

August 5, 2014

To: College of Physicians and Surgeons of Ontario

80 College Street
Toronto, Ontario M5G 2E2

Re: Request for Submissions on Policy Statement #5-08

To Whom It May Concern:

I wish to begin by thanking the College for asking for feedback and input on the new policy statement #5-08, and not only asking for feedback and input from College members, but also from the general public. The issues of human rights and effective health care are hugely important for society as a whole and decisions made by the College will certainly have implications that go well beyond the walls of doctors' offices.

As a lawyer I focus on questions of constitutional law and public policy. After achieving my law degree at the University of Ottawa, I completed a Master of Laws degree in constitutional law (with a focus on the Fundamental Freedoms found in section 2 of the *Canadian Charter of Rights and Freedoms*) at Osgoode Hall law school in Toronto. I also have an undergraduate honours degree in religion from McMaster University. Therefore, the various issues that come together in Policy Statement #5-08 speak to many of my passions and interests and these various issues are ones to which my expertise can be applied.

I am general legal counsel to the Association for Reformed Political Action (ARPA) Canada. Our organization seeks to engage the Reformed Christian communities in Canada to political engagement, and to apply the truths of the Bible to create sound public policy for our leaders in the public sphere. The issues raised in this submission will inevitably impact our religious communities generally, and will directly affect the many qualified physicians and surgeons (as well as other health care practitioners) who are members of the Reformed Christian communities in Canada.

The Law

I wish to keep this submission brief. I have had the privilege of reviewing the drafts of a number of other submissions, including the in depth legal analysis and recommendations of the Christian Medical and Dental Society and the Canadian Federation of Catholic Physicians' Societies, the constitutional analysis of the Justice Centre for Constitutional Freedoms, the submission of the Christian Legal Fellowship, the submission of Derek B. M. Ross, LL.B., LL.M., and the submissions of various doctors.

As far as legal analysis goes, I cannot improve on what has already been written. All of these reputable organizations and individuals have accurately captured what the law and our Constitution require of the College. I concur with their submissions and in particular agree that:

1. The *Ontario Human Rights Code* (and thus the Policy Statement #5-08) must be interpreted in light of, and are subject to, the *Canadian Charter of Rights and Freedoms*;
2. The *Charter* protects the freedom of religion and conscience of every individual Canadian from the unjust interference of the State and the Supreme Court of Canada has said that this protection is “jealously guarded”;
3. Doctors and surgeons do not lose the protection of the *Charter* simply because they are employed by the State;
4. Doctors and surgeons also benefit from the rights enumerated in the *Code* and the State (which includes the Ontario government and any administrative body it sets up, including the College) must abide by the Code as well;
5. The balancing of rights requires a proper understanding of what rights are actually being engaged. There is no right of a patient to receive any medical treatment they wish from any medical practitioner the patient happens to meet with.

The above legal principles are not simply legal rules that the College must abide by; these legal rules, if followed, will result in better medicine, better health care and better medical research. Ultimately, the College must follow the law as it currently stands for public policy reasons as much as for legal reasons. Allow me then to spend a bit of time discussing those policy reasons.

Public Policy

Liberal political theory was born as an attempt to spare politics and law from becoming embroiled in moral and religious controversies. But this ambition cannot succeed. Many of the most hotly contested issues of medicine, justice, rights and politics cannot be debated without taking up controversial moral and religious questions. As Harvard Professor Michael J. Sandel, one of the leading political philosophers in the world today, wrote in his 2009 book *Justice: What’s the Right Thing to Do?*

In deciding how to define the rights and duties of citizens, it's not always possible to set aside competing conceptions of the good life. And even when it's possible, it may not be desirable.

Asking democratic citizens to leave their moral and religious convictions behind when they enter the public realm may seem a way of ensuring toleration and mutual respect. In practice, however, the opposite can be true. Deciding important public questions while pretending to a neutrality that cannot be achieved is a recipe for backlash and resentment. A politics emptied of substantive moral engagement makes for an impoverished civic life. It is also an open invitation to narrow, intolerant moralisms. Fundamentalists rush in where liberals fear to tread.

Professionals and lay people who disparage or dismiss a religious argument or objection simply because it is informed by a particular religious tradition demonstrate a not-so-subtle form of religious intolerance, bias and sometimes condescension. Consider, for example, the objections to female genital mutilation: some Christian doctors object to the practice on religious grounds – the procedure is cruel, unnecessary and misogynistic, informed by an ideology contrary to God’s design for sexuality. Should the College wade into whether or not a surgeon is objecting to performing the procedure for the “right” reasons, that is, whether or not “secular”, “scientific” or “religious” reasons are used? Obviously not.

The practice of good medicine requires robust discussion and deliberation of multiple perspectives and multiple fields of inquiry, including religion. How else do we get free inquiry? How else do we pursue better medicine, better treatments, better practices? If all doctors must prescribe whatever a patient asks for, as long as it is available on the market, how far would the College be willing to go? Must a physician wait for a study to confirm suspicions of an ineffective and deadly treatment, (and logically to also wait for the resulting government ban) before the physician can stop prescribing certain immunization protocols? Or what of apotemnophilia? Must a surgeon comply with a patient’s request for the surgical removal of an otherwise healthy limb or appendage simply because the patient has a desire to be an amputee?¹ Perhaps a surgeon can only object if the objection is non-religious in nature.

A robust protection of physicians’ conscience rights means better health care. Good medicine requires ethical and clinical judgment on the part of physicians. Remember that doctors are incredibly intelligent and highly trained professionals; they do not make their conscientious objections lightly. Such conscientious objections will dovetail with their medical training and research.

Part of the problem today is the explosion of self-diagnosis. With the availability of the internet, many patients believe they know more than their physicians. (Perhaps watching too many episodes of *House* has something to do with this too – it’s probably not Lupus though.) However, a policy that subjugates a physician’s conscience to the whims and desires of patients only reinforces this trend. It puts the patient’s desires (sometimes based on terribly inaccurate information) above the medical judgment of a physician. While a physician may not impose a course of treatment on a patient without the patient’s consent, neither should a patient impose a course of treatment on a physician, without the doctor’s consent.

¹ Lest the College think I’m being unreasonably extreme, please see Tim Bayne and Dr Neil Levy’s article, “Amputees By Choice: Body Integrity Identity Disorder and the Ethics of Amputation” (2005) *Journal of Applied Philosophy*, 22/1: 75-86 in which they argue that there may be times when amputating perfectly healthy limbs could be morally permissible.

Recommendations

The College's Policy Statement, *Physicians and the Ontario Human Rights Code* must make room for the conscientious objections of physicians to certain medical treatments. In particular, where a patient request is made for a treatment or a procedure that is not immediately life threatening, and where a physician or surgeon objects to the treatment or procedure on conscientious grounds (religiously informed or not), a proper balancing of rights and best practices for effective medical treatment requires that the conscience of the physician must take precedence over the particular desires of the patient.

In cases where a patient desires a non-emergency course of treatment or a medical procedure to which a particular physician objects (on moral, religious or conscientious grounds), the best means by which the College can achieve a balance between the rights of their physicians and the interests of patients is through an online referral system. Such a system would allow Ontario patients to access a list of doctors in their geographical area who could perform the type of procedure or provide the type of treatment that the particular patient prefers.

Ultimately, patients should have the final say in their treatment. Please do not interpret this submission as a call for doctors to force their will on their patients. However, there is a clear line between a patient having the final say in their treatment and patients forcing a particular health practitioner to then be involved in that line of treatment. A patient can get another doctor. No patient should have the right to force a particular doctor to do anything against the doctor's conscience.

I would be pleased to provide further assistance to the College on this matter. I've listed my coordinates below and would happily engage further on this issue should you so desire. Thank you for considering my submissions.

All of which is respectfully submitted,

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