23 March, 2015 NUMBER 75/15

COLLEGE OF PHYSICIANS AND SURGEONS

OF SASKATCHEWAN

TO COUNCIL

FROM: Registrar

SUBJECT: Draft Policy - Conscientious Refusal - additional information from Ontario College

For Your Decision

M E M O R A N D U M

DATE: March 23, 2015
TO: Council
FROM: Bryan E. Salte
RE: Draft Policy – Conscientious Objection

1. Decision Required

This is supplemental to Infos. 38 and 73_15 which were distributed in relation to the draft policy on conscientious refusal.

2. Attached documents

Info 73_15 referenced two documents which I expected to receive from the College of Physicians and Surgeons of Ontario.

The briefing note to the Ontario Council is attached. The information in that document includes information about the public consultation in which:

1) 94% of the respondents stated that physicians should be required to provide patients with information about treatment or procedure options
2) 92% of respondents stated that physicians should be required to identify another physician who will provide the treatment, and advise the patient to contact them
3) 87% of respondents stated that physicians should make or coordinate a referral to another physician who will provide the treatment.

The consultation response from the Ontario Human Rights Commission is attached. Among the statements made in the document are two recommendations:

> **The OHRC recommends** that the CPSO's policy should clarify that physicians who limit their services because of moral or religious beliefs must make sure patients get the services they need in a timely way including referrals to other physicians when appropriate and necessary.

The OHRC also recommends that the CPSO's policy should require physicians who work in settings alongside other physicians, such as hospitals, clinics and shared service practices, to inform administrators and fellow physicians of any limits on their service because of moral or religious beliefs in order to manage and prevent any potential discriminatory impact on patients.

COUNCIL 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 between December 2014 and February 2015.
- Council is provided with a report on the consultation and the proposed revisions made to the draft policy in response to the feedback received.
- Council is asked whether the revised draft policy can be approved as a policy of the College.

BACKGROUND:

- A Working Group 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".
- 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:

- Council is provided with a report on the consultation, and a summary of revisions undertaken in response to the feedback received.

A. Report on Consultation

Consultation process

- The consultation was held from December 10, 2014 to February 20, 2015.

- 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

- In total, 3105 submissions have been received in response to this consultation. This includes 2208 comments either submitted by mail or posted to the online discussion page, and 897completed online surveys.

- Responses are tabulated as of the Council material submission date of February 11, 2015. An updated consultation report, including the final count of responses, will be provided at the March 2015 meeting of Council.

- Approximately 78% of responses are from members of the public, 14% from physicians or health care practitioners, 7% from "other" or "anonymous" and <1% from organizations[1].

[1] The organizational respondents to date are as follows: Christian Medical and Dental Society (CMDS); Renfrew Victoria Hospital - Regional Assault Program; Immanuel United Reformed Church; Alliance for Life Ontario; Queenship of Mary Community; Catholic Organization for Life and Family; Catholic Civil Rights League; Pro Life Movement; Canadian Disability Alliance; and Saskatchewan Pro-Life Association. Some organizations provided feedback through the online survey as well as in written form.

Summary of Feedback Received

- 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.

- The vast majority of consultation respondents are proponents of freedom of conscience, and argue that physicians should not have to provide services that conflict with their moral and/or religious beliefs.

- A vocal minority of consultation respondents argue the opposite perspective: that patient access to care should not be impacted by an individual physician's moral and/or religious beliefs.

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

The Duty to Accommodate

- Respondents recommended that the draft policy content on the Duty to Accommodate be augmented by including examples of circumstances where a physician's legal duty to accommodate would be limited due to the "undue hardship" the accommodation would cause.

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

Ensuring Access to Care

- The draft policy 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, who are also supportive of conscientious objection, are opposed to this requirement as they consider a referral to be morally equivalent to providing the treatment/procedure in question.

- Some respondents recommended that the referral requirement in the draft policy be expanded to permit referrals to an agency or resource. The prospect of referring to an agency was considered more palatable to some, from a moral perspective, 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 draft policy include examples of an effective referral, particularly what is meant by an “available” and “accessible” physician or other health-care provider.

iii) Protecting Patient Safety

- Many respondents expressed concern with the requirement in the draft policy 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. Those respondents felt the scope of this requirement was overbroad.

- 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 feedback 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**. A clean copy of the draft policy is attached as **Appendix 3.**

Key Revisions and Additions

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

2. In order to ensure the language used throughout the draft 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 draft 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. 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 revised to clearly signal that the requirement applies only in emergency situations, which was the Working Group's original intention.

5. 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.

   Rationale:

   - The Working Group is of the opinion that the referral requirement strikes an appropriate balance between patient and physician rights; reflects the expectations of the Ontario public; and is consistent with the positions of other medical regulators in Canada.

   - The draft policy protects patient rights by ensuring that patients are not prevented from accessing care that is clinically indicated and legally available because a physician objects to that care on moral or religious grounds.

   - Physicians' right to freedom of conscience and religion are respected by not requiring physicians to provide care that is clinically indicated and legally available but contrary to their religious or moral beliefs, except in emergency situations.

- In May 2014, the College commissioned a public opinion poll of a representative sample of Ontarians to capture public sentiment on conscientious objection.

- The polling results indicated that Ontarians believe that physicians who object to providing care on moral or religious grounds should be required to:
    - Provide patients with information about treatment or procedure options (94%)
    - Identify another physician who will provide the treatment, and advise the patient to contact them (92%)
    - Make/coordinate the referral (87%)

- The expectations that are outlined in the draft policy to ensure patient access to care are in line with the positions of a number of other Canadian medical regulators:

    - *Quebec:* Where physicians' personal convictions prevent them from prescribing or providing professional services that may be appropriate, the physician must offer to help the patient find another physician.

    - *Saskatchewan:* The expectations outlined in the draft policy, including the referral requirement, align with the position taken by the College of Physicians and Surgeons of Saskatchewan (CPSS) in their draft policy titled Conscientious Refusal. This draft policy has been approved in principle by the CPSS Council, and an external consultation is underway.

    - *Alberta, Manitoba and New Brunswick*: Patients must be offered timely access to another physician or resource that will provide accurate information about all available medical/surgical options to which the physician objects on moral or religious grounds.

<u>Substantive comments that were not incorporated into the draft policy</u>

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:

- Council will receive an update on feedback received from the date of drafting this briefing note to the end of the consultation period at the March 2015 meeting. Any further revisions to the draft policy that are proposed by the Working Group to address this feedback will also be reported to Council at that time.

- 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;
    - Examples of circumstances where a physician’s legal duty to accommodate may be limited due to the “undue hardship” the accommodation would cause; and
    - The impact, if any, of the Supreme Court of Canada’s decision that *Criminal Code* provisions prohibiting physician assisted death are invalid, on expectations set out in the policy.[2]

NEXT STEPS:

- Should Council approve the draft 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.

---

[2] A summary of the Supreme Court of Canada’s decision in *Carter v. Canada (Attorney General)*, 2015 SCC 5, will be provided to Council in a separate briefing note under items for information.

- 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 COUNCIL:

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

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

DATE: February 12, 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

Ontario
Human Rights Commission
Commission ontarienne des
droits de la personne

Ontario Human Rights Commission submission

Regarding

College of Physicians and Surgeons Policy Review: Physicians and the Ontario Human Rights Code

August 1, 2014

Overview

The Ontario Human Rights Commission (OHRC) is making this submission in response to the College of Physicians and Surgeons of Ontario's (CPSO) review of its policy on Physicians and the Ontario Human Rights Code (Code).[1]

The purpose of the CPSO's policy is to help physicians understand their rights and obligations under the Code and to set out the CPSO's expectation that physicians will respect the fundamental rights of individuals and patients who seek medical services.

Under the Code, everyone has a right to equal treatment in services, including receiving healthcare services, as well as in employment, contracts, vocational associations and housing accommodation, without discrimination because of creed, sex, sexual orientation, gender identity, age, marital status and disability, among other grounds. There is no hierarchy of rights.

The ground of creed includes protection from discrimination because of one's religious beliefs and practices. It also protects those who have no creed. There is a duty to accommodate creed and other Code grounds short of undue hardship.

However, the courts have made it clear that no right is absolute; all rights can be limited by the rights and freedoms of others. When two sets of rights compete, there is an obligation to consider each situation in context and look for solutions that aim to respect both sets of rights, as much as possible.

The CPSO's current policy already reflects a number of these principles and much of the input the OHRC provided in its 2008 submission on the CPSO's initial draft policy.[2]

This submission makes several recommendations for clarifying the human rights and obligations that physicians and patients have under the Code. Among these, the CPSO's policy should:

- Reference the new Code grounds of gender identity and gender expression and clarify that the ground "creed" includes religious and other creed-based beliefs and practices and also protects people who have no creed
- Clarify that *prima facie* ("on its face") discrimination under the Code might happen where physicians limit their services because of moral or religious beliefs unless there is a legitimate reason in the circumstances
- Rephrase competing rights principles in regard to the OHRC's Policy on Competing Human Rights and emphasize the aim to respect the importance of both sets of rights
- For physicians who limit services because of moral or religious beliefs, clarify their duties to patients under the CPSO's Practice Guide[3] and under its policy on Physicians and Health Emergencies[4]
- Clarify that physicians who limit their services because of moral or religious beliefs must make sure patients get the services they need in a timely way including referrals to other physicians when appropriate and necessary
- Require physicians who limit their services in settings such as hospitals, clinics and shared service practices, to inform administrators or fellow physicians accordingly to prevent any potential discriminatory impact on patients
- Clarify that organizations such as hospitals, clinics and professional associations also have a duty to accommodate physicians, not just patients; and that the duty to accommodate covers creed and other grounds, not just disability
- Clarify that the duty to accommodate might be limited by undue hardship because of cost, health or safety, or when there is significant interference with the legal rights of others.

Human Rights Code applies

The CPSO's policy appropriately recognizes that physicians must provide medical services without discrimination and cannot make decisions about whether to accept individuals as patients, whether to provide existing patients with medical care or services, or whether to end a physician-patient relationship on the basis of a person's race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status and/or disability.

The OHRC recommends that the CPSO's policy also cite the new grounds of gender identity and gender expression that were added to the Code in 2012 to set out clear protection for transgender and gender diverse individuals. Accordingly, the reference at footnote 2 of the CPSO's policy to the OHRC's previous position interpreting gender identity under the ground of sex is no longer relevant or necessary.

The CPSO's policy also appropriately recognizes that the CPSO itself is obliged to consider the Code when determining whether physician conduct is consistent with the expectations of the profession.

Clinical competence

The CPSO's policy appropriately states that the duty to refrain from discrimination does not prevent physicians from making decisions in the course of practicing medicine that are related to their own clinical competence. This is consistent with a case decided by the Human Rights Tribunal of Ontario.[5]

The CPSO's policy expects physicians to clearly communicate their decision and reason to limit services. This is important so that individuals or patients understand the reason for a physician's decision is based on actual lack of clinical competence rather than discriminatory bias or prejudice. It also provides the opportunity to address any misconceptions.

Religious beliefs and the Human Rights Code

The CPSO's policy appropriately advises that if physicians have moral or religious beliefs that affect or may affect the provision of medical services, they are to proceed cautiously with an understanding of any implications related to human rights.

The CPSO's policy also recognizes that personal beliefs and values and cultural and religious practices are central to the lives of many physicians and their patients.

The OHRC recommends that the CPSO clarify in its policy that personal beliefs and values and cultural practices alone do not necessarily fall within the meaning of "creed" under the Code. Creed does include religious and creed-based beliefs and practices. Code protection based on creed also includes the right of a person to not have a creed, and to be free from pressure to accept or comply with beliefs or practices relating to creed against their choosing.

The OHRC recommends that the CPSO clarify its policy statements on moral or religious beliefs and the Human Rights Code as follows:

Decisions to turn down individuals as patients, to restrict medical services offered, or to end physician-patient relationships, based on a physician's moral or religious beliefs, might be *prima facie* ("on its face") discrimination under the Code depending on the circumstances.

For example: because of their moral or religious beliefs, a physician does not take on an individual as a new patient or provide a treatment within their clinical competence because the individual is transgender. Or, a physician does not advise about birth control options for patients who are unmarried or in same sex relationships. These

actions are prima facie discrimination because of a patient's sex, gender identity, marital status, sexual orientation and / or creed (including freedom from religious pressure).

The physician and any other person or organization responsible would have to show a legitimate reason to justify actions that are prima facie discrimination in the circumstances. They would have to show the following:

- Providing the service would go against the core of the physician's sincerely held creed beliefs and practices
- Refraining from providing the service would otherwise have no significant impact on the patient's legal rights and health care services, and
- Patient access to health care would be facilitated, in an inclusive or seamless way, through referral to another physician for example, with dignity and respect, free from discrimination and harassment or a poisoned environment because of sex, sexual orientation, gender identity, creed (or lack thereof) or any other protected ground under the Code.

The law is becoming more and more clear and there are a number of legal principles that courts have identified when considering cases where equality rights clash with freedom of religion. For example:

- No right is absolute but is inherently limited by the rights and freedoms of others
- In the context of freedom of belief or religion, the freedom to hold beliefs is broader than the freedom to act upon them where to do so would interfere with the rights of others
- The core of a right is more protected than the periphery
- Rights must be interpreted in a context
- Aim to respect the importance of both sets of rights

The CPSO's policy identifies a number of these principles.

The OHRC recommends that the CPSO rephrase the legal principles in its policy having regard for the OHRC's Policy on Competing Human Rights. The OHRC Policy sets out legal principles for reconciling rights along with an analysis and process, based in existing case law, to help parties understand and address their rights and obligations.[6]

The process should be respectful of everyone and the context for each situation is important. For example: in a small town or rural area, or in an emergency situation, there may be limited options for accessing the required healthcare service elsewhere.

College expectations

The CPSO's policy appropriately sets out a number of expectations for physicians who do not accept individuals as patients, limit their practice, or end a physician-patient relationship on the basis of moral or religious belief. These include:

- Communicating clearly and promptly about services the physician chooses not to provide because of moral or religious beliefs
- Providing (and not withholding) information about all clinical options
- Treating patients with respect
- Not expressing personal judgments about the beliefs, lifestyle, identity or characteristics of an individual
- Not promoting one's own religious beliefs
- Advising individuals they can see another physician and in some circumstances helping to make arrangements to do so.

The OHRC recommends that for physicians who would limit services because of moral or religious beliefs, the CPSO should clarify their duties under its Practice Guide[7] and its policy on Physicians and Health Emergencies.[8]

The OHRC recommends that the CPSO's policy should clarify that physicians who limit their services because of moral or religious beliefs must make sure patients get the services they need in a timely way including referrals to other physicians when appropriate and necessary.

The OHRC also recommends that the CPSO's policy should require physicians who work in settings alongside other physicians, such as hospitals, clinics and shared service practices, to inform administrators and fellow physicians of any limits on their service because of moral or religious beliefs in order to manage and prevent any potential discriminatory impact on patients.

Legal duty to accommodate under the Code

The CPSO's policy focuses on the physician's duty to accommodate the disability-related needs of existing patients or individuals short of undue hardship. The policy also recognizes the duty to accommodate may apply to other grounds under the Code.

The OHRC recommends that the CPSO expand this part of its policy to indicate that responsible organizations, such as hospitals, clinics, shared service practices, property owners or management companies and professional associations such as the CPSO, have a duty to accommodate physicians as well.

Also, the CPSO should give examples of the duty to accommodate based on other grounds such as creed, family status and age as well as disability. For example: patients or physicians may need flexibility around scheduling appointments because they cannot make alternative child care arrangements or they need to attend important worship services. Older patients may face unique barriers related to disability or aging in accessing a medical service facility. Similarly, physicians may also need accommodation related to a disability or creed or other ground under the Code.

There is a limit on the duty to accommodate if undue hardship is shown based on cost, health or safety, but this is a high threshold. It may also be limited where there is significant interference with the legal rights of others.[9]

---

[1] See the CPSO's current human rights policy online at http://policyconsult.cpso.on.ca/?page_id=3403
[2] See the OHRC's 2008 submission on the CPSO's draft human rights policy online at http://www.ohrc.on.ca/en/submission-ontario-human-rights-commission-college-physicians-and-surgeons-ontario-regarding-draft-0. Also see the OHRC's related 2008 submission regarding the CPSO's draft policy on establishing and ending physician-patient relationships online at http://www.ohrc.on.ca/en/submission-ontario-human-rights-commission-college-physicians-and-surgeons-ontario-regarding-draft.
[3] See the CPSO's Practice Guide online at http://www.cpso.on.ca/Policies-Publications/The-Practice-Guide-Medical-Professionalism-and-Col
[4] See the CPSO's policy on Physicians and Health Emergencies online at http://www.cpso.on.ca/Policies-Publications/Policy/Physicians-and-Health-Emergencies
[5] In *Finan v. Cosmetic Surgicentre* (Toronto), 2008 HRTO 47 paras 42-50 (CanLII), two transgender women alleged a doctor, who performs elective cosmetic plastic surgery, including on the genitals of both women and men, refused them services because they were trans. One woman was seeking plastic surgery on her labia and the other was seeking breast augmentation. The Tribunal found the trans women did experience *prima facie* discrimination as the doctor denied the surgeries because they were trans. However, the HRTO accepted the doctor's justification that he was not qualified to safely perform the surgeries the trans women were seeking and found there was no expectation that he go get the necessary skills.
[6] See the OHRC's Policy on Competing Human Rights online at http://www.ohrc.on.ca/en/policy-competing-human-rights
[7] Supra, note 3.
[8] Supra note 4. The CPSO's policy on Physicians and Health Emergencies states that, "The College expects physicians to provide medical care during a health emergency". The policy also references the Canadian Medical Protective Association on what is a health emergency: "a possible definition of a health emergency is an urgent and critical situation of a temporary nature that seriously endangers the lives, health and/or safety of the population".
[9] See the OHRC's 2001 Policy and Guidelines on Disability and the Duty to Accommodate online at http://www.ohrc.on.ca/en/policy-and-guidelines-disability-and-duty-accommodate. Also see the OHRC's 2014 Policy on Preventing Discrimination based on Mental Health Disabilities and Addictions online at http://www.ohrc.on.ca/en/policy-preventing-discrimination-based-mental-health-disabilities-and-addictions.