted to the Faithful on the Occasion of the Extraordinary Jubilee of Mercy*, HOLY SEE (Sept. 1, 2015), http://w2.vatican.va/content/francesco/en/letters/2015/documents/papa-francesco_20150901_lettera-indulgenza-giubileo-misericordia.html, Pope Francis announced that "notwithstanding anything to the contrary, to concede to all priests for the Jubilee Year [8 December 2015 to 20 November 2016] the discretion to absolve of the sin of abortion those who have procured it and who, with contrite heart, seek forgiveness for it."

156. GRISEZ & SHAW, *supra* note 6, at 148.

157. *Id.*

158. John Paul II, *supra* note 123, ¶ 101; *see also id.* ¶¶ 59, 71.

159. *Id.* ¶ 101; *see also* Pope Francis, *supra* note 123, ¶¶ 120, 123.

160. John Paul II, *supra* note 123, ¶¶ 20, 57, 73.

is never legitimate to obey it,[161] and that there is "a grave and clear obligation to oppose [such law] by conscientious objection."[162] Whether a particular Catholic considers complying with the Obligations to be formal or material cooperation in an abortion which takes place as a consequence, the actions would be immoral under the Church's official teachings.[163]

IV RELIGIOUS FREEDOM IMPLICATIONS UNDER AUSTRALIAN LAW

A. Implications for Catholic Health Practitioners in Victoria and NSW

The Church's teachings have significant implications for Catholic health practitioners in NSW and Victoria who accept them. Whether abortion is lawful or not under domestic law, they consider deliberate abortion at any stage of gestation as identical to the deliberate killing of a human being after birth.[164] On this view, for the state to require such a person to participate in abortion is equivalent to the state requiring such a person to participate in the murder of an innocent victim.[165] For such a person, an obligation to refer a patient to a second health professional who the first health professional knows or reasonably believes does not object to abortion is equivalent to requiring that person to refer or direct a parent with a newborn baby to a health practitioner who has no moral objection to infanticide.[166] As Craven has put it, "By compulsorily referring a patient for an

161. *Id.* at 58 ¶ 73.

162. *Id.*

163. *Id.* ¶ 71–73, at 57–58. The fact that abortion is lawful under domestic law, or that the domestic law obliges participation in some way in abortion, does not mean that, for Catholics who follow the official teachings of the Church, participating in the abortion is morally permissible.

164. *Id.* ¶ 60–61, at 48–49.

165. *See* Laycock, *supra* note 108, at 878.

166. Whilst it might be argued that such as obligation to refer is remote from the procedure itself, referring or directing a patient to a health professional who has reasonable grounds to believe, or knows to have no conscientious objection, to carrying out a termination appears to be a much closer or greater participation in the ultimate act. It is greater than the funding of health care insurance, where a proportion of that insurance would potentially fund the acquisition of contraceptives (including contraceptives with a potentially abortifacient effect). Such insurance funding may or may not ever be utilized by staff of the type considered by the United States Supreme Court in the *Hobby Lobby* decision in relation to the Obamacare contraceptive mandate. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

abortion, an objecting medical practitioner necessarily makes him or herself complicit in an action they regard as ethically and morally impossible." [167]

Obliging a Catholic health practitioner to make such a referral or direction requires that practitioner to defy the teachings of his or her faith.[168] Like laws that seek to impose an obligation of disclosure of the contents of a confession on a Catholic priest, laws requiring referral or direction by a Catholic health practitioner who seeks to live by the dictates of his or her faith are likely to be futile because they seek to impose an obligation that cannot be followed.[169]

Whilst evidence is not available to confirm that Catholic health practitioners in Victoria or NSW have failed to comply with the Obligations, the Norwegian experience suggests that this is likely to occur.[170] In that country, a referral from a GP[171] was required for an abortion to take place and GPs had no legal right of conscientious objection. One GP who participated in a study undertaken in Norway explained that he refused to refer patients for terminations, despite his legal obligations to do so, because "My conscience is not a dress that I can put on or take off whenever I want to. My conscience must be there all the time, as a ballast, for me to remain a whole human being."[172]

The study refers to a number of doctors speaking of the moral value of unborn human life and some who speak of the value of human

167. Greg Craven, *Denying people right to conscience akin to fascism*, AGE, (Sept. 26, 2008), http://www.theage.com.au/news/opinion/denying-people-right-to-conscience-akin-to-fascism/2008/09/25/1222217428407.html.http://www.theage.com.au/news/opinion/denying-people-right-to-conscience-akin-to-fascism/2008/09/25/1222217428407.html.

168. *See* Pope John Paul II, *supra* note 123, at 16 ¶ 20, 48–49 ¶¶ 60–61, 57–59 ¶¶ 71-73.

169. Fiala & Arthur *supra* note 6, at 14; *see* Seward Reese, *Confidential Communications to the Clergy* 24 OHIO ST. L.J. 55, 81 (1963); R v. Gruenke, [1991] S.C.R. 263, 303–04 (Can.); Cook v. Carroll [1945] I.R. 515, 518 (Ir.).

170. Dr. Hobart is a GP working in a doctors' surgery (which is the name used in Australia for the offices that a GP occupies rather than a term used to describe premises where medical surgery occurs) in the suburb of Sunshine in Melbourne, Victoria. Andrew Smith, *Doctor refused to refer couple for sex-selective abortion: faces possible loss of his license*, LIFESITENEWS, (Oct. 08, 2013), https://www.lifesitenews.com/news/abortionist-refused-to-refer-couple-for-sex-selective-abortion-now-faces-lo.

171. A GP is a qualified practicing medical practitioner who is a "General Practitioner" rather than a specialist practicing in a single area of medicine.

172. Nordberg, Skirbekk & Magelssen *supra* note 3, at 4.

life from conception.[173] It describes this comment as representative: "Human life is something very special, and we humans are not granted the option of taking a life."[174] The study quotes another GP who said that "I want to contribute to improving people's lives, and to helping, soothing and comforting. Then it becomes self-contradictory to take lives."[175]

The Norwegian study found that "[s]everal [doctors] described an inability to refer for abortions. If referrals had been demanded of them, these informants stated, they would not have been able to carry on as GPs."[176] This has been the experience in Victoria where the Victorian Abortion Law has caused some health practitioners to cease to practice and others to move out of particular areas of practice.[177]

The Victorian Abortion Law and the NSW Policy, of course, assume that not all health practitioners will refuse to obey, will retire, or will cease to practice in areas more likely to attract abortion inquiries or requests. Some health practitioners will, no doubt, obey the Obligations and refer or direct. This does not justify the Obligations. There is growing evidence that requiring health practitioners to act against their consciences can lead to physical and mental symptoms known as 'moral distress' or 'moral injury'.[178] Two of the GPs, who participated in the Norwegian study and provided a referral for abortion, contrary to their professed inability to do so, described their feelings of bad conscience and guilt. One said that "[i]t felt like contributing to murder, in addition to breaking my own principles."[179]

Moral distress involves feelings of helplessness, anxiety, anger, guilt, sorrow, and frustration. It can have adverse effects on self-

173. *Id*. at 2.

174. *Id*. at 4.

175. *Id*.

176. *Id*.

177. McKenna, *supra* note 12, at 187 (referencing NICHOLAS TONTI-FILIPPINI, ABOUT BIOETHICS: MOTHERHOOD, EMBODIED CULTURE AND LOVE (2013)). As the Obligations are not limited to health practitioners working in maternity or gynecology there is no guarantee that moving out of the areas in which woman are more likely to consult a doctor about terminations would protect doctors from the Victorian Abortion Law or the NSW Policy. *See* Smith, *supra* note 170. Dr. Hobart, the subject of the case study presented below, is a GP.

178. McKenna, *supra* note 12, at 179, Sean Murphy & Stephen J. Genius, *Freedom of Conscience in Health Care: Distinctions and Limits,* 347 BIOETHICAL INQUIRY 10, 350 (2013).

179. Nordberg, Skirbekk & Magelssen, *supra* note 3, at 4.

respect, self-esteem, patient care and job satisfaction.[180] It can cause burnout, and contribute to health practitioners leaving their vocation.[181] Some studies indicate that moral distress is most likely to affect nurses (and one might extrapolate from these studies to apply to other health practitioners) whose ethical beliefs are most influenced by their religious faith.[182]

Health practitioners who consistently act against their conscience can also become desensitized to it. They are at greater risk of developing indifference to patients and "doubling" or "compartmentalization," leading to a weakened ability to make the types of ethical decisions critical for health practitioners.[183]

Hence, the Obligations put a Catholic health practitioner seeking to live by the teachings of their Church in an impossible position. To refer or to direct is to defy Church teachings and face excommunication, moral distress, and potentially loss of his or her moral compass. To fail to refer or direct is to risk disciplinary action and the potential loss of the right to practice medicine. It is much like seeking to compel a Catholic priest to testify as to the content of a confession in defiance of the teachings of his Church[184], or seeking to compel a politician to vote against his or her conscience.[185] The Obligations are also not imposed by Australia's other states and territories. As Laycock and Berg have observed:

180. Murphy & Genius *supra* note 178, at 350; Marek S. Kopacz , Kelsey V. Simons & Khamkay Chitaphong, *Moral Injury: An Emerging Clinical Construct with Implications for Social Work Education*, 34 J. RELIGION & SPIRITUALITY SOC. WORK: SOC. THOUGHT 252, 254 (2015); Kent D. Drescher et al., *An Exploration of the Viability and Usefulness of the Construct of Moral Injury in War Veterans* 17 TRAUMATOLOGY 8, 9 (2011); Shira Maguen & Brett Litz, *Moral Injury in the Context of War*, PTSD: NAT'L CTR. PTSD, http://www.ptsd.va.gov/professional/co-occurring/moral_injury_at_war.asp.

181. McKenna, *supra* note 12, at 179; Wong, *supra* note 6, at 24–27.

182. McKenna, *supra* note 12, at 176.

183. *Id*. at 180–81; Wong *supra* note 6, at 24–27; MICHAEL BURLEIGH, DEATH AND DELIVERANCE: 'EUTHANASIA' IN GERMANY, C. *1900–1945* 154 (1994).

184. *CCC*, *supra* note 130, ¶ 1467; Reese, *supra* note 169, at 60–61; Gruenke, S.C.R. 263 at 303–04. Victorian and NSW law do not require this. *See* A. KEITH THOMPSON, RELIGIOUS CONFESSION PRIVILEGE AT COMMON LAW: A HISTORICAL ANALYSIS 220 (2006), http://researchrepository.murdoch.edu.au/358/2/02Whole.pdf. This is not to suggest that futility is the only reason for the protection of religious confession privilege as there are a number of justifications for that protection. *See* Reese, *supra* note 169, at 80–87.

185. *See* Victoria, *supra* note 52, at 2959. As noted, the major political parties in Australia do not require this.

> [C]ommitted religious believers argue that some aspects of human identity are so fundamental that they should be left to each individual, free of all nonessential regulation, even when manifested in conduct. For religious believers, the conduct at issue is to live and act consistently with the demands made by the Being that they believe made us all and holds the whole world together.[186]
>
> No religious believer can change his understanding of divine command by any act of will . . . Religious beliefs can change over time. . .But these things do not change because government says they must, or because the individual decides they should . . . [T]he religious believer cannot change God's mind.[187]

B. A Case Study: Dr. Mark Hobart

The case of Dr. Mark Hobart is an example of the operation of the Victorian Abortion Law. Dr. Hobart is a Catholic, pro-life GP and a former activist in the Democratic Labour Party.[188] In a statement submitted in relation to a Victorian inquiry in 2011, Dr. Hobart said that "[t]o say [abortion] is not murder is against direct observation, reason and logic."[189] His public statements suggest that his opposition to abortion was based both on his Catholic faith and on reason. Dr. Hobart was reportedly approached by a couple who wished to obtain the termination of a 19-week pregnancy because they were pregnant with a girl when they wanted a boy.[190] Whilst the Victorian Abortion

186. Douglas Laycock & Thomas C. Berg, *Protecting Same-Sex Marriage and Religious Liberty*, 99 VA. L. REV 1, 3–4 (2013).

187. *Id*. at 4.

188. A political party which emerged following a split in the Australian Labor Party (ALP) in 1955 in which, a group of members of the ALP who were avowedly anti-communist and almost exclusively Catholic, were expelled from that party. It is an anti-abortion party. One of its party's principles is: "the sacredness of human life, from conception until natural death, as the fundamental basis for all human rights." *Principles: Articles 11-12 of the DLP Constitution,* DEMOCRATIC LAB. PARTY (Sep. 29, 2016, 7:03 PM), http://www.dlp.org.au/about/principles/.

189. Tory Shepherd, *Dr. Mark Hobart, who refused couple abortion for wanting a boy, believes abortion is murder*, ADELAIDENOW (April 29, 2013), http://www.news.com.au/national/dr-mark-hobart-who-refused-couple-abortion-for-wanting-a-boy-believes-abortion-is-murder/story-fncynjr2-1226631861565. See discussion above on the relationship between faith and reason in the Catholic intellectual tradition.

190. This is the usual bias in sex-selection terminations that normally target female fetuses. Michael Garenne & Sophie Hohmann, *Gender Saturation in the Southern Caucasus: Family Composition and Sex-Selective Abortion*, 46 J. BIOSOCIAL SCI. 786, 787 (2014). Sex-selection abortions are controversial, the ethics of the practice have been questioned, in some jurisdictions

Law obliged Dr. Hobart to refer the couple to a doctor willing to perform the procedure, he refused. The couple obtained a termination elsewhere and made no complaint.[191]

In April 2013, Dr. Hobart disclosed to the Melbourne newspaper, Herald Sun, that he had refused to refer a couple seeking an abortion on gender-selection grounds. Although there had been no patient complaint[192] and there was no evidence of the patient having any difficulty locating health practitioners to carry out the termination, the Medical Board of Victoria (MBV) launched an investigation. Three weeks after his comments appeared in the paper, Dr. Hobart received a letter from the Australian Health Practitioner Regulation Agency (AHPRA) advising him that the MBV had initiated an inquiry into his "professional conduct, following receipt of information that indicates [he] may have . . . failed in [his] obligation to refer a female patient seeking treatment or advice on abortion to a non-objecting practitioner."[193]

Another doctor was also reportedly cautioned by the MBV in 2013, following adverse comments he made about the referral provisions of the Victorian Abortion Law "in an online 'conversation' with colleagues."[194] The results of these investigations have not been made public.[195] In neither case does the behavior of these doctors

there have been demands for health practitioners who engage in the practice to be disciplined and it "can be seen as contrary to fundamental principles of human rights." Jean V McHale, *Sex Selection and Abortion: A Case for Legal Re-valuation?* 21 BRIT. J. NURSING 308, 309 (2012). AUSTRALIAN GOV'T NAT'L HEALTH & MED. RES. COUNCIL, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research,* 11.1 (2007), https://www.nhmrc.gov.au/_files_nhmrc/publications/attachments/e78.pdf provides that "[s]ex selection is an ethically controversial issue. The Australian Health Ethics Committee believes that admission to life should not be conditional upon a child being a particular sex. Therefore, pending further community discussion, sex selection (by whatever means) must not be undertaken except to reduce the risk of transmission of a serious genetic condition." Whilst this guideline is currently under review and applies to Assisted Reproductive Technology rather than to abortion, where sex selection is not currently prohibited, it demonstrates the ethical challenges presented by sex selection. The fact that the MBV would investigate a GP in such a case shows the strength of its opposition to conscientious objection of abortion.

191. Smith, *supra* note 170.

192. *Id*.

193. Terri M. Kelleher, *VICTORIA: Melbourne GP may be struck off after refusing abortion referral*, NEWS WKLY. (Oct. 26, 2013), http://www.newsweekly.com.au/article.php?id=56391.

194. *Id*.

195. Although, one report refers to Dr. Hobart as being "sanction[ed]." Australian Christian Lobby, *Victorian Premier and Opposition Leader Pledge to Allow Conscience Vote on*

suggest that patients were deprived of access to medical services. Neither case involved any patient complaint. These examples suggest that, rather than operating to ensure access to abortion services, the referral obligation has been used to discipline doctors who speak out in opposition to the lack of protection given to their conscientious objection to abortion. Health practitioners under investigation, and their families, face financial and emotional harm. In addition to the financial consequences of obtaining legal advice and representation, there must be a substantial strain on individuals and their families when faced with potentially losing the ability to continue to practice in their chosen profession. Even if the disciplinary action is successfully defended or not pursued to the stage of deregistration as a medical practitioner, "[i]n many respects, 'the process is the punishment.'"[196]

C. Protections for Religious Freedom Under Australian Law

This Article now considers the religious freedom implications of the Obligations under Australian law. Although there is no case law in Australia that has considered the issue of abortion and conscientious objection, Australian courts have made numerous statements recognizing the importance of religious freedom. It has been described as "the paradigm freedom of conscience,"[197] "the essence of a free society,"[198] "a fundamental concern to the people of Australia,"[199] a "fundamental freedom,"[200] and "a fundamental right because our society tolerates pluralism and diversity and because of the value of religion to a person whose faith is a central tenet of their

Forcing Doctors to Participate in Abortion, CONSCIENCELAWS.ORG (Sept. 24, 2014), http://consciencelaws.org/blog/?p=6029.

196. This phrase is taken from Augusto Zimmermann, Joshua Forrester & Lorraine Finlay, *Section 18C may render all speech "inoffensive,"* NEWS WKLY. (Mar. 26, 2016), http://newsweekly.com.au/article.php?id=57247. In this article, the authors make this argument about Section 18C of the Racial Discrimination Act (Cth), which they assert improperly limits freedom of speech. The same argument might be made in respect of the Obligations where, after investigation, the health practitioner is not deregistered or otherwise disciplined.

197. *Church of the New Faith v Comm'r of Pay-Roll Tax (Vic)* [1983] 154 CLR 120, 130 (Austl.); *Aboriginal Legal Rights Movement Inc v S Austl.* [1995] 64 SASR 551, 557 (Austl.).

198. *Church of the New Faith*, 154 CLR at 130 (Austl.).

199. *Canterbury Mun Council v Moslem Alawy Soc'y Ltd* [1985] 55 LGRA 318, 335 (Austl.).

200. *Aboriginal Legal Rights*, 64 SASR at 552, 555 (Austl.).

identity."[201] Australian courts have recognized "the importance of the freedom of people to adhere to the religion of their choice and the beliefs of their choice and to manifest their religion or beliefs in worship, observance, practice and teaching."[202] Despite these statements, apart from specific legislation that protects religious freedom in limited areas,[203] little substantive legislative support exists for religious freedom in most circumstances.

1. Section 116

One substantive support is Section 116 of the Australian Constitution, which contains a proscription on the Commonwealth establishing a state religion or imposing any religious test for the holding of any Commonwealth office. It also prevents the

201. *Christian Youth Camps Ltd v Cobaw Cmty Health Servs Ltd* [2014] VSCA 75, ¶ 558 (Austl.).

202. *Evans v NSW* [2008] 168 FCR 576, 580 (Austl.).

203. For example, although voting is compulsory in Australia if an elector has a religious belief that it is "his or her religious duty to abstain from voting," this will constitute a reasonable excuse under Section 245(14) of the Electoral Act and Section 45(13A) of the Referendum Act. *Electoral Backgrounder: Compulsory Voting*, AUSTRALIAN ELECTORAL COMM'N ¶ 41 (Sept. 12, 2014), http://www.aec.gov.au/About_AEC/Publications/backgrounders/compulsory-voting.htm. Members of the clergy of any church or any religious denomination are also "entitled to refuse to divulge that a religious confession was made, or the contents of a religious confession made" to them in NSW and Victoria. *Evidence Act 1995* (NSW) s 127(1); *Evidence Act 2008* (Vic) s 127(1). This protects the religious beliefs of clergy and of those who confess to them. Victorian equal opportunity legislation exempts actions which would otherwise be unlawful discrimination "if the discrimination is reasonable necessary for the first person to comply with the doctrines, beliefs or principles of their religion." *Equal Opportunity Act 2010* (Vic) pt 5 s 84. The religious beliefs of ministers of religion are protected as they have no obligation to "solemnise any marriage," and they are free to impose additional requirements on couples wishing to be married by them. *Marriage Act 1961* (Cth) pt 4 div 2 s 47. Exemptions are also provided to religious bodies from a range of discrimination provisions to enable them to operate schools, to provide accommodation, and to comply with their own doctrines in managing their own operations. Whilst these provisions are focused on the religious bodies operating these institutions, in doing so they facilitate choice by religious believers and others who may choose, for example, to attend or for their children to attend a religious school or to enter a religious order. Examples of protections for religious bodies include, for example, *Sex Discrimination Act 1984* (Cth) pt 2 div 4 ss 37 & 38; *Anti-Discrimination Act 1977* (NSW) pt 3 div 3 s 31A(3)(a), pt 3A div 3 s 38K(3), pt 4C div 3 s 49ZO(3), pt 6 s 56; *Equal Opportunity Act 2010* (Vic) pt 4 div 3 s 39, pt 4 div 5 s 60, pt 5 s 82 & 83(1)–(2). For a summary of the exemptions from various discrimination provisions that are afforded to religious (and other) schools in Australia, see GREG WALSH, RELIGIOUS SCHOOLS AND DISCRIMINATION LAW 1–11 (2015). Note however that there have been some recent amendments to the Victorian position following the passing of the Equal Opportunity Amendment (Religious Exceptions) Act 2016 on September 15, 2016.

Commonwealth from prohibiting the free exercise of religion.[204] Only a few cases have considered this section.[205] However, it is not relevant to the present inquiry on the present state of the law. As the Obligations are state laws or policies rather than Commonwealth laws, Section 116 has no application to them.[206]

2. International agreements

There are a number of potentially relevant international agreements to which Australia is a party. For example, Article 18 of the 1948 Universal Declaration of Human Rights provides that "[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance." Similarly, Article 18 of the International Covenant on Civil and Political Rights ("ICCPR"),[207] which Australia

204. Section 116 of the Australian Constitution provides that "[t]he Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."

205. *See Williams v Commonwealth* [2012] 248 CLR 156 (Austl.); *Church of the New Faith v Comm'r of Pay-Roll Tax (Vic)* [1983] 154 CLR 120 (Austl.); *A-G for Vic v Commonwealth* [1981] 146 CLR 559, 605 (Austl.); *Adelaide Co of Jehovah's Witnesses v Commonwealth* [1943] 67 CLR 116 Austl.); *Krygger v Williams* [1912] 15 CLR 366 (Austl.); *Hoxton Park Residents Action Grp Inc v Liverpool City Council* [2016] NSWCA 157 (Austl.); *see also* Paul Babie & Neville Rochow, *Feels Like Déjà Vu: An Australian Bill of Rights and Religious Freedom*, 2010 BYU L. REV. 821, 829–32; Denise Meyerson, *The Protection of Religious Rights Under Australian Law*, 2009 BYU L. REV. 529, 538–40, http://digitalcommons.law.byu.edu/lawreview/vol2010/iss3/8.

206. *A-G*, 146 CLR at 605; *Grace Bible Church v Reedman* [1984] 36 SASR 376, 386 (Austl.). Since those decisions, the High Court of Australia has identified an implied right of political communication under Sections 7 and 24 of the Australian Constitution, and that implied right applies not only to the Commonwealth government but also to state and territory governments. *See Austl Capital Television Pty Ltd v Commonwealth* [1992] 177 CLR 106, 137–46 (Austl.) (Mason CJ) (the restrictions of the religious freedom guaranteed by the Constitution as being a fetter to the Commonwealth government but not to state governments may be an issue appropriately open to challenge before the High Court of Australia in the future); *id.* at 217 (Gaudron J); *id.* at 227–33 (McHugh J); *Nationwide News Pty Ltd v Wills* [1992] 177 CLR 1, 69–74 (Austl.). This argument was not put by the self-represented defendant in the most recent decision on the application of Section 116 within states. *Williams v 'Threewisemonkeys'* [2015] TASADT 4 (Austl.).

207. International Covenant on Civil and Political Rights, *adopted on* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

has been a party to since 1980,[208] provides potentially relevant protections.[209] Australia requires international obligations to be enacted into domestic law before they have domestic operation.[210] Whilst, under Article 2 of the ICCPR, Australia undertook to respect and ensure that everyone within Australia and subject to Australian jurisdiction recognizes the rights in the ICCPR, the articles of the ICCPR have not been domesticated. As a result, they do not have the force of law in Australia.[211] The same is true of the Universal Declaration of Human Rights and other potentially relevant international instruments.[212] As they have not been domesticated, they are not binding in Australia.

3. Victoria

In Victoria, Section 14 of the Victorian Charter of Human Rights and Responsibilities Act 2006 (the "Charter")[213] provides that "[e]very person has the right to freedom of thought, conscience, religion and belief."[214] However, this provision cannot have any

208. George Williams, *The Victorian* Charter of Human Rights and Responsibilities*: Origins and Scope*, 30 MELB. U. L. REV. 880, 895 (2006).

209.

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

ICCPR, *supra* note 207, at art. 18(1)–(4).

210. *Victoria v Commonwealth* [1996] 187 CLR 416, 469 (Austl.); *Minister of State of Immigration & Ethnic Affairs v Teoh* [1995] 183 CLR 273, 288 (Austl.); *Chow Hung Ching v The King* [1948] 77 CLR 449, 455 (Austl.).

211. *Dietrich v The Queen* [1992] 177 CLR 292, 347 (Austl.).

212. Such as, G.A. Res. 36/55, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (Nov. 25, 1981) [hereinafter Religion Declaration].

213. *Charter of Human Rights and Responsibilities Act 2006* (Vic) pt 2 s 14(1)–(2); *see* Babie & Rochow, *supra* note 205, at 840–42, for a summary of the operation of the Charter.

214. *Charter of Human Rights*, *supra* note 213, at pt 2 s 18.

operation in relation to the referral obligation contained in the Victorian Abortion Law because the so-called "savings provision," Section 48 of the Charter, provides that "[n]othing in this Charter affects any law applicable to abortion or child destruction."[215] The Human Rights Consultation Committee (the "Committee")— which recommended the introduction of the Charter in Victoria— was concerned that, given the great passions the Committee had identified within the Victorian community for and against abortion, if it included the "right to life" within the rights afforded protection by the Charter, the Charter may have divided rather than unified Victorians.[216]

George Williams, who chaired the Committee, has described the inclusion of Section 48 in the Charter as "[a]n even better solution"[217] to the Committee's proposal that the Charter include a provision expressly limiting the Charter's protection of the "right to life" "to a person from the time of his or her birth."[218] Section 48 was introduced to enable the Charter to include a "right to life" without impacting the abortion debate.[219] The provision "ensures that when other rights in the *Victorian Charter of Rights*, such as that of privacy, might impact upon the abortion debate, they are incapable of doing so."[220] The inclusion of Section 48 denies health professionals any access to the Charter as a means of arguing for the protection of their religious freedom, in the context of abortion law and practice. Those adversely

215. VICTORIAN LAW REFORM COMM'N, *supra* note 14, at 162 D.4–D.6. Absent Section 48, the obligations imposed on health professionals with a conscientious objection to abortion to inform their patient of their objection might also potentially have attracted the operation of the privacy and reputation provisions contained in Section 13(a) of the Charter, which provides that a person has the right "not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with."

216. Williams, *supra* note 208, at 895–96.

217. *Id*. at 896.

218. Draft Charter of Human Rights and Responsibilities, recommended by the Committee, § 8(2).

219. According to the then Victorian Attorney-General, Rob Hulls, the "Savings Clause" was introduced at the request of the Catholic Church, as it was concerned that the Victorian Court might take the approach to abortion which had been taken by the Canadian Supreme Court in applying the Canadian Charter of Rights in *R v. Morgentaler* [1988] 1 S.C.R. 30 (Can.). The width of the operation of Section 48 and its application to religious liberty freedom of conscience and privacy in future abortion law reform was not then contemplated. See discussion in O'Rourke et al., *supra* note 6, at 102–03.

220. Williams, *supra* note 208, at 896. See also the discussion in VICTORIAN LAW REFORM COMM'N, *supra* note 14, at 162 (D.4)–(D.6), 171 (D.91).

impacted by the referral obligations contained in the Victorian Abortion Law may feel that their rights to religious freedom have been sacrificed to avoid "dividing Victorians around a set of human rights."[221]

The common law also provides no solution to the lack of relevant statutory protection for religious freedom in Victoria because it has never included a fundamental guarantee of religious freedom and expression that could not be abrogated by state parliaments.[222] Whilst the principle of legality requires a court seeking to infringe rights or overturn fundamental principles to do so with "irresistible clearness,"[223] the Victorian Abortion Law does recognize and expressly seek to qualify freedom of conscience.[224] Although the Victorian Abortion Act does not specifically refer to the right to freedom of religion in the disclosure and referral provisions, the reference to freedom of conscience in the Victorian Abortion Law is sufficient to incorporate the right to freedom of religion.[225] And even though international law is not part of the common law, it can influence the common law.[226] Where, for example, legislation is ambiguous, Australian courts should favor a construction that is consistent with Australia's obligations at international law.[227]Again, however, this provides no assistance in relation to the Victorian referral obligations as the provision is not lacking in clarity.

221. Williams, *supra* note 208, at 896.

222. *See Durham Holdings Pty Ltd v NSW* [2001] 205 CLR 399, 403 (Austl.); *Aboriginal Legal Rights Movement Inc v S Austl* [1995] 64 SASR 551, 555–57 (Austl.); *Grace Bible Church v Reedman* [1984] 36 SASR 376, 385 (Austl.); Garth Blake, *God, Caesar and Human Rights: Freedom of Religion in Australia in the 21st Century*, 31 AUSTL. B. REV. 279, 294–95 (2009); Meyerson, *supra* note 205, at 540–41; Neil Foster, Keynote Address at the 2015 Asia Pacific J. Reuben Clark Law Society Conference: Religious Freedom in Australia 17–20 (May 29, 2015), http://works.bepress.com/neil_foster/94.

223. *Potter v Minahan* (1908) 7 CLR 277, 304 (Austl.) (quoting SIR PETER BENSON MAXWELL & J. ANWYL THEOBOLD, ON THE INTERPRETATION OF STATUTES 122 (4th ed. 1905)).

224. *Abortion Law Reform Act 2008* (Vic) pt 2 s 7–8.

225. Freedom of religion has been recognized in Australia as forming a part of the freedom of conscience. Chief Justice Mason of the High Court of Australia and Justice Brennan described it as "the paradigm freedom of conscience" in *Church of the New Faith*, 154 C.L.R. at 130.

226. *Mabo v Queensland [No. 2]* [1992] 175 CLR 1 (Austl.); *Chow Hung Ching* [1948] 77 CLR at 449 (Austl.); *Jago v District Ct. of N.S.W.* [1989] 168 CLR 23 (Austl.).

227. *Teoh* 183 CLR at 287 (Austl.); *see* PEARCE & GEDDES, *supra* note 71, at 102–05, 229–30.

4. New South Wales

Like Victoria, NSW has no relevant legislative protections for religious freedom that could provide grounds to challenge the NSW Policy.[228] Whilst current law indicates that, so long as they do so clearly and unambiguously, state parliaments can exclude the operation of the common law protections for freedom of conscience and freedom of religion, the NSW Policy is not a law. It is "soft law"—a non-legislative policy.[229] No matter how clearly it is drafted, a policy may not have the effect of ousting common law protections. However, the abortion issue is untested. In practice, the issue may not arise, as a complaint concerning the "professional conduct of a health practitioner," such as non-compliance by a health practitioner with the NSW Policy, may be made under the Health Care Complaints Act 1993.[230]

In interpreting the very broad language of that Act, in the context of an alleged non-compliance with the NSW Policy, a court will apply the principle of legality mentioned above. The Health Care Complaints Act 1993 does not include any language indicating an intention to override the common law freedom of conscience or freedom of religion. Applying this principle, a court is not likely to find that the Health Care Complaints Act 1993 abrogates common law rights of freedom of conscience or religion. However, the content and extent of any such common law protection is unclear.[231]

In addition to common law freedoms, the court will seek to interpret and apply the Health Care Complaints Act 1993 where there

228. In some situations, the NSW Anti-Discrimination Act 1977—which forbids discrimination in certain specified areas on the ground of "race," but defines "race" in Section 4 as including "ethnic origin" and "ethno-religious" origin—could be relevant where discrimination is alleged to have occurred against an ethnically identifiable religious group in the areas designated. *See* NEIL REES ET AL., AUSTRALIAN ANTI-DISCRIMINATION LAW: TEXTS, CASES AND MATERIALS 192–94 (1st ed. 2008). The provisions of the NSW Anti-Discrimination Act are not relevant in this instance as we are not considering its application in the context of an "ethno-religious" or race-based group. As a result, in relation to the policy's operation on Catholic health professionals, the NSW Anti-Discrimination Act 1977 would not apply to prevent the operation of the policy.

229. *See supra* note 71 (discussing the meaning of "soft law").

230. Pursuant to Section 7 of the Health Care Complaints Act 1993, a complaint may be made concerning the "professional conduct of a health practitioner." *Health Care Complaints Act 1933* (NSW) s 7 (Austl.).

231. REX ADHAR & IAN LEIGH, RELIGIOUS FREEDOM IN THE LIBERAL STATE 130 (2d ed. 2013).

is any ambiguity and to the extent that its language will permit in conformity with international law.[232] Although it is by no means certain that this would be the case, there is some support for the view that, relating to abortion, a court could appropriately interpret the Act by reference to the ICCPR.[233] If that approach were followed, the court would be required to consider whether the disclosure and direct obligations go beyond the limitation permitted by Article 18.[234] In doing so, the court could consider relevant decisions of the United Nations Human Rights Committee applying the ICCPR and of the ECHR applying Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"),[235] which contain essentially the same terms.[236] For this reason the relevant decisions of the ECHR are briefly considered below.

In the ECHR, many cases involving claims of religious freedom by service providers and employees have failed where the court has found that applicants would be free to manifest their beliefs if they resigned and sought work elsewhere or that, whilst they were required to act inconsistently with their religious beliefs by the law they were still able to manifest their religious beliefs outside their professional

232. *See Lim v Minister for Immigration, Land Gov't and Ethnic Affairs* [1992] 176 CLR 1, 38 (Austl.); *Jumbunna Coal Mine NL v Victorian Coal Miners' Ass'n* [1908] 6 CLR 309, 363 (Austl.); *Teoh* 183 CLR at 287 (Austl.); PEARCE & GEDDES, *supra* note 71, at 102–05, 229–30. This does not mean that the Court can ignore the words used in the Australian legislation and substitute its own words that are consistent with international law but inconsistent with the Australian law being considered.

233. *DPP v Kaba* [2014] VSC 52, 181, 187 (Austl.).

234. In other words, the court must consider whether the obligations are "prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others." ICCPR, *supra* note 207, at art. 18.

235. Article 9 provides:

> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Convention for the Protection of Human Rights and Fundamental Freedoms, art. 9 § 1, Sept. 3, 1953, ETS No. 005.

236. *Iliafi v Church of Jesus Christ of Latter-Day Saints Austl.* [2014] FCAFC 26 (Austl.).

activities.[237] In the case of *Pichon*, for example, the court held that Article 9 does not "always guarantee the right to behave in public in a manner governed by [religious] belief" because "[t]he word 'practice' used in Article 9 § 1 does not denote each and every act or form of behaviour motivated or inspired by a religion or a belief."[238] On this basis, Article 9 did not provide any relief from the conviction of the sole pharmacists in a French town from breaching French law by refusing to supply legal non-abortifacient contraceptives because of their religious beliefs.[239] The Court did not consider whether the contraceptives could readily have been purchased from pharmacies in nearby towns.[240] It also failed to consider the full ramifications of the decision. For example, one potential consequence is that the pharmacists, unable to act inconsistently with their religious objection to contraception, would close their pharmacy, leaving no pharmacy in the town.

This approach to the interpretation of the word "practice" in Article 9 § 1 was subsequently followed in *R.R. v. Poland*.[241] This case involved delay and obfuscation by doctors and hospital staff in the provision of diagnostic services to a pregnant woman concerned about

237. Decisions made on the basis that the applicant would be free to manifest their beliefs if they resigned and sought work elsewhere include, for example, Sahin v. Turkey, 2005-XI Eur. Ct. H.R. 173; Ahmad v. United Kingdom, 4 Eur. H.R. Rep. 126, ¶ 15 (1981); Kalac v. Turkey, App. No. 20704/92, 27 Eur. H.R. Rep. 552 (1997); Stedman v. United Kingdom, App. No. 29107/95, 23 Eur. H.R. Rep. 168 (1997); Konttinen v. Finland, App. No. 24949/94, 87 Eur. Comm'n H.R. Dec. & Rep. (ser. A) at 68 (1996); Karaduman v. Turkey, App. No. 16278/90, 74 Eur. Comm'n H.R. Dec. & Rep. 93 (1993); X. v. Denmark, App. No. 7374/76, 5 Eur. Comm'n H.R. Dec. & Rep. 157 (1976); Arslan v. Turkey, App. No. 41135/98 (2010). Decisions made on the basis that the applicant would be free to manifest their religious beliefs outside of their profession include, for example, Pichon v. France, 2001-X Eur. Ct. H.R. 383.

238. Pichon, 2001-X Eur. Ct. H.R. at 388.

239. *Id*. The Court found that:

> as long as the sale of contraceptives is legal and occurs on medical prescription nowhere other than in a pharmacy, the applicants cannot give precedence to their religious beliefs and impose them on others as justification for their refusal to sell such products, since they can manifest those beliefs in many ways outside the professional sphere.

Id.

240. This is in contrast with the same court's rejection of a complaint by an ultra-orthodox Jewish association arguing that Article 9 was offended by a law which prevented them from establishing a slaughter-house in accordance with Jewish law on the basis that they could easily obtain meat slaughtered in accordance with Jewish law from Belgium. Cha'are Shalom ve Tsedek v. France, 2000-VII Eur. Ct. H.R. 23.

241. R.R. v. Poland, 2011-III Eur. Ct. H.R. 209, 253.

fetal abnormality who had expressed an intention to obtain an abortion if her fears were confirmed.[242] The applicant argued that "[r]efusing to diagnose a potentially serious illness [of an embryo] on the basis that the diagnosis might subsequently lead to a therapeutic act to which the doctor concerned objected on grounds of conscience [i.e., an abortion] was incompatible with the very concept of conscientious objection."[243]

Referring to *Pichon*, the court reiterated "that the word 'practice' used in Article 9 § 1 does not denote each and every act or form of behaviour motivated or inspired by a religion or a belief."[244] In this case, the court confirmed that the ECHR afforded states a wide margin of appreciation or latitude in how to legislate in the area of abortion.[245] The court confirmed its earlier finding that once a State adopts a legal framework allowing abortion in some situations, "the State is under a positive obligation to create a procedural framework enabling a pregnant woman to exercise her right of access to lawful abortion."[246] Though this requirement does not mean that a State cannot protect freedom of conscience, according to the court:

> States are obliged to organise the health services system in such a way as to ensure that an effective exercise of the freedom of conscience of health professionals in the professional context does not prevent patients from obtaining access to service to which they are entitled under the applicable legislation.[247]

The approach to freedom of religion in these cases has been criticized.[248] In *Eweida*, the court was unwilling to take the view that

242. *Id*. at 216–20.

243. *Id*. at 243.

244. *Id*. at 253 (citing Pichon, 2001-X Eur. Ct. H.R. 383).

245. *Id*. at 247. The European Court of Human Rights did so recognizing the inextricable interconnection between the rights claimed on behalf of a fetus and a mother. *Id*.

246. *Id*. at 251.

247. *Id*. at 253.

248. *E.g*., R v. Sec'y of State for Educ. and Emp't [2005] UKHL 15, [2005] 2 AC 246 (HL) (appeal taken from Eng.); Copsey v. WWB Devon Clays Ltd [2005] EWCA (Civ) 932, [2005] ICR 1789 ¶¶ 35–36 (Eng.). In *Copsey*, Lord Justice Mummery indicated that he would have found there to have been a material interference in the applicant's Article 9 rights were it not for the European Commission of Human Rights rulings which had found that a person's religious freedom had not been interfered with in his or her employment given their ability to change jobs. *See also id*. ¶¶ 60–62 (Rix, L.J.).

Convention rights would not be breached where an applicant could leave a job in order to exercise those rights.[249] The court held:

> [T]hat, where an individual complains of a restriction of freedom of religion in the workplace, rather than holding that the possibility of changing job [sic] would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate.[250]

In the court's view, it was required to ask whether a "fair balance [had been] struck between the competing interests of the individual and of the community as a whole, subject . . . to the margin of appreciation enjoyed by the State."[251] Applying this approach, the court found that the United Kingdom was in breach of Article 9 by failing to sufficiently protect the ability of a woman to manifest her Christian faith by wearing a cross visibly around her neck.[252] The court weighed Ms. Eweida's fundamental right to manifest her religion against her employer's desire to maintain its corporate image. It found that her religious freedom prevailed in the circumstances "where there is no evidence of any real encroachment on the interests of others . . . ."[253] The court also considered a number of other claims of breaches of Article 9 and found that Article 9 had not been breached in those instances because the interests of others might have been affected by the manifestations of religious belief by those applicants in the workplace.[254]

249. Eweida v. United Kingdom, 2013-I Eur. Ct. H.R. 215.

250. *Id.* at 32.

251. *Id.*

252. *Id.* at 35.

253. *Id.*

254. The court accepted that the actions of the three other claimants were manifestations of their religious belief and that Article 9 was engaged. *Id.* at 36, 37, 39. These claims were made by a nurse who also wished to wear a cross on a necklace; a civil servant who refused to be designated as a registrar of civil partnerships because she had a religious objection to participating in the creation of same-sex civil partnerships; and a counselor who, due to orthodox Christian beliefs on marriage and sexual relationships, refused to provide psycho-sexual counseling to same-sex couples. When undertaking the balancing exercise in relation to the three other applicants, the court nevertheless found that freedom of religion was outweighed. The outweighing factor for the nurse was a Department of Health uniform policy that prohibited the wearing of necklaces "to reduce the risk of injury when handling patients." *Id.* at 36. The court accepted that there was a risk of injury to the nurse and to patients, and that preventing this risk was "necessary" and sufficient to enliven the limitations permitted by Article 9 § 2. *Id.* at 37.

Given these authorities, even if international law were found to be applicable in considering the NSW Policy, it is by no means certain that a court would find that a medical practitioner who refused to comply with the direction obligations of the NSW Policy would be protected from disciplinary action or dismissal. The cases indicate that the facts will be critical. Assuming a hypothetical case of a Catholic doctor who, following disciplinary action for refusing to give a patient a direction as required by the NSW Policy, has had his or her right to practice medicine in Australia revoked, and given the Catholic Church's teaching in relation to abortion explained above, it seems likely that such a doctor would be able to establish that a refusal to direct a patient in accordance with the NSW Policy was a "manifestation" of his or her religious belief.[255]

Assuming a NSW Court applied this approach in considering Article 18 of the ICCPR, the issue for the Court would be whether the NSW Policy is "necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."[256] Applying *Eweida*, this would involve the court in balancing the health professional's right to freedom of religion against other rights such as the right of women to obtain access to lawful abortions in NSW.[257] If, for example, without a direction from the Catholic doctor, the woman was immediately able to access another health practitioner's assistance and obtain the procedure—particularly in the same facility—the court may be persuaded to find for the health practitioner.

V. CONCLUSION

Australians have a range of differing views on abortion. This is why Australia's major political parties have always given parliamentarians a conscience vote on abortion legislation. It is why Australia's other

Although the court noted that the civil servant had been employed when civil partnerships did not exist, it found that the legitimate aim of providing legal recognition and protection of different-sex couples outweighed the civil servant's right to religious liberty. *Id.* at 38. The same balancing considerations resulted in the ECHR finding that there was no violation of Article 9 when the psycho-therapist lost his job due to his non-compliance with a policy of his employer that required all staff to provide counseling in relation to marriage and sexual relationships whatever the patient's sexual orientation. *Id.* at 39.

255. *Id.* at 31 (interpreted by the Supreme Court of Victoria Court of Appeal in *Christian Youth Camps Ltd.* [2014] VSCA at ¶ 434 (Neave JA) (Austl.); *see also* Vartic v. Romania (No. 2), 2013-III Eur. Ct. H.R. 1296).

256. ICCPR, *supra* note 207, at art. 18.

257. Eweida, 2013-I Eur. Ct. H.R. at 47–48.

states and territories specifically protect health practitioners who have a conscientious objection to abortion. The Obligations unnecessarily put Catholic health practitioners seeking to follow their church's teachings in an impossible position. To comply is to defy Church teaching. Doing so risks excommunication, moral distress, and a loss of moral compass. Refusing to comply risks disciplinary action and the potential loss of the right to practice medicine. This would be much like seeking to compel a Catholic priest to testify as to the content of a confession in defiance of the teachings of his Church or seeking to compel a politician to vote against his or her conscience. We do not do that in Australia. It is not reasonable for a state to seek to override an individual's religious freedom in this way. The Obligations operate to deny religious freedom to Catholic health practitioners who seek to abide by the official teachings of their Church, and they do so for no good reason.

A number of factors indicate that the Obligations are unlikely and unnecessary to facilitate increased access to lawful abortion services. Firstly, since the Report was written, the Victorian Abortion Law has been clarified and medical abortion by the use of mifepristone has become widely available. Information about abortion providers is widely available on the internet and elsewhere. Secondly, it appears that a relatively small proportion of health practitioners have a conscientious objection to abortion—perhaps ten percent and perhaps less than five percent in the event of severe abnormality. Thirdly, the Obligations have a disproportionate impact on Catholic health professionals who wish to abide by the teachings of their Church. The Obligations actively discourage conscientious objectors, and particularly Catholics wishing to live in accordance with their faith, from seeking to join or continuing in the medical profession in Victoria and NSW. This not only has a detrimental effect on those Catholic health practitioners who leave the profession, but also deprives patients of access to the services that these health practitioners might otherwise provide including healthcare to patients who share their views about the value of embryonic human life. In this way, the Obligations act to reduce—not increase—patient choice. In addition, the Obligations, if complied with by those with conscientious objections, may have significant deleterious effects on health practitioners including mental distress and the loss of their moral compass. Finally, if there remained any concern that there was any inadequacy of the information available to women seeking to access

abortion services, state and federal governments could supplement the information presently available. If necessary, this could be done without the need to compel Catholic doctors to act against their conscience and their faith.

The need for the Obligations has not been established. The negative impacts outweigh any potential benefits. The very limited relevant protections of religious freedom under Australian law and the uncertain protections afforded by international law, which may be considered in NSW only, provide insufficient protection for the religious freedom of a Catholic health practitioner. For all these reasons, there is a need for urgent reform to remove the Obligations.