February 2015

EXECUTIVE COMMITTEE BRIEFING NOTE

TOPIC: Professional Obligations and Human Rights – Consultation Report & Revised Draft Policy

FOR DECISION

ISSUE:

- The draft *Professional Obligations and Human Rights* policy was released for external consultation on December 10, 2014. The consultation remains open, and is scheduled to close on February 20, 2015.
- The Executive Committee is provided with a report on consultation feedback received to date, and proposed revisions made by the Working Group in light of this feedback.
- The Executive Committee is asked whether the revised draft policy can be forwarded to Council for consideration for final approval.

BACKGROUND:

- A Working Group[1] was struck to lead the review of the College's current *Physicians and the Ontario Human Rights Code* policy (attached as Appendix 1).
- The policy, which was first approved by Council in September 2008, articulates physicians' existing legal obligations under the Ontario *Human Rights Code* (the "*Code*"), and the College's expectation that physicians will respect the fundamental rights of those who seek their medical services.
- Of particular interest among physician members, organizational stakeholders, members of the public and media, is the section of the policy that addresses the College's expectations in circumstances where physicians limit the services they provide on moral or religious grounds. Such objections are commonly referred to as "conscientious objections".

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[1] The Working Group consists of Dr. Marc Gabel (Chair), Dr. John Watts, Dr. Barbara Lent and Ms. Debbie Giampietri. Dr. Gena Piliotis (Medical Advisor) and Sayran Sulevani (Legal Counsel) also support the Working Group.

- The policy review process was informed by an extensive research review, which included: a comprehensive literature review with particular emphasis on conscientious objection in the health services context; a jurisdictional comparison of positions taken by key external stakeholders, including those of other regulators within Canada and internationally; a broad preliminary consultation on the current policy; and a public poll of a representative sample of Ontarians.

- Based on research undertaken, feedback received through the preliminary consultation, and public polling results, the Working Group developed a draft policy entitled *Professional Obligations and Human Rights*.

- The draft policy was approved for external consultation at the December 2014 meeting of Council.

CURRENT STATUS:

- The Working Group has considered all consultation feedback received to date. The vast majority of this feedback focuses on the issue of conscientious objection, or where physicians limit the care they provide on moral or religious grounds. The tone and content of this feedback echoes that received during the preliminary consultation period.

- Any further substantive feedback received prior to the close of the consultation period will be incorporated for Council's consideration. Given the consistency of feedback received to date, the Working Group anticipates that the core expectations of the draft policy will remain unchanged.

- The Executive Committee is provided with a report on the consultation feedback received to date, and a summary of revisions made to the draft policy in light of this feedback.

A. Report on Consultation

Consultation process

- Invitations to participate in the consultation were sent via email to a broad range of stakeholders, including the entire CPSO membership and key stakeholder organizations. In addition, a general notice was posted on the CPSO's website, Facebook page, and announced via Twitter. It was also published in *Dialogue* and *Noteworthy* (the CPSO's public e-newsletter).

- Stakeholders were given the option of submitting their feedback in writing, via email or regular mail, via a brief online survey, or by posting comments to a consultation-specific discussion page.

Number of responses

- To date, 727 submissions have been received in response to this consultation. This includes 324 comments either submitted by mail or posted to the online discussion page, and 403 completed online surveys.

- Approximately 53% of respondents have identified themselves as members of the public, 36% as physicians or health care practitioners, 10% as "other" or "anonymous" and <1% as organizations[2].

Summary of Feedback Received

- Overall, the majority of consultation respondents indicate that the draft policy clearly articulates physicians' legal obligations under the Ontario *Human Rights Code*, and the College's expectations of physicians who limit the health services they provide due to clinical competence, or due to their personal values and beliefs.

- As in the preliminary consultation, feedback focuses predominantly on the section of the draft policy that addresses the College's expectations in circumstances where physicians limit the services they provide on moral or religious grounds. This issue draws polarized perspectives.

- The vast majority of consultation respondents are proponents of freedom of conscience, and the idea that physicians should not have to provide services that conflict with their moral and/or religious beliefs. A vocal minority of consultation respondents argue that patients should not be impacted by an individual physician's personal persuasions.

- An overview of feedback received is provided below. The feedback is organized by section of the draft policy.

The Duty to Accommodate

- Respondents recommend that the policy include examples of circumstances where a physician's legal duty to accommodate would be limited due to the "undue hardship" the accommodation would cause.

[2] The organizational respondents to date are as follows: Christian Medical and Dental Society (CMDS); Renfrew Victoria Hospital - Regional Assault Program; and Canadian Disability Alliance.

Limiting Health Services for Legitimate Reasons

i) Clinical Competence

- Respondents commented that this section should expressly state that clinical competence and/or scope of practice must not be used as a means of unfairly refusing patients with complex care needs.

ii) Moral or Religious Beliefs

Respecting Patient Dignity

- Several respondents expressed concern that physicians, who are unwilling to provide certain elements of care due to their moral or religious beliefs, must inform their patients that the objection is due to personal and not clinical reasons. Respondents argue that a clear line cannot be drawn between the two.

Ensuring Access to Care

- The draft requires that physicians, who are unwilling to provide certain elements of care due to their moral or religious beliefs, refer the patient to another health care provider. The vast majority of consultation respondents to date, who are also supportive of conscientious objection, equate providing a referral to performing the procedure in question, and therefore oppose this requirement.

- Certain respondents recommended that the referral requirement be expanded to permit referrals to an agency or resource. The prospect of referring to an agency was considered more palatable to some as compared to providing a referral to an individual physician/health care provider.

- Several respondents were of the opinion that a referral should not be necessary where a treatment/procedure is publically available and accessible by self-referral.

- Respondents also recommended that the policy include examples of an effective referral, particularly what is meant by an "available" and "accessible" physician or other health-care provider.

Protecting Patient Safety

- Many respondents expressed concern regarding the broad scope of the requirement that physicians provide care that is urgent or otherwise necessary to prevent imminent harm, suffering, and/or deterioration, even where that care conflicts with their religious or moral beliefs.

- Respondents recommended that further detail around the degree/type of harm, suffering and/or deterioration that would trigger this requirement be included in the draft policy.

B. Revisions in Response to Feedback

- All of the feedback received to date has been carefully reviewed by the Working Group.

- The Working Group has made revisions to the draft policy in response to the feedback. A track changes version of the draft policy, highlighting the specific revisions made, is attached as **Appendix 2**. The revised draft policy is attached as **Appendix 3.**

Key Revisions and Additions

1. In order to enhance the clarity and flow of the policy, minor editorial changes have been proposed.

2. In order to ensure the language used throughout the policy mirrors that of the Ontario *Human Rights Code*, the term "equitable" has been replaced with "equal" in instances where the *Code* is directly referenced.

3. A footnote has been added to the Clinical Competence section of the policy to indicate that physicians must not use clinical competence or scope of practice as a means of unfairly refusing patients with complex health care needs or patients who are perceived to be otherwise difficult. This expectation originates from the College's *Accepting New Patients* policy.

4. Despite objection from consultation participants, the working group has elected to maintain the requirement that physicians, who are unwilling to provide certain elements of care due to their moral or religious beliefs, refer the patient to another health care provider. This requirement has been expanded to allow physicians to also refer the patient to an agency that will coordinate and/or provide the treatment/service to which the physician objects.

    - The Working Group is of the opinion that the referral requirement strikes an appropriate balance between physician and patient rights, while ensuring patient access to care is not impeded. Further, public polling conducted to capture public sentiment on conscientious objection indicates that the vast majority of Ontarians (87%) support a referral requirement in this context.

5. The requirement that physicians provide care that is urgent or otherwise necessary to prevent imminent harm, suffering, and/or deterioration, even where that care conflicts with their religious or moral beliefs, has been revised. This

language has been narrowed to clearly signal that the requirement applies only in emergency situations.

Substantive comments that were not incorporated into the policy

1. The Working Group considered feedback received on the perceived challenge of categorizing an objection as either personal or clinical. After careful review, the Working Group determined that it is possible to distinguish clinical objections from those that are personal, and therefore elected to leave this section of the policy unchanged.

2. The Working Group decided not to qualify the referral expectation in circumstances where the treatment/service to which the physician objects may be available to the patient through self-referral. This decision was made to avoid placing the onus on the patient and to ensure timely access to care.

ADDITIONAL CONSIDERATIONS:

- In order to provide further elaboration on key policy concepts, the Working Group has elected to develop a companion FAQ document. This document will include:
    - Circumstances where physicians may legitimately limit their practice due to their own clinical competence;
    - Examples of how physicians can satisfy the "effective referral" requirement, where they choose to limit the services they provide on moral or religious grounds;
    - Circumstances that would require physicians to provide emergency treatment, despite the fact that the treatment may conflict with their religious or moral beliefs;
    - An explanation for the membership that non-compliance with the policy will be considered in accordance with the College's duty to serve and protect the public interest;
    - Elaboration upon what is meant by "promoting religious beliefs; and
    - Examples of circumstances where a physician's legal duty to accommodate may be limited due to the "undue hardship" the accommodation would cause.

NEXT STEPS:

- As the consultation is still ongoing, any further feedback or revisions received prior to the close of the consultation period will be considered by the Working Group, and incorporated into the Council meeting materials.

- Should the Executive Committee recommend that the draft policy be sent to Council for final approval, it will be considered by Council at its March 2015 meeting.

- Should Council approve the policy, as revised, it will be published in *Dialogue* and will replace the current version of the *Physicians and the Ontario Human Rights Code* policy on the CPSO website.

- All stakeholders who responded to the consultation will receive a copy of the new policy, along with a letter thanking them for their participation.

DECISIONS FOR EXECUTIVE COMMITTEE:

1. Does Executive Committee have any feedback on the revised draft *Professional Obligations and Human Rights* policy?

2. Does Executive Committee approve the revised draft *Professional Obligations and Human Rights* policy?

CONTACTS: [redacted]

DATE: January 28, 2015

Attachments:

Appendix 1: Current Policy, Physicians and the Ontario Human Rights Code
Appendix 2: Revised Draft Policy, Professional Obligations and Human Rights (with track changes)
Appendix 3: Revised Draft Policy, Professional Obligations and Human Rights