AMA NEW SOUTH WALES

From the President's Office
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27 August 2020

The Hon. Gabrielle Upton MP
Committee Chair, Joint Select Committee
Parliament of New South Wales
Macquarie Street, Sydney NSW 2000

Via email: religiousfreedomsbill@parliament.nsw.gov.au

Re: JSC on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020

Dear Joint Select Committee,

Thank you for providing the Australian Medical Association of New South Wales (AMA NSW) with the opportunity to make a submission on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020.

Executive Summary

AMA (NSW) is a medical professional organisation representing more than 11,000 medical practitioners and medical students in NSW.

Whilst the AMA (NSW) exists to advance the professional interests of doctors and to uphold the integrity and honour of the profession, it also serves patients through effective advocacy and encourages the advancement of the health of the community.

An integral aspect of AMA (NSW)'s advocacy for patients is to ensure that all patients have appropriate access to medical care.

AMA (NSW) recognises religious freedom is important to society; equally, so is the right to health care. We recommend these values are appropriately balanced in developing anti-discrimination legislation.

AMA (NSW) would like to present general and specific comments in relation to the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020.

Terms of Reference

AMA (NSW) acknowledges the Terms of Reference, which require:

(1) A Joint Select Committee, to be known as the Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020, be appointed.

(2) That the Committee inquire and report into the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020, including whether the objectives of the bill are valid and (if so) whether the terms of the bill are appropriate for securing its objectives.

(3) That the Committee, in undertaking (2), have regard to:
- (a) Existing rights and legal protections contained in the Anti-Discrimination Act 1977 (NSW) and other relevant NSW and Commonwealth legislation;
- (b) The recommendations relevant to NSW from the Expert Panel Report: Religious Freedom Review (2018);
- (c) The interaction between Commonwealth and NSW anti-discrimination laws and the desirability of consistency between those laws, including consideration of:
  - (i) The draft Religious Discrimination Bill 2019 (Cth) which has been released for public consultation, and
  - (ii) The Australian Law Reform Commission's reference into the Framework of Religious Exemptions in Anti-discrimination Legislation.

(4) The Committee will consult with key stakeholders as required.

Commonwealth Draft Religious Discrimination Bill 2019

AMA (NSW) notes the appointment of the Joint Select Committee to inquire into the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 follows delays to the introduction of the Federal Government's Religious Discrimination Bill 2019 (Cth), which was set to be tabled in early March.

The Australian Medical Association (AMA) provided submissions on the *Exposure Draft Religious Discrimination Bill 2019* and the *Second Exposure Draft of the Religious Discrimination Bill 2019*.

AMA (NSW) reiterates Federal AMA's assertion that provisions in any religious discrimination bill should complement, and not undermine or override existing anti-discrimination laws.

Developing religious discrimination laws in isolation could obscure rights of particular groups (for example, LGBTIQ people, individuals from culturally and linguistically diverse backgrounds, asylum seekers and refugees, women, young people, individuals with mental health issues), and has the potential to marginalise individuals that may already face stigma and uncertainty when trying to access health care or particular health services.

AMA (NSW) recommends NSW suspend introduction of state religious freedom legislation until the Federal Government has determined the outcome of the Federal Religious Discrimination Bill 2019 (Cth).

Should the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 be enacted, AMA (NSW) recommends that health practitioners and the wider community be appropriately informed as to how religious discrimination legislation interacts with current anti-discrimination legislation.

AMA position on conscientious objection

Whilst the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 does not specifically address conscientious objection by doctors, in the Second Reading Speech, the Hon. Mark Latham stated, "Professional people should not be forced to abandon their faith, the very basis of their existence, in the conduct of their duties."[i]

Given that this Bill – if passed – could have potential significant implications for anti-discrimination laws in other jurisdictions in Australia, AMA (NSW) would like to reiterate the AMA position on

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conscientious objection, which was outlined in AMA's submission on the *Exposure Draft Religious Discrimination Bill 2019.* As stated in that submission:

"In accordance with the World Medical Association's *Declaration of Lisbon on the Rights of the Patient*, every person is entitled without discrimination to appropriate health care. As such, it is essential to ensure that the enjoyment of religious freedom does not undermine the right to health care.

In accordance with the AMA's *Code of Ethics 2016*, doctors (medical practitioners) have an ethical and professional duty to provide care impartially and without discrimination on the basis of age, disease or disability, creed, religion, ethnic origin, gender, nationality, political affiliation, race, sexual orientation, criminal history, social standing or any other similar criteria.

Doctors are entitled to have their own personal beliefs and values as are all members of the community. The AMA believes it is acceptable for a doctor to refuse to provide or to participate in certain medical treatments or procedures based on a conscientious objection; however, there must be an appropriate balance between the rights of doctors to conscientious objection with the rights of individuals to access and receive appropriate health care.

It is important to acknowledge that conscientious objection can occur not just in relation to religious beliefs but also personal moral or ethical concerns. In addition, a very important feature of conscientious objection is it should be based on an individual's deeply held (often long-term) personal beliefs. This is important as not every individual who identifies with a particular religion will necessarily have the same level of conviction in relation to a particular belief or doctrine of that religion (for example, a particular religion may oppose abortion, contraception or same-sex marriage but may have members who do not oppose these activities).

In accordance with the *AMA's Position Statement on Conscientious Objection 2019*, a conscientious objection occurs when a doctor, as a result of a conflict with his or her own personal beliefs or values, refuses to provide, or participate in, a legal, legitimate treatment or procedure which would be deemed medically appropriate in the circumstances under professional standards. A conscientious objection is based on sincerely held beliefs and moral concerns, not self-interest or discrimination. A refusal by a doctor to provide, or participate in, a treatment or procedure for legitimate medical or legal reasons, does not constitute a conscientious objection.

The primacy of patient care and the limits to conscientious objection by doctors

Any legislation that addresses conscientious objection by doctors must reflect and uphold the ethical and professional standards of the medical profession where the doctor's primary duty is to support the health needs of patients. If applied inappropriately without being balanced against this duty to the patient, a doctor's right to conscientious objection could have significant negative and harmful impacts on individuals' access to health care. In particular, individuals that already face stigma and uncertainty when trying to access particular health services (as highlighted previously, examples include LGBTIQ people, individuals from culturally and linguistically diverse backgrounds, asylum seekers and refugees, women, young people, individuals with mental health issues) as well as those for whom access to services may be logistically challenging (for example, individuals with disabilities, the elderly, those living in rural and remote areas).

A doctor's duty to minimise disruption to patient care

In its policy on conscientious objection, the AMA strongly advocates that a doctor's refusal to provide or participate in certain medical treatments or procedures based on conscientious objection directly affects patients and they have an ethical obligation to minimise disruption to patient care. In such circumstances, a doctor:

- should never use a conscientious objection to intentionally impede patients' access to care;

- should always provide medically appropriate treatment in an emergency situation, even if that treatment conflicts with their personal beliefs and values;
- should make every effort in a timely manner to minimise the disruption in the delivery of health care and ensuing burden on colleagues and other health care professionals;
- inform the patient of their objection, preferably in advance or as soon as practicable;
- inform the patient that they have the right to see another doctor and ensure the patient has sufficient information to enable them to exercise that right;
- take whatever steps are necessary to ensure the patient's access to care is not impeded;
- continue to treat the patient with dignity and respect, even if the doctor objects to the treatment or procedure the patient is seeking;
- continue to provide other care to the patient, if they wish;
- refrain from expressing their own personal beliefs to the patient in a way that may cause them distress;
- inform their employer, or prospective employer, of their conscientious objection and discuss with their employer how they can practice in accordance with their beliefs without compromising patient care or placing a burden on their colleagues.

This guidance strikes a reasonable balance between a doctor's right to conscientious objection and the right of patients to access health care while also minimising any adverse effects on the doctor's colleagues and employer.

Professional codes of conduct
In addition, in those circumstances where it is considered acceptable for a doctor to conscientiously object to providing a medical service, the doctor nonetheless has ethical and professional obligations to the patients directly affected by that decision. For example, the Medical Board of Australia's *Code of Conduct for Doctors in Australia: Good Medical Practice*, the Code by which all registered medical practitioners must abide, states the following in relation to conscientious objection:

Good Medical Practice involves:
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."[ii]

Religious discrimination legislation must reflect and uphold, not undermine or override, professional standards

According to the Bill, section 22N, under *Discrimination against applicants and employees* (3) Without limiting subsection (1) and (2), it is unlawful for an employer to—

> (a) restrict, limit, prohibit or otherwise prevent an employee from engaging in a protected activity, or
> (b) punish or sanction an employee:
>> (i) for engaging in a protected activity, or
>> (ii) because an associate of the employee engaged in a protected activity.

AMA (NSW) is concerned that the proposed legislation allows people to make statements (asserted to be based on religious belief) that offend, insult or intimidate groups such as women, LGBTIQ people or persons with disabilities. There is potential for bullying, harassment and intimidation of people or groups of people that can lead to risk of harm to the health and wellbeing of individuals.

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AMA (NSW) notes that this potentially conflicts with professional standards and guidance set by the Australian Health Practitioner Regulation Agency (AHPRA), particularly guidelines developed for registered health practitioners to help them meet their obligations when using social media.

AHPRA's *Social Media: How to Meet your Obligations under the National Law* reminds doctors that when interacting online, they should maintain professional standards and be aware of the implications of their actions.

The guidelines clarify that when engaging online or via social media, even in a private capacity, practitioners should act ethically and professionally, and that the Medical Board could consider such use if it raises concerns over a doctor's fitness to hold registration.

Relevant excerpts from the guidelines include the following:

Inappropriate use of social media can result in harm to patients and the profession, particularly given the changing nature of privacy and the capacity for material to be posted by others. Harm may include breaches of confidentiality, defamation of colleagues or employers, violation of practitioner–patient boundaries or an unintended exposure of personal information to the public, employers, consumers and others. Information stays on social media indefinitely. Information published on social media is often impossible to remove or change and can be circulated widely, easily and rapidly. Therefore, it's important that you are very careful about what you like or post online regardless of where in the world the site is based or the language used.

Where relevant, National Boards may consider social media use in your private life (even where there is no identifiable link to you as a registered health practitioner) if it raises concerns about your fitness to hold registration. While you may think you are engaging in social media in a private capacity because you do not state you are a registered practitioner, it is relatively easy and simple for anyone to check your status through the register, or make connections using available pieces of information.[iii]

The provisions outlined in the Bill could undermine APHRA's professional standards. Currently, should a doctor act in a way inconsistent with standards set by AHPRA and the Medical Board, s/he could be subject to a notification under AHPRA. A notification could have potential employment implications for the doctor, including possible dismissal. Under the Bill, however, the doctor would be protected from such dismissal even though they breached their professional standards. This makes rules set by AHPRA and the Medical Board secondary to the Bill.

Discrimination in areas of employment

According to the Bill, section 22M, Religious ethos organisations taken not to discriminate in certain circumstances, it states:

(1) For the purposes of this Part, a religious ethos organisation is taken not to discriminate against another person on the ground of the person's religious beliefs or religious activities by engaging in conduct if the organisation genuinely believes the conduct—

> (a) is consistent with the doctrines, tenets, beliefs or teachings of the religion of the organisation, or
>
> (b) is required because of the religious susceptibilities of the adherents of the religion of the organisation, or
>
> (c) furthers or aids the organisation in acting in accordance with the doctrines, tenets, beliefs or teachings of the religion of the organisation.

(2) Without limiting subsection (1), conduct referred to in that subsection includes giving preference to persons of the same religion as the religion of the religious ethos organisation.

(3) Nothing in this section, or any provision of this Act that refers to a religious ethos organisation, affects the operation of section 56 (Religious bodies).

As noted in the AMA submission to the *Second Exposure Draft of the Religious Discrimination Bill 2019,* on similar exceptions relating to work, it is important these provisions do not negatively impact on the medical workforce and patients' access to health care as a doctor may be:

- refused employment, promotion or career development opportunities because they do not adhere to the same religion affiliated with the hospital or aged care facility; or
- terminated because they act on their clinical/vocational responsibility to provide a health service to a patient that is inconsistent with the religious beliefs of the hospital or aged care facility (i.e. an inherent requirement of the position).

According to the AMA, such provisions may "limit the education, training and career development opportunities for many doctors should they be discriminated against by religious hospitals and aged care facilities for not adhering to a particular faith.

This may cause distress to those already employed at such facilities who may fear dismissal based on their faith (or lack thereof) rather than their abilities. In addition, many doctors may choose not to seek employment at all in these hospitals or facilities due to fears of being overlooked for employment in the first place, fears of being dismissed in the future and/or fears of not being given opportunities for career development.

Any negative impacts on the medical workforce could then limit patients' access to health care, particularly in rural areas, should these provisions result in limiting the number of doctors seeking, or actually selected, to work at a particular hospital or facility.

Not only can these provisions potentially affect the number of doctors working at a particular hospital or facility but the diversity of doctors as well, particularly in terms of gender, qualifications and experience as well as cultural and linguistic backgrounds."[iv]

Recommendations:

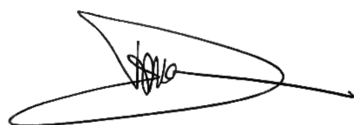
1. That NSW suspend introduction of state religious freedom legislation until the Federal Government has determined the outcome of the Federal Religious Discrimination Bill 2019 (Cth).

2. That should the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 be enacted, AMA (NSW) recommends that health practitioners and the wider community be appropriately informed as to how religious discrimination legislation interacts with current anti-discrimination legislation.

3. That religious discrimination legislation must reflect and uphold, not undermine or override, professional standards.

4. That religious discrimination legislation does not negatively impact on the medical workforce and patients' access to health care.

Yours Sincerely,



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[i] https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1820781676-81731'

[ii] https://ama.com.au/submission/ama-submission-religious-discrimination-bill-2019

[iii] https://www.ahpra.gov.au/Publications/Advertising-resources/Social-media-guidance.aspx

[iv] https://ama.com.au/system/tdf/documents/AMA%20submission%20on%20the%20Second%20Exposure%20Draft%20of%20the%20Religious%20Discrimination%20Bill%202019.pdf?file=1&type=node&id=51856