Women's Health Tasmania

Response to the second draft of the Religious Discrimination Bill 2019

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CHOICE
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About Women's Health Tasmania

Women's Health Tasmania (WHT) is a universal service, available to all women in Tasmania. It seeks to increase the range of services, and its reach, to women vulnerable to inequitable health outcomes due to social or economic determinants. WHT acknowledges the impact of societal influences such as income, education, gender, sexual orientation, ethnicity, disability and isolation on health outcomes, and seeks to reduce the negative effects of these factors on individual women.

WHT is part of a national network of women's health centres. It is a health promotion charity funded by the Tasmanian Department of Health and Human Services, and guided by the World Health Organisation's definition of health – "Health is a state of complete physical, mental and social well-being, not merely the absence of disease or infirmity"[1]. WHT provides a safe, supportive environment for women. It is run by women, for women, and aims to promote positive health outcomes by providing a diverse range of services, taking a holistic approach. This perspective on women's health has seen WHT at the forefront of preventative health in Tasmania.

WHT's vision is for Tasmanian women to be informed, supported and active decision-makers in their own health and well-being. As a result, WHT has also been a key advocate on issues such as a woman's right to make informed choices about her health. Our leadership has been evident in a wide range of health policy, in social justice and gender equity. WHT consistently advocates on behalf of women with both State and Commonwealth governments, on a range of legislation and policies impacting on women's health. In recent years, WHT has broadened its service delivery component by undertaking outreach activities, offering a state-wide information telephone line and using electronic technologies. It currently provides services to women from 74 different postcode areas.

WHT continues to provide direct services to individual women and to advocate for, and promote, the health and well-being of all Tasmanian women. Our knowledge and expertise are based on 31 years' experience working with, and for, the women of this state.

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1. Introduction

Women's Health Tasmania supports making discrimination on the ground of religious belief or activity unlawful. However, we have grave concerns about provisions in the Religious Discrimination Bill which endow certain people with the positive right to behave in harmful ways.

WHT wrote a submission in response to the exposure draft of the Bill. Serious concerns were raised in this submission which have not been addressed in the second draft of the bill. They were:

- The over-ride of all other anti-discrimination acts
- The problems with the conscientious objection Section 8 (5) and (6)
- The over-ride of section 17 (1) of the Tasmanian Anti-Discrimination Act, by allowing statements of belief to be communicated which offend, humiliate, intimidate, insult or ridicule others.
- Section 8 (3) and (4) allowing employees greater freedom to say what they like in the name of religion outside work hours.

These concerns have not been addressed in the second draft of the Bill.

This submission adds to the concerns expressed in the first submission and focuses on the implications for health services, health practitioners and patients.

2. Changes in the second draft of the Bill

WHT welcomes two remedial changes in the second draft of the Bill. These are: limiting the number of health professions who for religious reasons would be given the right to over-ride existing professional frameworks developed to manage conscientious objection; and secondly, clarification that the intention of the provision is not to allow refusal to particular people or groups of people but to allow refusal of particular health services.

However, it is important to note that these are modifications of proposals in the first exposure draft that were themselves extreme and highly problematic, and that in their remediated form they still present significant problems. In addition to our concerns about sections 8 (6) and (7) (conscientious objection), WHT has serious concerns about section 42 (statements of belief) and the over-ride of Tasmanian human rights legislation.

Having read the second draft of the Bill we repeat the recommendation made in response to the first exposure draft – we ask that this Bill be withdrawn and that it be replaced with legislation that provides protection to people with religious faith from direct and indirect discrimination on the basis of religious belief and activity, including having no religious belief, in line with Australia's existing anti-discrimination framework.

3. Fundamental problems with the Bill

This Bill goes far beyond ensuring the substantive right to religious freedom as it is outlined in international law. In this body of law the right to manifest a religion or belief covers the following types of conduct: the right to worship or assemble; to establish and maintain appropriate charitable institutions; to make, acquire and use the materials related to the rites or customs of one's religion; to write and publish about ones' religion; to solicit donations; to develop a leadership; to observe holidays and ceremonies.[2]

This Bill will create a legislative right to proselytize in workplaces and in public places in ways that cause distress and harm to other people, and which over-ride the fundamental rights and freedoms of others. This is contrary to international law.

The International Covenant on Civil and Political Rights, to which Australia is a signatory, recognises that 'that the right to manifest religious or other beliefs may be subject to limitations that are prescribed by law and necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others.' [3] International humanitarian law belief freedoms ensure both freedom of, and freedom from, 'religion or belief'.

The Government has stated that the Religious Discrimination Bill has emerged from a long period of consultation, including the Inquiry into Religious Freedom and its subsequent report. However, a reading of the Report on the Inquiry into Religious Freedom raises questions about where key parts of the draft Bill have emerged from. It is not clear why the Government has made the decision to single out conscientious objection in health service delivery as a potential area of discrimination came from. The Review itself does not make a single reference to religious concerns around the provision of health services, or to concerns about the management of conscientious objection by health practitioners. Nor does the Australian Government response to the review.

However, clearly the Government is responding to pressure from somewhere. A reading of the published submissions to the Review reveal respondents advocating for religious freedoms expressing four main concerns relating to health service delivery in Australia – all of which have been responded to in some way in this draft legislation. They provide an insight into where people may seek to use the provisions to influence health service delivery in order to exercise 'religious freedom'. They are:

- The legislative requirement in some states that doctors refer women seeking terminations to another practitioner if they have a conscientious objection to abortion.
- The existence of abortion clinic safe access zone laws in Tasmania, the ACT, the Northern Territory, Victoria and NSW
- The increasing pressure across jurisdictions to ban conversion therapy
- The existence of vaccination programs

4. Section 5(2)

Subclause 5(2) of the proposed Bill effectively overrides Council by-laws in a way that poses a threat to the delivery of health services, and to the psychological health and wellbeing of the community.

The explanatory notes state that the over-ride 'will ensure that persons are still protected from discrimination under this Bill even if their religious activity contravenes council by-laws. This may include, for example, religious activities, such as street preaching, which are made unlawful by the operation of local government regulations.'[4]

This dramatically inhibits local government from responding to public order issues. A preacher objecting to a counsellor providing counselling to HIV patients may begin preaching outside that counsellor's health service and cause a significant nuisance, including making statements which promote or urge conduct that causes distress, grief, fear or anger to others (see our discussion on the

capacity to do harm to patients in section 8 'on compromised care and justifiable harm' below). This behaviour would not be covered by state government Safe Access Zone legislation.

5. Section 8 (5) and (6) Conscientious Objection

> "In addition, the Bill provides that conditions, requirements or practices imposed on health practitioners which would have the effect of restricting or preventing a health practitioner from conscientiously objecting to providing or participating in a particular kind of health services on the basis of their religious belief or activity …will constitute unlawful discrimination."
> *The second exposure draft of the Religious Discrimination Bill 2019, Explanatory notes s30*

By over-riding the conditions and ethical and employment requirements that require health professionals to maintain standards of patient care, the proposed Bill provides key health practitioners with an absolute right to conscientious objection. The proposed Bill will over-ride professional codes of practice and ethics, policies and accreditation requirements - as where there is a conflict between these standards and the law, the law takes precedence.

Previously, health practitioners have never been guaranteed an absolute right to conscientious objection. Traditionally, the right to conscientious objection has been managed by a substantial body of law, health professional codes of practice, policy and health service accreditation requirements on patients' rights.

The Australian Medical Association (AMA), Australian Nursing & Midwifery Federation (ANMF) and the Pharmacy Guild of Australia have policies and codes of ethics permitting conscientious objection - but also outlining the responsibilities such a stance brings for those health professionals to:

- ensure the patient is informed of the conscientious objection
- refrain from expressing their own personal belief
- treat the patient with dignity and respect
- appropriately facilitate continuity of care for the patient and ensure access to care is not impeded
- not refuse to carry out urgent life-saving measures or procedures

This is because, as stated in the Medical Board's Code of Conduct for Doctors, "Doctors have a duty to make the care of patients their first concern"[5]. For example, the AMA's Position Statement on Conscientious Objection for doctors states the ethical framework within which doctors are expected to act to ensure patient care[6]. It includes the following guidelines:

> 1.3 Conscientious objection cannot be based on self-interest or discrimination
>
> 1.5 Doctors have an ethical obligation to minimise disruption to

patient care and must never use a conscientious objection to intentionally impede patients' access to care.

2.1 A doctor should always provide medically appropriate treatment in an emergency situation, even if that treatment conflicts with their personal beliefs and values.

2.3 A doctor with a conscientious objection should

- 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
- 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

The Medical Board of Australia's Code of Conduct[7] requires doctors to facilitate coordination and continuity of care (s2.1.3) and refer a patient to another practitioner when this is in the patient's best interests (s2.1.5). While upholding a doctor's right to provide or directly participate in treatments to which they conscientiously object the Medical Board requires doctors to inform patients of their objection and not use their objection to impede access to treatments that are legal (s2.4.7).

Where legislation has imposed conditions on doctors' right to conscientious objection, such as the Reproductive Health (Access to Terminations) Act 2013 (Tas), it is in line with this ethical framework. In the case of the Tasmanian Act, a medical practitioner with a conscientious objection has a legal duty to perform a termination in an emergency where there is risk to life or of serious injury. Further, the Act places a legal obligation to provide the woman with a list 'of prescribed health services'. These are services where a woman can seek advice, information or counselling on the full range of pregnancy options, thus ensuring that patient rights are respected. This legislation ensures patients' rights are protected, and access to required treatment is ensured without the objecting doctor directly participating. This framework of coordinated professional ethics and legislation has provided clarity and protection for both patients and doctors around rights and responsibilities and has ensured doctors' rights are balanced with patient care.

Refusal to treat patients based on religious beliefs will not apply only to women seeking a termination. Contraception is against the beliefs of some religions, as is the treatment of pain for the terminally ill. Health practitioners of faith may also refuse to treat patients with HIV, with drug or alcohol addiction, to provide information or referral to IVF treatment, to

provide contraceptives/morning after pills, hormone therapy to treat gender dysphoria, and medication for sexually transmitted infections. In the US, some conservative Christian groups oppose mandatory vaccination for diseases typically spread via sexual contact, arguing the possibility of disease deters risky sexual contact.

Conscientious objection by hospitals and faith-based welfare services

Religious bodies are defined in the proposed legislation as any organisation that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a religion. This means that the right to refuse medically necessary services such as those listed above is also extended to hospitals, health services and welfare agencies run by faith-based organisations.

With significant government outsourcing of public services since the 1990s, faith-based charities are now the country's largest providers of aged and disability care.

Again, this puts at risk the rights and health of marginalised Australians. It also puts at risk Government health policy priorities that use faith-based welfare organisations as the mechanism for reaching hard to reach populations.

6. Section 8 (5) and (6) – conduct rules

The Bill states the conduct rules for health practitioners are "not reasonable", if they prevent a health practitioner from conscientiously objecting on the basis of their religion. A conduct rule is any requirement from an employer or qualifying body relating to the provision of a health service.

The explanatory notes to the Bill give as examples of employer conduct rules requirements to undertake procedures, or provide information, prescriptions, or referrals, related to services such as abortion, euthanasia, contraception or sterilisation[8] – but the implications are far wider.

If this Bill becomes legislation, the owners of health services will be limited in their ability to establish requirements that health practitioner employees abide by professional codes of conduct, provide consistency of service, or provide what is considered evidence-based good medical practice if these codes of ethics or standards of practice are in conflict with an employee's religious beliefs.

Similarly, qualifying bodies (such as universities) or bodies which have professional or registration standards or policies which require people to engage, or not engage, in certain behaviour in order to receive or maintain their qualification or authorisation may be found to be discriminatory if the requirements are not considered reasonable by the courts. The Bill makes it unlawful for a qualifying authority or body to fail to confer or to vary an authorisation on the basis of someone's religious belief or activity based on their religious belief.

It is unclear how regulatory bodies will be able to enforce regulation of health practitioners with this in place. It has been suggested that should this legislation pass the only avenue of recourse to employers would be to take a complaint about their employee to the Australian Health Practitioners Regulatory Authority (AHPRA) but also that doing so would place them at risk of a complaint of discrimination.

7. Religious bodies

The Bill provides that 'religious bodies' – including religious schools, religious charities and welfare organisations, and organisations organised around faiths that deliver commercial services – can discriminate on the basis of religious belief if the discrimination is in good faith and in accordance with their religious beliefs. As the Australian Human Rights Commission has pointed out: "this is a wide exemption that undercuts protections against religious discrimination, particularly in the areas of employment and the provision of goods and services'.

The second draft of the Bill gives religious bodies the right to give preference to persons that share their religion. This preference could be in the receipt of services, meaning that parts of the population could potentially be denied or alienated from services. Religious hospitals, aged care facilities and accommodation providers will also be able to take faith into account in staffing decisions.

This has widespread implications for the delivery of health and welfare services, particularly disability and aged services – much of which is provided by faith-based agencies. It also has widespread employment implications. In Tasmania, for example, around 10,000 workers are employed in the not-for-profit sector, many in faith-based agencies.

The second draft also extends the range of organisations which can claim exemption from religious discrimination. This has now been extended to religious bodies that are registered as public benevolent institutions, meaning that charities whose work is largely commercial are also now included under the scope of the Act.

8. Compromised patient care and justified harm to patients

Patient care should be of primary, not secondary importance

The proposed legislation would create a system where a patient's care is a secondary consideration to that of the health care providers' personal beliefs. This is entirely at odds with the current health care practice of patient-centred care. The National Safety and Quality Health Service (NSQHS) Standards[9] - which all hospitals, day-procedure services and the majority of public community and dental services across Australia are required to implement - clearly outline this in the Partnering with Consumers Standard[10]. The intention of this standard is to create an organisation in which there are mutually valuable outcomes by having:

- Consumers as partners in planning, design, delivery, measurement and evaluation of systems and services; and
- Patients as partners in their own care, to the extent that they choose.

The Bill allows 'justifiable' adverse impacts on patients

Part 2 Section 8 (6)(b) of the Draft describes when a conduct rule is necessary to 'avoid an unjustifiable adverse impact on the health of any person who would otherwise be provided with the health service by the health practitioner'.

The proposed legislation limits the adverse impacts on patients which can't be justified to the extremes of death or serious injury.[11]

The Act therefore does not just permit health practitioners to refuse to perform safe, lawful, medically justifiable treatment that would benefit patients. It introduces the idea that there are *justifiable* adverse impacts on patients. Minor to moderate injury or harm to health or wellbeing affecting patients will be lawful if they occur as a result of the patient's health practitioner exercising their 'right' to 'religious freedom'.

The Bill also allows the expression of beliefs that cause psychological harm to patients.

The Bill does say that it will be unlawful for people to express a religious belief that is promoting or urging conduct that would constitute a serious offence within the meaning of the Criminal Code. The Criminal Code does say it is unlawful to harm other people's mental health. However, the Criminal Code defines behaviour which causes "harm to a person's mental health' as unlawful when it causes 'significant psychological harm'. The Criminal Code expressly states that it 'does not include mere ordinary emotional reactions such as those of distress, grief, fear or anger.'[12]

This means that the proposed Bill would provide protection to people who promote or urge conduct that causes distress, grief, fear or anger to people who are vulnerable to discrimination, if they do so because of their religious beliefs.

9. Section 42 (1) The override of Tasmanian Anti-Discrimination Act

The proposed Religious Discrimination Bill specifically over-rides subsection 17 (1) of the Anti-Discrimination Act 1998 of Tasmania.

The proposed legislation does make provision that statements of belief which are malicious, likely to harass, vilify, incite hatred or violence against another person or group of persons will be considered discrimination. This means discriminatory remarks which are humiliating, even intimidating, but not a call to violence, cannot be the subject of a complaint.

Tasmania's Anti-Discrimination Act protects all Tasmanian citizens from being subjected to offensive and therefore damaging behaviour. It is to this higher bar that any anti-discrimination or human rights legislation should be raised.

The Tasmanian Act provides the ability to speak about issues of faith. The Tasmanian Supreme Court has found that Section 17(1) does not infringe free speech or freedom of religion. James Durston, the author of an anti-gay flyer found by the Anti-Discrimination Tribunal to have breached section 17 and section 19 (incitement to hatred) of the Anti-Discrimination Act 1988 (Tas) appealed to the Supreme Court on the grounds that his free speech and freedom of religion were being infringed. Justice Brett found that sections 17 and 19 do not infringe these rights, and that they are valid under the Australian Constitution. He also concluded that freedom of religion and freedom of speech are not unfettered rights, and the Tasmanian Anti-Discrimination Act strikes the right balance between these rights and right of citizens to live free from hate.[13]

Section 17 (1) of Tasmanian Anti-Discrimination Act is not open to a subjective interpretation of offence, humiliation, intimidation, insult or ridicule. Section 17(1) does not simply allow someone to complain because they feel offended. Whether someone is "offended, humiliated, intimidated, insulted or ridiculed" must be something that would be anticipated by "a reasonable person". There are a growing number of court decisions establishing what a reasonable person would anticipate.

These are cited in the Tasmanian Supreme Court decision on Durston (discussed above).

It has been pointed out by commentators that this is a risky way for the over-ride to be framed as future Tasmanian Governments could introduce a new subsection reinstating the provision. The only effective way for the Australian Government to protect the over-ride would be to clearly state the legislation's real intention; statements made on the basis of religious belief which offend, humiliate, intimidate, insult or ridicule people vulnerable to discrimination are permissible under this Bill.

10. The impact on women and minority groups

The second draft of the Bill has removed the capacity of health practitioners to refuse to provide service to patients on the basis of their attributes (eg identity, religion, gender). With this iteration of the Bill, health practitioners can only conscientiously object to a procedure, and must refuse to provide that treatment/procedure to all members of the community for the objection to be considered genuine. The example given is that a practitioner could not refuse to provide contraception to unmarried women, they would have to refuse to provide contraception to all women.

This ignores the fact that certain procedures and treatments are highly gendered, or specific to particular population groups. It is only women who seek regular and emergency contraception, the termination of unwanted pregnancies and IVF treatments. It is only trans people who require hormone treatment for gender dysphoria.

It also creates an impossible situation for patients, doctors and health services. For example, a doctor refusing to provide the feminising hormone treatment for transgender women will also presumably have to refuse it to all patients, who may need it to treat the symptoms of menopause, high blood pressure or chronic heart failure.

11. Conclusion

In view of the serious concerns with the Bill, and the harm and social divisions it could cause, Women's Health Tasmania calls on the Government to withdraw this Bill and to introduce legislation designed purely to protect religious belief and activity (including having no religious belief or refusing to engage in religious activity).

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[12] Definition of 'harm' https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/ProtectingMinorsonline/Report/c02

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