



Submission of Family Planning NSW

Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020

August 2020

About Family Planning NSW

Family Planning NSW is the leading organisation for reproductive and sexual health in New South Wales, Australia and the Pacific. Our mission is to enhance the reproductive and sexual health and rights of our communities by supporting all people to have control over and decide freely on all matters related to their reproductive and sexual health throughout their lives.

Family Planning NSW has significant experience in the provision of reproductive and sexual health services, including for people of diverse backgrounds and in regional communities where there may be limited reproductive and sexual health service providers.

Family Planning NSW welcomes the opportunity to provide feedback on the *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020*.

Implications for human rights and health services

Family Planning NSW has in-principle support for protection against discrimination on the grounds of religious belief. However, the Bill, as it is currently drafted, infringes on the rights of patients to receive high quality essential reproductive and sexual healthcare and on the rights of students to receive evidence-based comprehensive sexuality education. We urge the Joint Select Committee to not pass the Bill in its current form and reconsider this Bill to ensure that it promotes equitable access to healthcare services, without risk of discrimination.

Our primary concern is that this Bill will disproportionately impact the provision of health services for groups who are already vulnerable. The provisions in the Bill prioritise the religious beliefs of religious organisations and healthcare workers over the healthcare needs of marginalised individuals and communities, many of whom are at increased risk of poor physical and mental health outcomes and require non-discriminatory and welcoming access to healthcare. It is not appropriate that the legal protection against discrimination given to these groups should be any less than that given to people who hold particular religious beliefs.

The Bill fails to adequately balance the right to be free from religious discrimination with other rights, including the right to:

- the highest standard of health
- reproductive and sexual health services
- protection from discrimination on other grounds, including on the basis of sex, transgender and sexual orientation.

Recommendations

Family Planning urges NSW Parliament not to pass the Bill in its current form. We recommend that the following sections of the Bill be deleted or amended:

- **this Bill places protection of religious beliefs above protection against discrimination on other grounds, such as gender and sexuality – Section 3(2)**
If this Bill is passed, religious beliefs would be given greater legislative protection than other rights recognised by the *Anti-Discrimination Act 1977* (NSW). Religious activities are broadly defined as any activity, which is not an imprisonable offence that is motivated by a religious belief.
- **There are no consequences for conduct - Sections 22N(3)-(5), 22S(2)-(4) and 22V(3)-(5)**
NSW government and non-government employers would be unable to respond appropriately to religiously motivated conduct which may breach their obligations or cause harm to others.

- **There are double standards in employment, education and service delivery – Sections 22M**
Faith-based organisations (including schools, healthcare and social services) would be exempt from the new provisions, allowing them to discriminate on the grounds of religion in employment, education and service delivery, even when receiving public funding.

Major concerns

It is our view that failure to adequately consider the broader implications of this Bill, both in terms of human rights and health service provision will have a significant impact on access to essential reproductive and sexual health and other health services for vulnerable communities.

The Bill (which is complex, and features difficult and ambiguous legal drafting) essentially grants privileges to people who hold certain religious beliefs to engage in otherwise illegal actions, or actions which would otherwise attract workplace or contractual sanctions. In short, a subset of our society would be granted permission to cause harm to others. Herein lies the fundamental problem of this Bill. In the context of reproductive and sexual healthcare, it would allow harms to innocent individuals who have a right to access the healthcare and education they need.

To inform the Committee’s deliberations, in response to the *Terms of Reference* (noted in the Appendix), we outline our key concerns:

1. The Bill privileges religious expression to the exclusion of other beliefs

Prohibiting discrimination on the grounds of religious belief or activity is consistent with the tolerant, pluralistic nature of Australian society. The proposed Bill would add religious beliefs and activity as a protected ground of discrimination under the Anti-Discrimination Act alongside the existing grounds, which include age, sex, disability, homosexuality etc. However, instead of adopting the same drafting that is used for the other protected grounds, the Bill extends greater protection to religious beliefs and activity. The scope of the Bill is broader than existing protections against discrimination on the basis of, for example, gender or homosexuality, raising a concern that it will be more difficult to uphold other Australian discrimination laws. Instead, the Bill seeks to favour one right over all others.

2. The Bill cuts across existing professional standards relating to conscientious objection by health practitioners

The Explanatory notes state that religious activity is not solely ‘religious rituals’, but includes religious convictions that impact on or motivate behaviour. ‘Religious activity’ is defined at Section 22K(1) to include: “(b) conduct, refusal (including refraining from participating in activities that are inconsistent with religious beliefs), omission, expression, and association carried out in accordance with, in connection with, based upon, constitutive of, supportive of or a corollary of a religious belief.”

Further, health workers must observe conscientious objection provisions made in abortion law. Currently, the law requires practitioners to:

- respectfully disclose their conscientious objection to the patient, and at times to their employer and/or colleagues
- ensure continuity of patient care by referring that patient on to a practitioner who does not have a conscientious objection, or providing information about how the patient can contact a non-objecting practitioner or service
- provide care in case of an emergency.

We are concerned that the proposed Bill does not allow room for any of these important safeguards that are specific to the provision of health services. As it currently stands, the Bill offers no mechanism to ensure that patient needs are appropriately balanced against the health practitioner’s religious beliefs. If passed in its current form, it could have damaging consequences for patients in regards to their reproductive and sexual health. For example, health practitioners may not be required to provide treatment contrary to their religious beliefs even in emergency situations, or

they may not be compelled to refer a patient elsewhere for treatment that is contrary to their own beliefs. This may result in serious health implications for patients, especially those who are already marginalised and vulnerable.

The issues around conscientious objection to abortion were extensively debated by NSW Parliament only last year, and very specific provisions were agreed to in the *Abortion Law Reform Act 2019*. We are deeply concerned that the proposed Bill would come into conflict with these provisions, threatening to undermine the position that was agreed last year.

Family Planning NSW strongly requests that the Bill must be amended so that it does not disturb the existing law and standards around conscientious objection.

3. This Bill will undermine the ethical codes of health and medical professionals

The Bill makes it harder for employers and professional bodies to require all health workers and services to treat patients equally.

In graduation ceremonies around Australia, doctors recite *The Physician's Pledge*(1) as they begin their new careers: "As a member of the medical profession... I will not permit considerations of age, disease or disability, creed, ethnic origin, gender, nationality, political affiliation, race, sexual orientation, social standing or any other factor to intervene between my duty and my patient..." It is important that doctors uphold these principles throughout their career.

It must be lawful for organisations providing reproductive and sexual health services to implement and enforce codes of conduct and employment conditions that require employees and contractors to provide lawful services to all consumers.

Family Planning NSW provides a comprehensive suite of reproductive options, including abortion services in NSW. Our organisational purpose is to provide specialised services and programs and advocate for the reproductive and sexual health and rights of all. Our policy and culture is 'pro-choice' and embracing of the full suite of reproductive options. Under the proposed Bill it would be possible for individual clinicians, who may not be pro-choice for religious reasons, to seek employment at our organisation and other similar pro-choice organisations but then choose to not perform the functions of role they have been employed to do citing religious freedoms. The Bill could be used to undermine the integrity of organisations, and by clinicians, as justification for providing advice to patients that is not in line with an organisation's policy and culture. As an employer, we would be unable to respond appropriately to religiously motivated conduct which breaches our obligations and causes harm to patients.

In particular, section 22S of the Bill implies that it would be unlawful for a professional regulatory body (which would include bodies that regulate the registration of health practitioners) to withdraw a person's professional registration or impose conditions on registration based on the person's religious belief or activity. There is no exemption for disciplinary action taken against a health practitioner to enforce appropriate and accepted professional standards in health care. This raises the real risk that professional misconduct by a health practitioner (for example, refusing to perform an abortion necessary to save a woman's life) may not be the subject of any disciplinary action if the conduct was done in accordance with the practitioner's personal religious beliefs. It is extremely concerning that the Bill could undermine the enforcement of professional standards in health care in this way.

The Bill (Sections 22N(3)-(5), 22S(2)-(4) and 22V(3)-(5)) makes it difficult for an employer to respond to discriminatory conduct that occurs outside occupational settings, provided that conduct is motivated by religious beliefs. This could lead to professional healthcare associations being unable to investigate a healthcare professional who promotes discredited practices (such as conversion therapy) or makes harmful statements about the health needs of marginalised groups (such as women, people with disability, or people of diverse sexualities and genders). It also means that an

employer may be unable to engage in disciplinary action against a staff member (such as a teacher, or healthcare professional) who expresses a faith-based opinion about marginalised groups, while on a break, or in a public forum (such as social media) while not at work.

4. Religious organisations may inhibit access to necessary health services, including reproductive and sexual healthcare

Family Planning is concerned that the Bill contains quite extensive special provisions and exemptions relating to “religious ethos organisations”. It defines “religious ethos organisations” very broadly such that they would include hospitals run by religious organisations. It is inappropriate that such hospitals, which often receive substantial taxpayer funding to provide health services, should not be held accountable to provide health services in an inclusive and non-discriminatory way, rather than solely in accordance with their own religious beliefs.

It is the responsibility of government to provide equitable health services. Religious ethos organisations could argue it is unlawful discrimination under s22Z if they are required to provide healthcare in conflict with their religious beliefs in the course of carrying out any function under a State program. Family Planning NSW is deeply concerned that the Bill would substantially weaken the obligation of hospitals and health facilities operated by religious organisations to provide healthcare in a non-discriminatory and non-judgmental way.

We are also deeply concerned that reproductive and sexual health services provided by religious organisations could be most affected. Reproductive and sexual health services include comprehensive sexuality education, contraception, prevention, testing and treatment of sexually transmitted infections including provision of PreP (pre-exposure prophylaxis for the prevention of HIV), pregnancy-related services including pregnancy options counselling, abortion services and gender-affirming care (such as hormone therapy).

5. The Bill may further limit access by marginalised groups to reproductive and sexual healthcare

Marginalised groups already face significant healthcare access barriers. The Bill will challenge Australia’s domestic and international obligations to achieve equity in healthcare access and health outcomes. Healthcare should be provided in an inclusive and non-judgmental environment to minimise access barriers faced by marginalised groups. However, this Bill encourages health practitioners to allow their own religious beliefs to affect how they interact with patients.

Women

Reproductive coercion, and domestic and family violence, constitutes a violation of women’s human rights. These include, but are not limited to, women being treated as equals and being allowed to make choices about their reproductive health such as planning if and when they become pregnant.

People with disability

People with disability are often denied the information, education and support they need to make informed decisions about contraception, family planning and parenthood. People with disability often face discrimination, for instance, from service providers who assume that a person with disability is non-sexual, or not capable of having a relationship or parenting.(2)

Sexuality and/or gender diverse people

Family Planning NSW is concerned that experiences of homophobia, transphobia and isolation from health services present significant barriers to accessing health services that could be compounded as a result of this Bill. Sexuality and/or gender diverse young people have higher rates of mental health concerns and are more likely to attempt suicide in their lifetime(3) and are significantly less likely to access cervical cancer screening compared to the general population.(4,5)

Young people

Many young people experience discrimination in accessing healthcare simply due to their age, or additionally due to belonging to a marginalised group. In NSW, young people who are competent to

consent to healthcare can access health services independently – generally from the age of 14. However, judgemental attitudes by health professionals can affect young people’s engagement with services and act as a barrier to accessing healthcare. Further, young people lack an awareness of services and often require active support to access and navigate the services they need.(6)

People from culturally and linguistically diverse backgrounds

Maximising reproductive and sexual health outcomes for all groups in a multicultural community requires a combination of mainstream services that are responsive to cultural diversity and specially designated services that meet the needs of particular groups, including the promotion of health literacy for vulnerable migrants (people who have recently arrived in Australia from a non-English speaking country).(7) Supporting healthcare clinicians, therefore, need to actively facilitate discussions about reproductive and sexual health with their clients and create awareness of referral pathways to health services, not hinder access.(7)

People living in rural and remote locations

The availability of healthcare in rural and remote areas results in access barriers. Access to healthcare services, particularly for reproductive and sexual health, can be limited without additional barriers being imposed.

6. The Bill may limit the provision of comprehensive sexuality education to school students

Comprehensive sexuality education is a crucial early intervention strategy for ensuring the reproductive and sexual health and wellbeing of students. Evidence shows that comprehensive sexuality education improves health outcomes in young people and supports students to create healthy relationships throughout their lives. Comprehensive sexuality education also contributes to reduced sexual health risk-taking, including delayed initiation of sexual intercourse, increased use of contraception and condoms and reduced gender-based violence.(8, 9)

If comprehensive sexuality education is not taught, because a religious school decides the content is inconsistent with their religion or because a teacher from a non-religious school decides not to teach comprehensive sexuality education for religious reasons, a large number of students will not reap its benefits and miss out on essential education. Consistent implementation of comprehensive sexuality education is needed to ensure all student needs are met, including students belonging to diverse groups such as young people with disability, who are sexuality and gender diverse and young people from culturally diverse backgrounds.

References

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Appendix – The Joint Select Committee’s Terms of Reference

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 to 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.