

Submission of Family Planning NSW

Religious Discrimination Bill 2019 – Second Exposure Draft

Submitted to the Attorney-General's Department, Australian Government
via email to ForConsultation@ag.gov.au
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About us

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 welcomes the opportunity to provide feedback on the *Religious Discrimination Bill 2019: Second Exposure Draft* (the Bill).

Implications for human rights and health services

Family Planning NSW commends the Bill's commitment to indivisible, universal human rights, as expressed at section 3(2). However, the Bill as it currently stands does not reflect this commitment. It fails to adequately balance the right to be free from religious discrimination with other rights, including:

- the right to the highest standard of health
- the right to reproductive and sexual health services
- the right to freedom from discrimination without distinction of any kind, including on the basis of sex, pregnancy, sexual orientation, transgender or intersex status.

Family Planning NSW has significant experience in the provision of reproductive and sexual health services, including for people of diverse sexualities and genders, and to pregnant and breastfeeding people. We work across the state of NSW including in regional communities with limited reproductive and sexual health service providers. FPNSW, as a member of the NSW Pro Choice Alliance, advocated for the decriminalisation of abortion and the passage of the Abortion Law Reform Bill 2019.

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 reproductive and sexual health and other health services for vulnerable and geographically remote communities.

Our submission is focused on conscientious objection, due to our experience as health service providers and our concern that this provision will disproportionately impact the provision of health services for groups who are often already vulnerable. We urge the Attorney-General's Department to reconsider this Bill to ensure that it promotes equitable access to health services.

Recommendations

Family Planning NSW recommends the following clauses be deleted:

- **sub-sections 8(3)-(5):** These provisions will allow healthcare professionals, doctors, nurses, midwives, pharmacists and psychologists, to make discriminatory statements of religious belief outside of their employment or professional body affiliation. They also prevent employers from providing inclusive and safe workplaces for employees and patients.
- **sub-sections 8(6) and (7):** These provisions allow doctors, nurses, pharmacists, psychologists to refuse a range of services to an individual if they deem a medical procedure, service or treatment to be inconsistent with their personal religious beliefs.

- **Section 42:** This section overrides federal, state and territory anti-discrimination laws and protects people from prosecution who express prejudicial or discriminatory views about a range of Australians, based on their religious beliefs.

The full text of these sections of the draft Bill is included in Appendix A.

Major concerns

Family Planning NSW is deeply concerned that the provisions in the Bill prioritise the religious beliefs of 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.

Our major concerns are outlined below.

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 overriding of other Australian discrimination laws is inconsistent with the objectives of the Bill which recognise the indivisibility and universality of human rights. Instead, this provision seeks to favour one right over all others.

2. This Bill expands the right to conscientious objection without any of the safeguards enshrined in professional codes of conduct and state-based legislation.

Any legislation relating to conscientious objection must balance the rights of individuals to operate within their own moral and religious framework with the ethical consideration health providers have to act in the best interests of their patients.(1)

The Bill is out of step with the protections provided by the codes of conduct of professional bodies such as the Australian Medical Association(2) and the Australian Nursing and Midwifery Board(3), and by existing legislation including, for instance, state and territory abortion legislation. These protections include requirements for 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.

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

It makes it harder for employers and professional bodies to require all health workers and services to treat patients equally.(4) 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.

In Graduation ceremonies around Australia new doctors recite *The Physician's Pledge*(5) 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.

4. The Bill contains very weak protections for patients seeking healthcare

The Bill assumes that conscientious objection to provision of a health service will be reasonable and will not have an “unjustifiable adverse impact” on patients: this is a dangerous assumption to make given existing challenges accessing some health services, particularly for marginalised groups. The Bill also shifts the burden of proof on to those seeking to ensure access.

5. The conscientious objection provision may inhibit access to health services.

It is the responsibility of government to provide equitable health services. We are deeply concerned that reproductive and sexual health services are likely to be among the services most affected by this provision. These include contraception, prevention and screening of sexually transmitted infections, and pregnancy-related services including pregnancy options counselling, abortion services, pre-exposure prophylaxis (PrEP – a treatment to prevent HIV infection) and gender-affirming care (such as hormone therapy).

6. 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 further challenge Australia’s domestic and international obligations to achieve equity in healthcare access and health outcomes.

Even under existing approaches to conscientious objection, people seeking to access reproductive and sexual health services, including emergency contraception (the ‘morning after pill’) and abortion care, can experience significant barriers to service. For instance, a 2019 study of the impact of conscientious objection on abortion in Victoria found that rates of objection were low in Australia compared to other countries, but that a ‘significant minority (15%) of practitioners who claim a conscientious objection do not adhere to obligations to refer, but instead attempt to delay or deny access. If even a small proportion of doctors with a conscientious objection refuse to refer, this could have a significant impact on women’s access, particularly if conscientious objectors are over-represented in certain geographic areas, or see more vulnerable patients presenting later in pregnancy’.(6)

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.(7) We are concerned that the current barriers experienced by people with disability seeking to access reproductive and sexual health services may be compounded by the Bill’s expansive conscientious objection provision.

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 by an expansive conscientious objection provision. Sexuality and gender diverse young people have higher rates of mental health concerns and are more likely to attempt suicide in their lifetime.(8) Research shows that over one-third of lesbian, bisexual or queer women were overdue for cervical screening(9) and that transgender men are significantly less likely to access Pap smears compared to the general population.(10)

Conclusion

This Bill prioritises the religious beliefs of healthcare workers over the healthcare needs of individuals, including people who are marginalised. When healthcare services can be refused based on religious belief, this challenges Australia's pursuit of achieving health care equity. Discrimination on the grounds of religious belief or activity is inconsistent with the tolerant, pluralistic nature of Australian Society.

References

1. Victorian Law Report Commission. Law of Abortion Final Report 15.; 2008.
2. Northern Territory Department of Health and Community Services v. J.W.B and S.M.B. (Marion's Case).
3. Nursing and Midwifery Board of Australia. Code of conduct for nurses. 2019.
4. Equality Australia. Religious Discrimination Bill 2019 and health care. . 2019.
5. World Medical Association. Declaration of Geneva, The Physician's Pledge. 2019.
6. Keogh LA, Gillam L, Bismark M, McNamee K, Webster A, Bayly C, et al. Conscientious objection to abortion, the law and its implementation in Victoria, Australia: perspectives of abortion service providers. BMC medical ethics. 2019;20(1):11-.
7. Family Planning NSW. Love and Kisses. Taking action on the reproductive and sexual health and rights of people with disability: Family Planning NSW; 2014.
8. National LGBTI Health Alliance. The statistics at a glance.
9. Mooney-Somers J, Deacon, RM, Scott, P, Price, K, Parkhill, N. Women in contact with the Sydney LGBTQ communities: Report of the SWASH Lesbian, Bisexual and Queer Women's Health Survey 2014, 2016, 2018.; 2018.
10. James SE HJ, Rankin S, Keisling M, Mottet L, Anafi M. The Report of the 2015 U.S. Transgender Survey. 2016.

Appendix A

Sub-sections 8(3)-(5):

(3) For the purposes of paragraph (1)(c), an employer conduct rule that:

(a) is imposed, or proposed to be imposed, by a relevant employer; and
 (b) would have the effect of restricting or preventing an employee of the employer from making a statement of belief other than in the course of the employee's employment; is not reasonable unless compliance with the rule by employees is necessary to avoid unjustifiable financial hardship to the employer. Note: A requirement to comply with an employer conduct rule that is not reasonable under this subsection is also not an inherent requirement of employment (see subsection 32(6)).

(4) For the purposes of paragraph (1)(c), a qualifying body conduct rule that would have the effect of restricting or preventing a person from making a statement of belief other than in the course of the person practising in the relevant profession, carrying on the relevant trade or engaging in the relevant occupation is not reasonable unless compliance with the rule by the person is an essential requirement of the profession, trade or occupation.

(5) Subsections (3) and (4) do not apply in relation to a statement of belief:

(a) that is malicious; or
 (b) that would, or is likely to, harass, threaten, seriously intimidate or vilify another person or group of persons; or
 (c) that is covered by paragraph 28(1)(b).

Note: Paragraph 28(1)(b) covers expressions of religious belief that a reasonable person, having regard to all the circumstances, would conclude counsel, promote, encourage or urge conduct that would constitute a serious offence.

Sub-sections 8(6) and (7)

(6) For the purposes of paragraph (1)(c), if a law of a State or Territory allows a health practitioner to conscientiously object to providing or participating in a particular kind of health service because of a religious belief or activity held or engaged in by the health practitioner, a health practitioner conduct rule that is not consistent with that law is not reasonable.

(7) For the purposes of paragraph (1)(c), if subsection (6) does not apply, a health practitioner conduct rule is not reasonable unless compliance with the rule is necessary to avoid an unjustifiable adverse impact on:

(a) the ability of the person imposing, or proposing to impose, the rule to provide the health service; or
 (b) the health of any person who would otherwise be provided with the health service by the health practitioner.

Section 42:

42 Statements of belief do not constitute discrimination etc.

(1) A statement of belief, in and of itself, does not:

(a) constitute discrimination for the purposes of any anti-discrimination law (within the meaning of the Fair Work Act 2009); or
 (b) contravene subsection 17(1) of the Anti-Discrimination Act 1998 (Tas.); or
 (c) contravene a provision of a law prescribed by the regulations for the purposes of this paragraph.

(2) Subsection (1) does not apply to a statement of belief: 13

(a) that is malicious; or 14
 (b) that would, or is likely to, harass, threaten, seriously 15 intimidate or vilify another person or group of persons; or 16
 (c) that is covered by paragraph 28(1)(b).