Submission No 31

ANTI-DISCRIMINATION AMENDMENT (RELIGIOUS FREEDOMS AND EQUALITY) BILL 2020

Organisation: Dying with Dignity NSW

Date Received: 20 August 2020

Dying with Dignity
New South Wales

SUBMISSION ON THE
NSW ANTI-DISCRIMINATION AMENDMENT (RELIGIOUS FREEDOMS AND EQUALITY) BILL 2020

ABOUT US

Dying with Dignity NSW (DWD NSW) is a law reform organisation pursuing a change in the law that will enhance self-determination and dignity at the end of life. Our aim is legislation that entitles a mentally competent adult experiencing unrelievable suffering from a terminal or incurable illness to receive medical assistance to end their life peacefully, if that is what he or she wants.

As well as our role in advocacy and lobbying to bring about a change in the law, we promote the use of Advance Care Directives to assist with patient control at the end of life (EOL) and we provide our members with information about changes in the legal climate for EOL, both in Australia and overseas. We are a not-for-profit organisation limited by guarantee and we rely on membership, donations and bequests in order to continue our work.

SUMMARY OF OUR CONCERNS

While being generally supportive of adding religion to the list of "protected attributes" in the NSW Anti-Discrimination Act (**Act**), we have three concerns about the Bill.

The first is that it goes beyond protection of people with a religious belief from discrimination. It would also allow those people the positive right to discriminate against others. The anti-discrimination laws are intended to operate as a "shield", but this would allow them to be used as a "sword" by a particular group.

No other person or group with a "protected attribute" has the right to use that attribute as a "sword".

The second is that we believe the Bill would make it possible, and not unlawful, for a religious ethos organisation (REO) to dismiss or discipline an employee or volunteer who, in their private lives, expressed support for a cause or activity, such as voluntary assisted dying, which was contrary to the teachings of that religion or which offended the "susceptibilities" of adherents of that religion.

The third is that we fear that an REO, such as a hospital, hospice or aged care home, could refuse to offer voluntary assisted dying (if it becomes legal in NSW) to patients who qualify under the eligibility criteria, and worse still, would be able to refuse to refer the person on to a practitioner or organisation that would offer the service.

In this submission we make some preliminary remarks about the thinking that apparently lies behind the Bill. We then point to the sections of the Bill that concern us with respect to the above matters..

GENERAL POINTS ABOUT THE BILL

Rights are said to be universal and indivisible, but in this Bill, religious rights take precedence over all others.

We note that the Principles of the Act make reference to the International Covenant on Civil and Political Rights (ICCPR) and suggest it will be reflected in the Bill, but this is not the case. Article 18(3) of the ICCPR states that "limitations upon a person's right to manifest their religion or belief must only be made where such are necessary to protect public safety, order, health or the morals or the *fundamental rights and freedom of others*." We claim that in provisions of the Bill such as 22M, 22N (9), 22V(6) and 22Z, no check on the right of the REO to do whatever it pleases is proposed.

People without religious belief are not given the same rights as those with religious belief.

In Section 22K of the Bill "religious belief" is said to include (b) "not having any religious conviction, belief, opinion or affiliation", but nowhere else in the Bill is this reflected. If it was genuinely the case that" religious belief" embraces "not having a religious belief" then, logically a secular organisation could represent itself as a REO. In this Bill there is no recognition of the rights of those with no religious conviction. This Bill does not contemplate the possibility that REOs could infringe the human and civil rights of other groups, including those with no religious belief.

The notion of Religious Ethos Organisation (REO) is extremely broad.

In 22K it is defined as a private educational authority or a registered charity or *any other body* that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion. In other words, given the vagueness of the term "religious" you are a

REO if you say you are. And again, the Bill does not envisage any limitation of the ability of REOs to curtail the rights and freedoms of others. The exemptions given to them are absolute.

CONCERNS SPECIFIC TO DYING WITH DIGNITY NSW

Now to move to the issues which most concern Dying With Dignity and its members and supporters.

Employees' freedom of speech

22M says that a REO does not discriminate against a person if its conduct is motivated by its religious convictions. This explicitly includes preferring persons of the same religion in employment. A worrying clause is 22M (1)(b), which talks about the REO's conduct being required because of the *religious susceptibilities of the adherents of the organisation*. This is extremely broad and we see a major problem with it. The clause apparently does not limit or prohibit that ability of an employing religious organisation to refuse to employ or to sack employees who in a private capacity espouse views that are not in accordance with those of the employing organisation. An example would be a nurse in an aged care home who, outside of their employment context, is a member of an organisation such as ours. We believe that, so long as that employee does not advocate for assisted dying while inside the employment situation, their freedom to express their views should not be limited and is an infringement of their civil rights.

Example 3 in the Explanatory Note protects an employee who makes statements opposing voluntary assisted dying (VAD) on religious grounds. However, a person who makes statements supporting VAD may face workplace recriminations if they work for a REO. The right to free speech must work both ways.

Provision of healthcare services

In the absence of protection for employees to freely express their views as outlined above, ability of patients to access medical services such as abortion, birth control and (if legal) assisted dying, would be restricted as doctors and nurses would be reluctant to provide these services for fear of damage to their current or future employment prospects. With a very significant proportion of healthcare services in Australia provided by faith based providers, many healthcare workers depend on this sector for their livelihoods.

The definition of REO should be restricted to organisations whose **principal activities** relate to a particular religion or provision of services to adherents of that religion and the definition more tightly prescribed. Organisations providing services to the broader community or receiving public funding or should be expressly excluded. In particular, hospitals, nursing homes and other providers of healthcare services should not qualify as REOs.

Conscientious objection and the obligation to refer

We agree that there should be a right to conscientious objection for medical practitioners for those who for religious reasons are not willing to participate in voluntary assisted dying in jurisdictions where it is legal. However, in such cases we would strongly advocate for the obligation of the objecting practitioner or healthcare facility to refer the patient to an individual or service which is willing to participate in assisted dying. It is a total dereliction of duty to leave the patient, who is necessarily in a highly vulnerable state, high and dry.

This accords with the *Australian Medical Association's* code of conduct in relation to conscientious objection, which states in clause 1.5 that '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.' Further it states (in clause 2.2) 'A doctor who invokes a conscientious objection to providing or participating in specific treatments or procedures should make every effort in a timely manner to minimise disruption in the delivery of health care and ensuing burden of colleagues and other health care professionals.' Finally (in clause 2.3) it says that such a doctor should 'take whatever steps are necessary to ensure that the patient's access to care is not impeded.'

We refer to the submission made by the Human Rights Law Centre on the Federal Religious Discrimination Bill in which they said the following. "The right of health professionals to freedom of religion must be balanced against the rights of their patients to life, health, autonomy and non-discrimination" as outlined in Section 18 (3) of the ICCPR cited in the preamble to this Bill. They go on: "Health practitioners choose their profession and their speciality and are in a position of power and authority in relation to their patients and the public. This is especially true for doctors who practice in regional and remote locations. Doctors have a duty of care to all their patients, which requires them to act in their patients' best interests. A person can suffer serious physical, mental, financial and social harm if they encounter a doctor with a conscientious objection to providing a health service, especially if that doctor refuses to disclose their objection or provide information or direction about where the patient can go to receive the healthcare they need." Patients at the end of life and who are suffering intolerably do not need the distress of being left without assistance at such a terrible time. Those who live in jurisdictions where assisted dying is legal must be assisted to find the care they are requesting.

We have searched in vain in this Bill for something that addresses this moral imperative. Unlike in the proposed Federal Bill there is nothing in this Bill that explicitly addresses the provision of health services and thus it does not mention the right of a person to refuse to

supply services to a person if those services contravene their religious beliefs, as might be the case if the service sought was legally available VAD.

However, what it does do is elevate the status of REOs and make them virtually unfettered in the extent to which they can impose their views on others. The section on state laws and programs 22Z, is quite worrying. 22z(2) says "a person is taken to discriminate against a religious ethos organisation on the ground of religious beliefs or religious activities if the person requires a REO to engage in conduct … in a manner that is contrary to the doctrines, tenets, beliefs or teaching s of that organisation (a) in the course of performing any function under a Sate law…"

Apart from the oddness of allowing a whole organisation to be the aggrieved party in a discrimination action, it is difficult to guess what the thrust of this section might be. However, it is possible to draw the conclusion that it is there to provide a catch-all device for a REO refusing to carry out procedures such as VAD even where they are legal under state law.

The consequences of whole organisations in the health area being able to opt out of offering health services which are perfectly legal and needed by the community on religious grounds are truly alarming. Given the dominance of religious organisations in sectors such as aged care and palliative care, allowing such organisations to opt out of offering certain services will leave patients who desire and deserve such services high and dry. In effect the REOs are imposing their religious views on the whole community, something which is supposedly outlawed by this Bill.

We argue that a specific clause specifying that an objecting practitioner or healthcare facility should be required to refer the patient onwards or facilitate a transfer to another healthcare facility should be added to the bill.

Contact person:
Dr Elizabeth Jacka
Dying With Dignity NSW
[redacted]