Submission on Tasmanian Reproductive Health (Access to Terminations Bill) 2013

Introduction

Freedom 4 Faith (F4F) is an organisation that was formed to educate the Christian church and wider public on issues relating to freedom of religion in Australia. F4F’s leadership team includes senior Christian leaders from the Anglican, Baptist, Pentecostal, Presbyterian and Seventh-day Adventist traditions, as well as legal experts.

The purpose of this submission is to highlight aspects of the Reproductive Health (Access to Terminations) Bill 2013 that would adversely affect rights associated with religious freedom. Of particular concern to F4F are proposed clauses 6 and 7 which significantly undermine freedom of conscience for doctors, nurses and counsellors. Further, while understanding the motivation for introducing access zones, F4F is concerned that proposed clause 9 is drafted too vaguely, and would improperly restrict freedom of assembly, movement and speech.

Conscientious Objection

The right to conscientious objection has long been recognised by law, including international law. Article 18 of the International Covenant on Civil and Political Rights (ICCPR) states:

“Everyone shall have the right to freedom of thought, conscience and religion.”

It is also recognised by domestic codes and guidelines, such as the National Health and Medical Research (NHMRC) Guidelines, which read:

“Conscientious objectors are not obliged to be involved in the procedures or programs to which they object. If any member of staff or student expresses a conscientious objection to the treatment of any individual patient or to any ART procedures conducted by the clinic, the clinic must allow him or her to withdraw from involvement in the procedure or program to
which he or she objects. Clinics must also ensure that staff and students are not disadvantaged because of a conscientious objection.”

The Medical Board of Australia has also published a Code of Conduct which addresses the question of conscientious objection. It reads:

“2.4.6 Being aware of your right to not provide or directly participate in treatments to which you conscientiously object, informing your patients and, if relevant, colleagues, of your objection, and not using your objection to impede access to treatments that are legal.

2.4.7 Not allowing your moral or religious views to deny patients access to medical care, recognising that you are free to decline to personally provide or participate in that care.”

Despite these protections, this Bill seeks to limit the right to conscientious objection in two significant ways:

1. The Bill imposes a duty on medical practitioners and nurses to perform/assist abortions in certain circumstances (clause 6); and
2. The Bill requires medical practitioners and counsellors to refer women to abortion providers in certain circumstances (clause 7).

1 Duty to Perform or Assist

F4F is concerned that clause 6 of the draft Bill unfairly limits the right of conscientious objection.

Clause 6(3) reads:

“Despite any conscientious objection to terminations, a medical practitioner is under 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.”

The problems with this clause are essentially threefold.

First, the requirement, if it is to be enacted, ought to specify that any duty imposed on a practitioner only applies if no other suitably qualified staff who do not have such a conscientious objection are available to deal with the emergency.

1 NHMRC “Ethical guidelines on the use of assisted reproductive technology in clinical practice and research” http://www.scribd.com/doc/6863092/nhmrc-art-ethics

Second, the clause fails to consider that a mother may choose to preserve the life of her child even if her own is thereby at risk. In some very unfortunate circumstances, the life of the mother and baby may both be at risk. Depending on the viability of the unborn child, some women may decline to undergo an abortion and proceed in a way that increases the likelihood of the baby’s survival. However, the only duty imposed by clause 6(3) is for a doctor to save the life of the mother. While this may be the case in most circumstances where the mother and baby’s life are at stake, it shouldn’t be presumed to apply to all cases and irrespective of the mother’s own wishes. In light of this, F4F requests that clause 6(3) be re-drafted to enable a doctor, where possible, to accommodate a pregnant woman’s request to save the life of her child, even at risk to her own.

Third, clause 6(3) imposes a duty for a medical practitioner to perform a termination where necessary to prevent the woman from suffering ‘serious physical injury.’ The term ‘serious physical injury’ is undefined. This would inevitably lead to uncertainty about the circumstances in which a medical practitioner’s duty to perform an abortion under this clause is enlivened. The term ‘serious physical injury’ is also capable of being defined broadly by the courts to include events that some medical practitioners would not classify as sufficiently injurious to warrant a termination of pregnancy.

F4F submits that the proposed duty on medical practitioner’s to perform an abortion to ‘prevent serious physical injury’ is drafted poorly, and should be deleted in its entirety, because a medical practitioner could not know in advance when he or she is required to act against conscience in relation to an abortion on this basis.

The duty relating to ‘serious physical injury’ should also be deleted from clause 6(4), which requires nurses to assist in abortion procedures. Clause 6(4) reads:

“Despite any conscientious objection to terminations, a nurse is under a duty to assist a medical practitioner in performing a termination in an emergency if a termination is necessary … to prevent her from serious physical injury.”

This duty would place nurses in a vulnerable position of being required to submit to the medical practitioner’s judgment about what constitutes an ‘emergency’ and what amounts to ‘serious physical injury’, even if the nurse vehemently disagreed with the medical practitioner’s assessment of risk.

2. **Obligation to Refer**

F4F is also concerned by clause 7(2) of the draft Bill, which states:

“If a woman seeks a termination of pregnancy or pregnancy options advice from a medical practitioner and the practitioner has a conscientious objection to terminations, the practitioner must refer the woman to another medical practitioner who the first-mentioned practitioner knows does not have a conscientious objection to terminations.”
This clause is problematic for three reasons.

First, it assumes that medical practitioners know what their colleagues think about abortion. Many medical practitioners, however, do not have a clear-cut view on the moral permissibility of terminations but would need to assess the merits of the case before they determine the appropriate course of action. Therefore, how can a doctor be sure that the doctor to whom the first-mentioned doctor refers a patient will be willing to perform an abortion when they have not yet assessed the patient’s circumstances?

Second, if a doctor does form a conscientious objection to termination in the given circumstances, the requirement for the doctor to refer the patient to another doctor who (supposedly) will not object may force the first-mentioned doctor to be complicit in an activity that he or she considers a serious moral wrong.

Third, it is unnecessary. Patients are quite capable of finding the information they need concerning the availability of services. They can look up abortion clinics in the yellow pages or do an internet search. They can ask their GP. They can go to their local state-run hospital. The notion that the onus has to be placed on the medical practitioner to find another willing medical practitioner does not take account of the free availability of information in the modern era.

The Bill also imposes a duty of referral on counsellors. Clause 7(3) states:

“If a woman seeks pregnancy options advice from a counsellor and the counsellor has a conscientious objection to terminations, the counsellor must refer the woman to another counsellor who the first-mentioned counsellor knows does not have a conscientious objection to terminations.”

First, it assumes that counselling is directive when in practice most pregnancy counselling services are non-directive. That is to say, counsellors tend not to “coach” their clients towards a particular outcome but rather guide women to reach their own conclusions. Many counsellors – including Christian counsellors – would be prepared to outline the process involved with each pregnancy option. The role of a counsellor is effectively to provide women with information so that she can make an informed decision.

Second, clause 7(3) does not apply merely to professional counsellors trained in non-directive counselling techniques. Clause 7 defines ‘counsellor’ broadly to mean ‘a person who provides a service that involves counselling whether or not for fee or reward’. The Bill also defines ‘pregnancy options advice’ to mean ‘advice or information relating to pregnancy options including continuing a pregnancy or terminating it.’

Thus, the Bill imposes a duty not only on professional counsellors but other members of the community such as volunteers, ministers of religion and other well-meaning people who offer advice or information to a woman regarding pregnancy options. The definition of a
counsellor is extraordinarily broad, for it is not confined to people who have professional qualifications in counselling or who belong to a recognised counselling organisation.

The imposition of professional obligations on unprofessional volunteers is troubling. Furthermore the expectation that these people would to take a “neutral” approach to the issue of abortion is both unrealistic and absurd. Most women who participate in these alternative forms of counselling often do so because they wish to hear the honest views of that person, for example their priest or minister of religion.

F4F submits that the clause 7(2) and 7(3) ought to be removed from the Bill. At the very most, doctors may be required to explain that abortion is legal in certain circumstances and that the patient may wish to seek out a doctor who does not have a conscientious objection, but without requiring the doctor to make a referral. A similar requirement may be imposed on counsellors, but this term needs to be more tightly defined to refer to professional counsellors who provide a service for fee or reward.

Access Zones

It is not just the Bill’s incursion on the right to freedom of conscience that is problematic. Clause 9 of the Bill also seeks to limit freedom of movement, speech and assembly by preventing persons from engaging in behaviour that is deemed to be ‘prohibited’ within 150 metres of abortion clinics.

The Bill defines ‘prohibited behaviour’ in the following way:

\[ a) \text{ in relation to a person, besetting, harassing, intimidating, interfering with, threatening, hindering, obstructing or impeding that person; or} \]
\[ b) \text{ a protest, or sidewalk interference, in relation to terminations; or} \]
\[ c) \text{ graphically recording, by any means, a person accessing or attempting to access premises at which terminations are provided; or} \]
\[ d) \text{ any other prescribed behaviour.} \]

The penalty for breaching this proposed law is a fine and/or a period of up to 12 months imprisonment.

Abortion is a sensitive issue, and no woman approaching an abortion facility benefits from being harassed or threatened. However, the definition of ‘prohibited behaviour’ is broad, and includes vague and undefined terms. If this provision is to remain, then the draft legislation ought to define not only what is unlawful but what is lawful. For example, the law could state that “nothing in this section should be taken to prevent peaceful protests that do not interfere with a person’s access to a facility, nor to the display of signs that seek to convey information about abortion.”
Many people – including Christians opposed to liberal abortion laws – may feel that protesting outside abortion clinics is not an effective way to engage in the abortion debate. However, the protection afforded to abortion clinics would appear to be discriminatory. Why should the premises at which terminations are carried out deserve the protection of ‘access zones’, and not other locations or premises? Will the Tasmanian Parliament now create access zones around every other location in which public protest might possibly occur? If not, why is one venue for protest singled out for restrictions when others are not? This Bill seeks to establish a precedent for the limiting of freedom of speech and assembly that is damaging to a free society. The right to freedom of movement, assembly and speech are central tenets of a liberal democratic society and deserve broad protection, subject only to the criminal law and also laws on public disorder.³

Conclusion

The right to conscientious objection is closely connected with freedom of religion and belief. For many professionals – whether in the medical or counselling professions - the decision not to perform or assist in abortion is an outworking of their religious belief that life begins in a morally significant way at conception and that abortion involves the destruction of innocent human life. Those who hold such beliefs may find assisting or referring for abortion and its availability, not only unacceptable, but deeply offensive and compromising of their deepest and most sacred beliefs and values. To deny the right of such persons to exercise their conscientious objection disrespects their deeply held beliefs about the value of human life and directly contravenes our commitments to freedom of religion and conscience under the ICCPR.

The purpose of this brief submission is to draw attention to aspects of this Bill that would significantly undermine freedom of conscience, and also the freedom of movement, assembly and speech. F4F would welcome the opportunity to further discuss the contents of this submission and ways that the Bill can be improved to protect fundamental freedoms.

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³ See Australian Government Department of Immigration and Citizenship “Five Fundamental Freedoms”