Submission to the Attorney General's Department
regarding the "Religious Freedom Bills", second exposure drafts

From: Australian Lesbian Medical Association (ALMA), an NGO with special consultative status at the Economic and Social Council (ECOSOC) of the United Nations.
Date of submission: 28 January 2020

Introduction

The Australian Lesbian Medical Association (ALMA) is pleased to make a submission as part of the public consultation process in relation to the Department's package of three draft Bills that described collectively as the 'Religious Freedom Bills'.

The Religious Freedom Bills ("the Bills") comprise second exposure drafts of the:

- Religious Discrimination Bill 2019 (Cth) (the Bill)
- Religious Discrimination (Consequential Amendments) Bill 2019 (Cth) (the Consequential Amendments Bill)
- Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 (Cth) (the Freedom of Religion Bill).

ALMA is a support network for Australian and New Zealand doctors and medical students who identify as lesbian and same sex attracted women. ALMA is committed to creating a better medical profession for our current and future members and improving health outcomes for lesbian and same sex attracted women generally. ALMA seeks to bring about this change through local and international advocacy and improving Australian health policy and practice in relation to lesbian and same sex attracted women's health needs and eliminating and fighting discrimination and homophobia in all forms.

Preamble

First and foremost, we wish to emphasize our support for Article 18 Of the Declaration of Human Rights that "everyone has the right to freedom of thought, conscience and religion."[i]

Our submission regarding the proposed Religious Discrimination Bills refers primarily to doctors and healthcare and the grave concerns we hold for the potential impact of the Bills on the provision of otherwise legal health services to vulnerable people should these Bills be enacted. We do not believe the Bills appropriately balance the healthcare provider's right to freedom of religion with a patient's right to health (Article 25.1)[1], nor the rights of doctors and other healthcare providers to safe, discrimination free workplaces (Article 23.1)[1].

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It is well accepted within a human rights framework that some rights may need to be limited in the interests of giving effect to the fundamental rights and freedoms of others. We believe the objects of this Bill "with respect to freedom of religion and freedom of expression", are already adequately covered by the Australian Constitution and various State and Federal anti-discrimination legislations. Faith-based organizations already enjoy exemptions to various aspects of these legislations that privilege them over secular ones. Legislation of further rights as outlined in these Bills will have the effect of severely impacting the rights of others to access health care and safe workplaces.

We note also that the Religious Freedom Review 2018 suggested the government "should review [these exemptions], having regard to community expectations." It seems that "community expectations" may differ somewhat to what the Bills propose.

For example, the Panel of the Religious Freedom Review 2018 stated that although they received many submissions "where the right to manifest religious belief was perceived to be under threat" they received only limited evidence "to suggest that the right to freedom of religion is currently being infringed in any of these areas." The Panel further noted that "the human right to freedom of religion, as articulated in the International Covenant on Civil and Political Rights (ICCPR) and other international instruments, provides a broad freedom to people to manifest their faith either individually or in community. However, this aspect of the right may be limited in the interests of giving effect to the fundamental rights and freedoms of others." Such limitations are generally accepted in international law.

We also believe that the stated objective of the Bill to "ensure, as far as practicable, that everyone has the same rights to equality before the law, regardless of religious belief or activity" is negated by the fact the Bill privileges of people of faith over people of any other status in Australian society, in violation of Article 2 of the Declaration of Human Rights.[1] In short, we believe the Bill legislates for natural people with religious beliefs and religious institutions to discriminate at will against other groups who do not align with their religious beliefs, in a very divisive and dangerous way. Human rights legislation usually only extends to natural persons and not to institutions and organizations, so this also runs counter to international law.

A recent story in the Daily Telegraph (20 December 2019) highlights how impossible this Bill will be in practice. When a Muslim Uber driver allegedly refused to take a Christian couple carrying their Christmas ham in his car because it violated his religious beliefs, the spokesperson for the Attorney General, Christian Porter, apparently stated the offended Christian couple, "would be able to take action against the driver under proposed changes to the Religious Discrimination Bill if their allegations were true."

However, considering that eating ham at Christmas is not a religious obligation for Christians, the Christian couple insisting that a private Muslim contractor should allow them into his vehicle with a ham in direct contravention of his religious obligations is discriminatory and legislating in their favour would also seem to also contravene the Australian Constitution, Section 116 that prohibits the Commonwealth from making "any law … for imposing any religious observance, or for prohibiting the free exercise of any religion". Should such a case go to court under this legislation, whose beliefs would be privileged? The Christian or the Muslim? And if one or the other were to win, would that set a common law precedent privileging one religion's beliefs over another's, thereby effectively restricting freedoms of practitioners of the losing religion?

This case is just one example of why we consider this legislation to be gravely unworkable and a genuine threat to the equality of rights of all Australians before the law as expressed in the Australian Constitution, the ICCPR and other international human rights covenants.

The Case for Healthcare

Hippocrates' teachings remain among the central tenets of ethical medical practice. Foremost of these is, "First, do no harm." In *Of the Epidemics*, Hippocrates wrote, "The physician must be able to tell the antecedents, know the present, and foretell the future - must mediate these things, and have two special objects in view with regard to disease, namely, to do good or to do no harm." Modern medicine embodies this concept in the ethical principle of beneficence/non-maleficence, i.e. promoting the wellbeing of patients and preventing illness, while minimizing harm.

Health practitioners, especially doctors, are widely considered by consumers to be objective, scientific and neutral in the practice of their art. However, the existence of physician bias and

its potential for negative impact on health outcomes is well studied. [ii,iii,iv] The right of doctors to conscientious objection is hotly contested among ethicists, with critics arguing that such objections violate patient autonomy, another key ethical pillar of medicine, and unjustly make patients' access to healthcare services dependent on the personal values of individual physicians.[v]

The requirement to refer to a fellow doctor who does not hold a conscientious objection is often cited as the solution to this ethical dilemma, but there remain cases in which some doctors declare this referral is itself immoral. This issue certainly appeared during the 2008 debate on the abortion law reform bill in Victoria. Studies show that doctors remain divided about a professional obligation to refer if they believe the referral is immoral.[vi]

Whether it is in the withdrawal of life support[vii], the provision of contraception, abortion, sterilization, sexual health, fertility services, vaccination or even the provision of pain relief to cancer patients[viii], doctors hold many and varied personal views and values within the broader frameworks of professional ethics and community expectations that create variations in patient outcomes.

Such values and beliefs may be held consciously or unconsciously, and studies show that even culturally sensitive, egalitarian practitioners may apply biases without being aware they are doing so.[ix]

Both patient and practitioner populations in Australia have become increasingly diverse in recent decades. Add to this that every clinical situation is unique, and every consultation presents a unique and often disparate interaction between doctor and patients cultures, values and beliefs, and it is possible to see how often practitioners and patients must negotiate complex clinical decisions without recourse to a shared ethical standard.[x]

Having spent more than a decade teaching and researching to improve medical students', doctors' and other health professionals' understanding of the potential negative impact of their conscious and unconscious biases on patient outcomes in Australia and overseas (KI),[xi,xii,xiii] I have a particular concern about this Bill providing legislative protection to the breadth of

practitioners' disparate values and beliefs regarding patient care under the guise of conscientious objection.

While practitioners may believe they genuinely and rightly hold certain beliefs, there is no objective means of determining whether they are genuine or just a matter of convenience.[xiv] And even if they are genuinely held beliefs upheld by peers of the same faith (Subclause 5.1), why should that constitute a sound reason for randomly refusing access of certain persons to otherwise legal health services? Why should their actions not be judged by their healthcare peers as they would in the case of any other patient outcome issue?

Ethicists argue that in a secular, liberal democracy there is no reasonable conscience-based cause to allow practitioners to refuse healthcare services to patients and that, "conscience clauses today are by and large a concession of special rights to Christian healthcare professionals."[xv] [xvi]

This section highlights another weakness of this bill, also noted by the Human Rights Commission's September 2019 submission on the first exposure draft: the poor definition of "religion". The HRC noted, "The scope of the Bill is overly broad in defining who may be a victim of religious discrimination and, arguably, too narrow in defining who may be found to have engaged in religious discrimination."

With regard to conscientious objection, the validity of a practitioners' conscientious objection will be judged by "a person of the same religion [who] must be able to reasonably consider that the objection is in accordance with the doctrines, tenets, beliefs or teachings of that religion … [where] the relevant 'religion', in this sense, is the denomination, sect, stream or tradition to which person adheres." (Explanatory notes, Second Exposure Draft, 2019)

Various religious sects hold beliefs that run counter to accepted, evidence based medical practice. Scientologists don't believe in psychiatry or vocalization during childbirth; Jehovah's Witnesses don't believe in blood transfusions or transplants; some Hindu sects believe pain is karma[xvii], other cultures believe epilepsy is demon possession. [xviii]

Over 60 vaccine-preventable outbreaks in religious settings have been described due to vaccine refusal, and in these cases the relevant scriptural passages were not interpreted uniformly by each believer within a faith tradition.[xix]

Others have listed examples of areas in which this Bill may potentially inhibit access to health services for certain populations, especially LGBTIQ people, people with disabilities or psychiatric illnesses, youth, and people living in rural and remote areas. While the Bill purports to prevent a practitioner applying this objection refusing "to provide a particular kind of health service, or health services generally, to particular people or groups of people", the Bill thus places and undue onus on the patient refused treatment to firstly understand why they have been refused a service, to prove it and then seek redress under a further anti-discrimination legislation such as the Sex Discrimination Act 1984.

The Explanatory notes state at 184, "It is not intended that this provision would allow health practitioners to exercise their conscientious objection in a manner which directly affects the patient, causes disruption to patient care or intentionally impedes patients' access to care." However, we already know through the processes of abortion law reform in various State jurisdictions that there are myriad examples of practitioners, especially in rural communities, subverting women's access to timely abortion services without declaring their conscientious objection. It seems from these notes (185) a person must die or have a serious injury before a conscientious objection can be said to have had an "unjustifiable adverse impact". This ignores the already strong evidence of the negative mental health outcomes experienced by minority populations such as young women unable to access contraception or abortion services or the LGBTIQ community through poor access to healthcare due to stigma and discrimination.[xx]

Of particular concern to us is the potential detrimental impact of the Bills in rural areas for both patients and doctors belonging to marginalised populations, especially LGBTIQ identified people.

Rural patients have reduced access to health professionals and disproportionately risk being discriminated against on religious grounds due to gender or sexual orientation by conservative doctors and other healthcare providers. This is magnified in small communities where patients

may be less likely to be open about their sexual or gender orientation due to fear of being outed and exposed to homophobia. [xxi]

Potential areas of discrimination by doctors of faith may include refusal of STI screening, fertility treatment for same sex couples, unmarried women, or patients who have sex before marriage. A US study found that in states where it was legal to discriminate against same sex couples the rates of mental distress (rates of depression, emotional problems and anxiety) was higher compared to states where it is illegal to discriminate on the basis of sexual orientation.[xxii] A 2010 study showed that LGBTIQ students in rural settings found that up to 25% had attempted suicide compared to 15% of urban students.[xxiii] The association between suicide and minority stress in LGBTIQ people is well known.[xxiv] The Bills have the potential to increase this suicide risk.

The Bills would also have a detrimental impact on the experiences of LGBT doctors, especially in rural areas. Doctors and medical students who identify as sexual or gender minorities have reported discrimination in the workplace[xxv], including being denied referrals, social ostracizing and harassment.[xxvi] They have also observed discriminatory care towards LGBTIQ patients and their families and LGBTIQ co-workers.[xxvii] The potential for the Bills to allow discrimination based on religious grounds can only exacerbate feelings of alienation.

LGBTIQ doctors and health workers may also be subject to discrimination by publicly funded, faith-based hospitals and healthcare services. This may include nursing homes, hospitals, community and mental health services and even private corporations or practices with a religious ethos. As with patients, LGBTIQ doctors and other health workers living in rural areas may have limited opportunities to choose a workplace that is affirming and accepting of them.

A current AMA position statement already protects the rights of doctors "to refuse to provide or to participate in certain medical treatments or procedures based on a conscientious objection" on the proviso that they respect the "ethical obligation to minimize disruption to patient care and must never use a conscientious objection to intentionally impede patients' access to care." [xxviii] This protection alone already creates barriers to care for patients seeking access to otherwise legal medical services such as abortion, contraception and sexual health in areas with limited services, and the Bills can only compound this problem.

The experience of stigma due to disclosure of sexuality or gender identity is known to reduce the use of preventive and primary health services with consequent poor health outcomes.[xxix] Stigma can be anticipated (fear of future discrimination), enacted (direct experiences of discrimination) and internalized (stigma based on devalued conception of self due to sexual or gender orientation). The Bills have potential to exacerbate all forms of stigma with inevitable negative impacts on health outcomes in an already marginalized population.

In Summary

It seems clear that this Bill has been written through a lens that privileges Judeo-Christian beliefs over others with little thought for the pluralism of religious belief in Australia or any respect for those who hold no such beliefs.

Further, the Bill appears to assume that conscientious objections will only be held about certain services such as reproductive health and end of life care, again reflecting certain Judeo-Christian beliefs. This is a nonsense in a pluralistic environment when the breadth of faith-based conscientious objections of individual practitioners are impossible to identify and police.

There are no measurable limits placed on what might be called a conscientious objection if a peer from the same faith or sect agrees that it aligns with those tenets. There is no allowance for a conscientious objection to be advertised to consumers or declared during a consultation, and no allowance for professional peer oversight of the outcomes of refusing certain treatments in certain populations.

Of particular concern is the potential of the Bills to increase discrimination and negative health outcomes in already marginalized populations, including LGBTIQ patients, doctors and other health workers.

We call on Parliament to reject this Bill in its entirety, but with particular regard to the potential for this Bill to increase social inequalities, especially in the provision of healthcare to vulnerable people through the allowance of unlimited conscientious objection to individual practitioners.

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All Australians are entitled to receive uniform service delivery from healthcare professionals. All healthcare professionals deserve the right to work in a safe and non-discriminatory environment. Australians must not be subjected to a conscientious objection lottery.

Thank you for considering our submission

Yours sincerely

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