

COUNCIL BRIEFING NOTE

TOPIC: Physicians and the Ontario *Human Rights Code* Draft Policy

ISSUE:

This briefing note provides Council with an overview of the feedback received on the draft Physicians and the Ontario *Human Rights Code* policy. Based on feedback, and the direction of the Executive Committee, suggested revisions have been made to the draft policy.

Council is asked whether it approves the revised draft policy.

BACKGROUND:

- In June 2008, Council released the draft Physicians and the Ontario *Human Rights Code* policy for consultation. The draft policy is attached as **Appendix A**.
- The draft policy does two things: it articulates physicians' existing legal obligations under the *Human Rights Code*, and it sets out the College's expectations of physicians.
- Recent changes to the complaints processes at the Human Rights Commission, along with complaints on human rights received by the College suggest that an explanation of human rights obligations and professional expectations would assist the profession.

CURRENT STATUS:

Consultation

- Consultation on the draft policy commenced the end of June 2008.
- The consultation period was originally intended to close August 15, 2008 however, due to the interest of the profession and the public in the draft policy and media attention, the College extended the consultation deadline to September 12, 2008 to provide all interested parties with ample opportunity to provide feedback.

- The College sent a Notice to the Profession on August 20, 2008, advising physicians of the deadline extension and clarifying a few key points in the draft policy. The Notice is attached as **Appendix B**.
- The College has received feedback on the draft policy from a wide variety of respondents, both from Ontario, and other Canadian provinces. As of September 11th, the College has received over 1300 responses in total. In many instances, however, individuals submitted multiple responses.
- A rough breakdown of the feedback received as of September 11th 2008 is provided here for Council's information. Feedback has been received from:
 - 537 members of the public, 208 of whom identified themselves as Ontario citizens;
 - 304 physicians, 268 are Ontario physicians;
 - 45 organizations, 29 of which are from Ontario;
 - 3 political figures (M.P.'s), 1 of those from Ontario;
 - 14 religious figures, 10 of whom are from Ontario.
- In addition, a form email promoting freedom of conscience, and messages containing slight variations of this form email were received from over 500 members of the public, across Canada.
- Council will be provided with an update on any additional feedback received, at its meeting on September 18th, 2008.
- Feedback on the draft policy has been mixed. Although a number of individuals and organizations have provided positive feedback and voiced support for the draft policy, many respondents have expressed concern, a number objecting strenuously to the draft policy content included under the heading, 'Moral or Religious Beliefs'.

Feedback

- Outlined below is an overview of the general themes contained in the consultation feedback. A chart, providing a summary of the themes raised in the consultation feedback is attached as **Appendix C**.
- The majority of consultation feedback has focused on draft policy content under the heading 'Moral or Religious Beliefs'. Respondents have also provided editorial comments, and feedback on draft policy content on accommodation of disability.

i) Moral and Religious Beliefs

- Responses to this section of the draft policy have been mixed.

Feedback from Key Organizations

- The CMPA advised that we ensure our draft policy accords with the Ontario Human Rights Commission, so that physicians have a clear understanding of their obligations, and can take risk management steps.
- Ontario Human Rights Commission advocated for this aspect of the draft policy to be strengthened further, and the limits to freedom of religion highlighted.
- The College of Physiotherapists of Ontario offered support for this document, and have asked permission to copy it and adopt it as its own policy.
- The College of Physicians and Surgeons of Manitoba provided positive feedback, and indicated that it has been dealing with similar issues, and may amend its Discrimination in Access to Physicians policy (currently in development), to accord with our draft policy, particularly the requirements for physicians to provide information about clinical options to patients, and assist patients in accessing care.
- The Ontario Medical Association's position is that the CPSO should abandon the draft policy. The OMA argues,
 - The draft policy content does not adequately inform physicians that their right to freedom of religion is protected under the *Charter of Rights and Freedoms of Canada*;
 - Since the law related to balancing religious freedoms with equality rights is unclear, the CPSO draft policy has the potential to misstate the law, to conflict with publications of the Human Rights Commission, or to conflict with future case law which may deal with these issues;
 - It is objectionable that under the draft policy physicians could be disciplined for withholding information about procedures or treatments that conflict with their religious or moral beliefs. The OMA believes the vast majority of Ontario physicians will provide patients with appropriate advice without a CPSO policy in this regard.
 - It should never be professional misconduct for an Ontario physician to act in accordance with his or her beliefs.

Debate about Freedom of Religion

- A lot of feedback received on the draft policy has involved a debate over the scope or breadth of the freedom of religion and conscience, guaranteed by the *Canadian Charter of Rights and Freedoms*.

- This debate has primarily been amongst individual respondents: members of the public, religious figures, and physicians. Some organizations who advocate for a pro-life perspective have also entered the debate.
- Respondents who have supported the draft policy argue that although physicians do have freedom of religion and conscience, this freedom does not entitle physicians to refuse to provide medical services to patients or refuse to assist patients or individuals to access medical services.
- Respondents who are opposed to the draft argue the draft policy violates physicians' freedom of religion and conscience.
- They claim that physicians' freedom of conscience is violated because the draft policy forces physicians to perform procedures to which they object for moral or religious reasons.
 - As a point of clarification, the draft policy does not state that physicians are required or compelled to perform procedures they deem to be morally or religiously objectionable.
- Respondents also claim that physicians' freedom of conscience is violated by the expectation that they:
 - discuss or provide information about objectionable medical services;
 - assist patients or individuals who wish to become patients in making arrangements to see another physician.
- Those respondents opposed to the draft policy have also objected to the fact that decisions made on the basis of religious beliefs could be considered discrimination under the law, or that physicians who refuse to accord with the College's expectations could be found guilty of professional misconduct.

Requirement to Assist in Accessing Care

- The draft policy includes an expectation that when physicians feel they cannot provide a service for moral or religious reasons, they must advise patients or individuals that they can see another physician, and in some circumstances, assist them to do so.
- This specific element was highlighted in the Notice to the Profession, sent to the entire membership on August 20, 2008.
- Feedback on this requirement has been provided by physicians, and by other respondents, primarily members of the public.
- The feedback received has been mixed.

- A number of respondents strongly support maintaining this requirement. They argue that arranging for alternate care is essential, is part of providing ethical care and is fundamental in caring for patients.
- Many respondents however, feel that this requirement is inappropriate, and argue that assisting patients or individuals to obtain an objectionable service would render the physician an accomplice to a morally problematic act.

ii) Reasonable Accommodation of Disability

- Respondents provided constructive feedback on this aspect of the draft policy.
- The feedback was aimed at ensuring that the content more accurately reflects the legal duty to accommodate under the *Code* and refers physicians to guidance provided by the Human Rights Commission.

Public Survey

- Due to the interest shown in the subject matter of the draft policy, the Executive Committee directed staff to arrange for a public opinion survey to be conducted on the draft policy's most contentious issues: those related to moral or religious beliefs. The Executive Committee felt the survey results would assist Council in its consideration of the draft policy.
- Environics Research Group conducted the survey, polling a random sample of 500 adult Ontarians. A copy of the survey questionnaire is attached as **Appendix D**.
- A memorandum from Environics detailing the findings of the survey is attached as **Appendix E**.
- Key findings from the survey are as follows:
 1. 85% of participants feel that physicians should not be able to refuse to provide a medical service because the service conflicts with their moral or religious beliefs;
 2. When physicians refuse to provide a medical service for moral or religious reasons,
 - 92% of participants think physicians should communicate clearly to the patient about any service they feel they cannot provide;
 - 91% of participants think physicians should give patients information about all clinical options;
 - 94% of participants think that physicians should tell patients they can see another doctor;

- 91% of participants think that physicians should provide patients with a referral.
- The survey results differ significantly from feedback received from the public via the consultation
- The survey results suggest that the majority of participants would be generally supportive of the draft policy content related to moral or religious beliefs.
- The results indicate that the majority of participants may in fact believe that the draft policy does not adopt a strong enough stance on moral or religious beliefs

Executive Committee's Recommendations

- The Executive Committee considered consultation feedback on this draft policy and proposed suggested policy revisions (listed below).
- With respect to the draft policy content on 'Moral or Religious Beliefs', the Executive Committee's recommendations were aimed at clarifying key messages in the draft policy, and highlighting the distinction between the requirements of the *Code*, and the expectations of the College.

Suggested Policy Revisions

- Based on feedback, and the direction of the Executive Committee, five significant revisions to the draft policy are proposed for Council's consideration and discussion.

1. Throughout the draft policy, replace the word 'potential patients' with 'individuals who wish to become patients'.
2. In relation to draft policy content about Moral or Religious Beliefs, delete the following sentence:

"However, as a physician's responsibility is to place the needs of the patient first, there will be times when it may be necessary for physicians to set aside their personal beliefs in order to ensure that patients or potential patients are provided with the medical treatment and services they require." (page 4, draft policy)

3. Change the title of two sub-headings which relate to draft policy content on Moral or Religious Beliefs:
 - Replace '*Contravention of the Code*' with '*Ontario Human Rights Code: Current Law*' (page 5, draft policy)
 - '*Professional Misconduct*' and replace with '*College Expectations*' (page 6, draft policy)

4. In relation to draft policy content on Moral or Religious Beliefs, amend the last bullet point under *Professional Misconduct/College Expectations*
- Remove the requirement that physicians ‘must ensure arrangements are made without delay for another physician or health care provider’ to take over care of patients or individuals who wish to become patients.

→Amend the bullet point to read:

“Advise patients or individuals who wish to become patients that they can see another physician with whom they can discuss their situation and in some circumstances, help the patient or individual make arrangements to do so.”

5. In relation to Accommodation of Disability, amend draft policy content to more clearly and accurately describe the legal duty to accommodate, as it exists in the *Human Rights Code*.

- In addition to these key revisions, more minor revisions have been proposed to improve the policy’s clarity.
- The proposed revisions have been included in a **revised draft policy** attached as **Appendix F**. The proposed revisions have been highlighted for Council’s convenience and reference.

DECISIONS FOR COUNCIL:

Council is asked to provide direction on the proposed policy revisions, and whether they approve the revised draft policy.

- 1. In relation to the proposed revisions to the draft policy, does Council,**
 - Accept some or all of the 5 proposed policy revisions, as outlined above?
 - Accept the minor proposed policy revisions as highlighted in the draft policy?
- 2. Does Council approve the draft policy, as revised?**

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DATE: September 11, 2008

Attachments

Appendix A: Draft policy, Physicians and the Ontario *Human Rights Code*
Appendix B: Notice to the Profession, August 20, 2008
Appendix C: Chart, Summary of Consultation Themes
Appendix D: Public Survey Questionnaire, Environics Research Group
Appendix E: Memorandum, Environics Research Group
Appendix F: **Revised** Draft policy (includes proposed revisions)