



Protection of Conscience Project

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Revision Date: 2019 Nov 29

Model Protection of Conscience Statute (Model of a hybrid protection of conscience law)

Introduction:

A protection of conscience law can be a general, procedure-specific or hybrid statute.

General protection of conscience legislation offers protection in relation to all procedures or services to which health care personnel might object for reasons of conscience, without specifying them. This provides the broadest and most flexible protection.

Procedure-specific legislation offers protection in relation to specific procedures or services that are acknowledged to be morally controversial, such as abortion or euthanasia. Procedure-specific legislation may be more politically viable, but it is inflexible (unresponsive to new technological developments generating ethical conflicts) and narrow (applying only to the specified procedures).

Hybrid protection of conscience legislation offers protection in relation to certain classes of procedures, services or activities that are acknowledged to be morally controversial. It may attract less opposition than a general law, but more than a procedure-specific law.

The model presented here is a hybrid protection of conscience statute.

Readers will find other approaches to legislative drafting under existing and proposed protection of conscience laws.

An Act to Ensure Protection of Conscience in Health Care

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PREAMBLE

WHEREAS freedom of conscience is a fundamental freedom in any liberal, democratic society professing pluralism and tolerance and is recognized in international law and conventions;

WHEREAS the exercise of freedom of conscience is not merely a manifestation of personal preference, prejudice or feeling;

WHEREAS health care personnel have a single conscience that informs both personal and professional judgement, and which must be applied in their daily work;

WHEREAS denying freedom of conscience to health care personnel reduces them to mere functionaries of the state, patient or legal system and prevents the conscientiously informed exercise of professional judgement that is essential in their daily work;

WHEREAS the exercise of professional judgement informed by conscience must translate into the freedom not to participate in practices or activities forbidden - expressly or by implication - by sincerely and deeply held moral or ethical beliefs;

WHEREAS the right of persons to non-discriminatory access to lawful services can be accommodated by facilitating access to the services in a manner that does not require health care personnel to do what they believe to be wrong;

[*the following law is enacted*]

PART I

1. Short Title

This Act may be cited as *The Protection of Conscience Act*.

2. Interpretation

In this act

"**contested service**" means¹ a service in which health care personnel are asked to participate, to which a person objects for reasons of conscience;

"**designated class of services**" means a class of service defined in Part III;

"**employee**" includes² contractors;

"**employer**" includes a manager, supervisor or party to a contract for the delivery of services;

¹ The definition is limited to what follows.

² The definition is not limited to what follows.

"health care personnel"³ includes physicians, pharmacists, nurses, midwives and any person providing medical, pharmacological or nursing treatment or health care;

"human individual" includes a human zygote, embryo, foetus and human individuals who have been born, whether or not they are recognized by law as human beings or human persons;

"participation" includes

- i) prior consultation or planning;⁴
- ii) providing a professional opinion or rendering assistance in order to facilitate a service or make it more effective;⁵
- iii) recommendation or promotion, collaboration, or facilitation by referral or other means;⁶
- iv) counselling or education of persons in a manner suggesting that a service is morally neutral or acceptable;
- v) conduct that would make an individual a party to an offence or civilly liable if a service were a criminal offence or tort;
- vi) providing a service to which a person objects for reasons of conscience.

"patient" includes a lawfully designated substitute medical decision-maker;

"person"⁷ includes any juridical person or plurality of juridical or natural persons acting collectively in or through an identifiable institution, society, association or group, whether incorporated or not;

"reasons of conscience"⁸ means sincere adherence to

- a) religious doctrine or precept, or

³ By virtue of the definition of *person*, this term includes institutions, organizations, etc.

⁴ Consistent with the definition of *participation* used in the American Medical Association policy prohibiting physician participation in executions.

⁵ Consistent with the definition of *participation* used in the American Medical Association policy prohibiting physician participation in executions.

⁶ The focus is on complicity. Referral is offered as an example of facilitation that can reasonably be understood to entail complicity.

⁷ The term includes institutions, organizations, etc.

⁸ The definition includes religious convictions that prohibit participation in certain acts, so freedom of religion is not explicitly identified.

- b) moral or ethical belief, or
- c) philosophical principle

that is understood by the adherent to make it wrongful⁹ to participate in a service.

"service" includes interventions, treatments, procedures, services and activities.

PART II¹⁰

OBLIGATIONS OF HEALTH CARE PERSONNEL

3. Notice to employers¹¹

3(1) Health care personnel must give reasonable notice to employers of religious, ethical or other conscientious convictions that influence their recommendations or practice or prevent them from participating¹² in services that are likely to be requested of them so that employers can accommodate them.

3(2) Notice is reasonable if it is given

- a) at the time health care personnel become employees;¹³ or
- b) having become an employee, as soon as practicable after health care personnel first become aware that a conflict of conscience may arise.

4. Notice to patients

4(1) Health care personnel primarily responsible for management of patient care¹⁴ must give reasonable notice to patients of religious, ethical or other conscientious convictions that influence their recommendations or practice or prevent them from participating in services that are likely to be

⁹ The Act is concerned only with the protection of preservative freedom of conscience: refusing to do what one believes to be wrong.

¹⁰ Part II demonstrates that the legislature has considered not only the fundamental freedoms of health care personnel, but also their obligations to patients.

¹¹ Employers can only accommodate the exercise of freedom of conscience if they are given reasonable notice.

¹² See the definition of *participation*.

¹³ It is not necessary to give notice until after one has been hired.

¹⁴ Not all health care personnel interacting with patients have the competence, authority or relationship with patients that make it necessary for them to give notice or advise them of treatment options.

requested of them so that patients may, if they wish, consult or seek services from other health care personnel.

4(2) Notice is reasonable if it is given

- a) before or at the time health care personnel assume primary responsibility for management of a patient's care; or¹⁵
- b) as soon as practicable after health care personnel who have assumed primary responsibility for management of a patient's care first become aware that a conflict of conscience may arise.

5. Providing information to patients

5(1) Health care personnel primarily responsible for management of patient care¹⁶ must provide patients with sufficient and timely information to make them aware of relevant services so that they can make informed decisions about accepting or refusing treatment or care.

5(2) For the purpose of this section:

- a) Sufficient information means diagnosis, prognosis and a balanced explanation of the benefits, burdens and risks associated with each service.
- b) Information is timely if it is provided so as to enable interventions that are most likely to cure or mitigate the patient's medical condition, prevent it from deteriorating further, or avoid interventions involving greater burdens or risks to the patient.
- c) Relevant services include all legal and clinically appropriate services that may have a therapeutic benefit for the patient, whether or not they are publicly funded,¹⁷ including the option of no services or services not recommended by health care personnel.

5(3) Health care personnel who are unable or unwilling to comply with this section¹⁸ must

¹⁵ While it may be possible to recognize that a conflict may occur when a patient is first taken on, that is not always the case

¹⁶ Not all health care personnel interacting with patients have the competence, authority or relationship with patients that make it necessary for them to give notice or advise them of treatment options.

¹⁷ An appropriate therapeutic option ought to be disclosed even if it is not publicly funded.

¹⁸ i.e., unable or unwilling to provide information.

promptly arrange for a patient to be seen by other health care personnel who can do so.¹⁹

6. Exercise of freedom of conscience

- 6(1) In exercising freedom of conscience, health care personnel must adhere to the requirements of Sections 4 and 5.²⁰
- 6(2) Health care personnel who decline to participate in services for reasons of conscience must²¹
- a) advise affected patients that they may seek the contested services elsewhere;
 - b) when appropriate,²² communicate to a person in authority a patient's request for a complete transfer of care so that the person in authority can facilitate the transfer;
 - c) upon the request of an appropriate person in authority or the patient, transfer the patient's records to someone designated by the person in authority or patient.²³
- 6(3) Health care personnel may, upon request, if consistent with their convictions,²⁴
- a) provide a referral; or
 - b) arrange for a transfer of care to other health care personnel; or
 - c) provide contact information for a person, agency or organization that provides or facilitates service sought by a patient; or
 - d) provide general, non-selective information to facilitate patient contact with other health care personnel or sources of information about the service sought by the patient.

¹⁹ i.e., provide information.

²⁰ The Act specifies the minimum obligations of health care personnel. Regulators and professional associations may provide additional guidance not inconsistent with the Act, such as an obligation to provide what assistance the objector is professionally and ethically able to offer.

²¹ The Act specifies the minimum obligations of health care personnel. Regulators and professional associations may provide additional guidance not inconsistent with the Act, such as an obligation to provide what assistance the objector is professionally and ethically able to offer.

²² The situation is most likely to arise in an institutional setting.

²³ The transfer is initiated by a person in authority or patient, not by objecting health care personnel.

²⁴ What follows is a range of options that can be considered by objecting health care personnel, who are free to choose options that are consistent with their convictions.

6(4) In acting pursuant to subsection (2) or (3) above, health care personnel must continue to provide treatment or care unrelated to the contested service unless health care personnel and patient agree to other arrangements.

6(5) Health care personnel unwilling or unable to comply with this section²⁵ must promptly arrange for a patient to be seen by other health care personnel who can do so.

7. Non-abandonment

7(1) Subject to subsection (2), when a patient is imminently likely to suffer death or permanent serious injury if a service is not immediately provided,²⁶ health care personnel must

- (a) if no competent and willing health care personnel are available, participate in such services that are within their competence, including contested services; or
- (b) immediately arrange for available competent and willing health care personnel to provide such services, including contested services.

7(2) This section does not apply when the service intended to prevent imminent death or imminent permanent serious injury to one person has been or is likely to be facilitated by a contested service resulting in the death or serious permanent injury of another person.²⁷

PART III

DESIGNATED CLASSES OF SERVICES

8. Designated classes of services; definitions

8(1) In this Act, a service falls within a designated class of service if it involves

- a) control or manipulation of the human genome, human genetic material, human fertility, human sexual response or human birth;
- b) human experimentation or transformation;
- c) causing human death;

²⁵ Unwilling/unable to give notice, unwilling/unable to give information, unwilling/unable to tell patients they may seek assistance elsewhere, or unwilling/unable even to provide general information about how to find other health care personnel.

²⁶ i.e., in an emergency.

²⁷ The exception addresses the possibility that the emergency provision could be used to compel participation in organ transplantation using organs obtained by morally contested procedures causing death or serious permanent injury, such as euthanasia, execution or organ purchase.

- d) oppressive activities such as coercive interrogation, force-feeding or torture;
- e) dishonesty, including lying, deception, falsification or deliberate misrepresentation;
- f) the storage, handling, transfer, sale, barter, or giving of human tissue or genetic material obtained by (a) to (e) in this subsection

8(2) In this Section,

"causing human death" means, by an act or omission, deliberately causing or facilitating the death of a human individual, with or without the individual's consent, but does not include

- a) failing to provide or withdrawing medical treatments or interventions that are reasonably believed to be inefficacious or disproportionately burdensome; or
- b) failing to provide or withdrawing treatment, interventions or care refused by a competent individual or by a lawful substitute decision maker acting on behalf of an incompetent individual.

"falsification" means

- a) in the case of research data, the fabrication of research data or the deliberate introduction of bias or error into research data by any means, including addition, omission, suppression, misrepresentation, emphasis, or de-emphasis, during any phase of an experiment, including the design of the protocol, the material(s) and method(s) used, and the analysis of the data obtained;
- b) in the case of research claims, the fabrication of research claims or the deliberate introduction of bias or error into research claims by any means, including addition, omission, suppression, misrepresentation, emphasis, or de-emphasis involving: research grant applications; advertisements; computer programs; research committees; proceedings; findings; reports; publications; conferences; or other medical or research information;
- c) when harm is suffered or believed to have been suffered by a human individual in the course of care, treatment or research, the fabrication, alteration, suppression, concealment or misrepresentation of data or information that may be relevant to the existence, cause, nature and extent of the harm;
- d) in other cases, lying or deliberate misrepresentation or deception.

"human experimentation" includes any manipulation or surgical or pharmacological treatment of a human individual for the purpose of research, when the treatment

- a) is not directly therapeutic for that individual; or
- b) is not known to have therapeutic effects; or
- c) may entail a risk of harm disproportionate to reasonably anticipated therapeutic effects.

"human transformation" includes the surgical, pharmacological or genetic treatment or

manipulation of a human individual for the purpose of

- a) erasing or transforming identifiably human characteristics, including age, race, ethnicity, sex or mental capacity or intelligence; or
- b) incorporating non-human characteristics into a human individual.

"torture" means²⁸ any act or omission, whether or not it is legal under military law or the law in force in the place where it occurs, by which

- a) pain is deliberately inflicted on a person, or
- b) an attempt is made to inflict despair or mental or spiritual anguish on a person by
 - i) deprivation of air, food, water, shelter, clothing, hygiene, privacy, companionship, sensory experience, medical treatment or religious practice, or
 - ii) sexual touching or degradation, including seduction and exposure to pornographic or obscene materials, or
 - iii) enforced participation in acts proscribed or thought to be proscribed by the person's religion, beliefs or moral principles, or
 - iv) the application of mind or mood altering substances, or
 - v) the application of extremes of temperature, light, sound, or smell or the provision of unpalatable food or drink, or
 - vi) threats to cause death, pain or bodily harm to the person or another person, or
 - vii) threats to do any of the above

for the purpose of punishment or personal gratification, to intimidate or coerce the person or some other person, or to obtain information or a statement or purported consent.

PART IV

PROTECTION OF CONSCIENCE

9. Compulsion prohibited²⁹

9(1) Every one commits an offence who, by an exercise of authority or by intimidation, compels another person to participate in a contested service when that person has indicated that he does not wish to participate for reasons of conscience.

²⁸ The definition excludes pain or suffering attendant upon the provision of legitimate medical treatment.

²⁹ Applies when an objector succumbs to compulsion.

9(2) For greater certainty, "intimidation" includes threats or suggestions that a person who refuses to participate will suffer discrimination or disadvantage.

10. Intimidation prohibited³⁰

10(1) Every one commits an offence who, for the purpose of inducing another person or class of persons to participate in a contested service, intimidates or attempts to intimidate or influence that person or class of persons by threats or suggestions that participation in a contested service is a condition of

- a) employment, contract, membership or fellowship;
- b) advancement or full participation in a trade union, occupational or professional association, occupation or profession;
- c) admission to an educational programme or institution;
- d) occupational or professional qualification or certification.

10(2) Every one commits an offence who, for the purpose of inducing another person or class of persons to participate in a contested service, intimidates or attempts to intimidate or influence that person or class of persons by threats or suggestions that failure or refusal to participate in a contested service may adversely affect

- a) employment, contracts, membership, or fellowship;
- b) benefits, pay or advancement;
- c) full participation in a trade union, occupational or professional association, occupation or profession, or admission to an educational programme or institution;
- d) educational, occupational or professional qualification or certification

11. Punishment prohibited³¹

Every one commits an offence who

- a) disciplines, suspends or dismisses a person or cancels his contract; or
- b) reduces a person's pay, benefits, scholarships, bursaries, or occupational or professional rank or academic standing; or
- c) revokes, suspends or adversely affects a person's membership, fellowship or full participation in a trade union, occupational or professional association, occupation or profession, or educational programme or institution; or

³⁰ Applies when coercion unsuccessfully attempted.

³¹ Applies when an objector is punished or disadvantaged for refusing to comply.

- d) revokes educational, occupational or professional qualification or certification because he failed or refused to participate or agree to participate in a contested service.

12. Discrimination prohibited

Every one commits an offence who

- a) refuses to employ or contract with a person or admit him to a trade union, occupational or professional association, occupation, profession, or educational programme or institution because he refused or failed to agree to participate in a contested service;
- b) refuses to employ a person or admit him to a trade union, occupational or professional association, occupation, profession, or educational programme or institution because he refused or failed to answer questions about or discuss his willingness to participate in a contested service;
- c) adversely affects the opportunities of persons to secure employment or admission to, or full participation in a trade union, occupational or professional association, occupation, profession or educational programme or institution unless they agree to participate in a contested activity or answer questions about or discuss their willingness to participate in a contested service.

13. Negotiated exemptions prohibited

13(1) A person who attempts to circumvent this Act by negotiating a contract or agreement contrary to it commits an offence.

13(2) All agreements contrary to this Act are of no force or effect.

PART V

GENERAL

14. Liability

14(1) Health care personnel who, in good faith, comply with this Act, shall not thereby be considered

- a) negligent or guilty of professional misconduct;
- b) guilty of unlawful discrimination against a person or class of persons.

14(2) In any proceedings³² alleging non-compliance by health care personnel with a provision of

³² Civil, criminal or disciplinary.

Part II, nothing in this Act shall be interpreted³³ to exclude or restrict a defence based on Section 2 of the *Canadian Charter of Rights and Freedoms*³⁴ or analogous provisions of provincial human rights statutes.

15. Penalties

Anyone who commits an offence under Part III is liable on conviction

- a) for a first offence, to imprisonment for 6 months, or to a fine of \$1,000.00, or both;
- b) for a second offence, to imprisonment for 6 months, or to a fine of \$5,000.00, or both;
- c) for each subsequent offence, to imprisonment for 6 months and to a fine of \$10,000.00.

16. Saving³⁵

16(1) This Act does not apply when a contested service

- a) is the principal duty of a position for which a person was hired or for which an employer is seeking an employee; or
- b) is required of a person in a position created or designated in order to accommodate the exercise of freedom of conscience by other persons,³⁶ and
- c) the requirement for participation is stated in writing in advertising, contracts, job descriptions, and other instruments before the position is filled.³⁷

³³ This prevents a court from ruling that the Act provides a complete framework for the adjudication of contested issues.

³⁴ Constitution Act, Part I: Canadian Charter of Rights and Freedoms, Section 2. Everyone has the following fundamental freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and (d) freedom of association. In other jurisdictions the provision can be revised to refer to equivalent statutes.

³⁵ Nothing in the Act would hinder employers who wish to hire people to perform specific tasks, or to dismiss those hired specifically for such work should they fail to live up to the terms of their engagement. However, the terms of engagement must be bona fide, clear and in writing.

³⁶ An employer may seek to accommodate freedom of conscience by creating or designating certain positions even if contested activities are not the principal duties of an employee filling such position..

³⁷ Employers may not designate positions in order to avoid accommodation.

15(2) For the purposes of this section, a service is a principal duty if it is reasonably expected to occupy fully more than one half of the normal working hours of the person holding that position.

15(3) Nothing in this Act shall be understood to limit the power of professional or occupational regulatory authorities to make regulations that are not inconsistent with this Act.³⁸

17. Existing duties

Nothing in this Act abrogates or limits the legal duties of employers or others in relation to accommodation and non-discrimination under human rights law with respect to services not included in Part III.

18. Procedure on trial

18(1) A court that convicts or discharges an accused of an offence under this Act, shall, at the time sentence is imposed, order the accused to pay to the victim of the offence an amount by way of satisfaction or compensation for the loss of wages and benefits which resulted from the commission of the offence.³⁹

18(2) Where a court has not been satisfied beyond reasonable doubt that an offence has been committed, but is satisfied on the balance of probabilities that an accused engaged in conduct prohibited in Part IV, the court shall not convict the accused but shall order the accused to pay to the victim of the offence an amount by way of satisfaction or compensation for the loss of wages and benefits which resulted from the conduct.⁴⁰

19. Enforcement of judgement

Where an amount that is ordered to be paid under Section 18 is not paid forthwith, the victim of the offence may, by filing the order, enter as a judgement in the Supreme Court of British Columbia, the amount ordered to be paid, and that judgement is enforceable against the accused in the same manner

³⁸ The Act specifies the minimum obligations of health care personnel. Regulators and professional associations may provide additional guidance not inconsistent with the Act, such as an obligation to provide what assistance the objector is professionally and ethically able to offer.

³⁹ Adapting provisions in the Canadian *Criminal Code*: §160(4)b; §447.1(1)b; §732.1(3.1)a; § 738(1). The provision would have to be modified in other jurisdictions.

⁴⁰ The trial procedure allows for civil compensation in common law jurisdictions when an offence cannot be proved beyond a reasonable doubt, but can be proved on the balance of probabilities. This spares the accused, the state and the victim the expense of a separate civil proceeding, and provides the accused better protection of his rights than may be had in a quasi-judicial tribunal.

as if it were a judgement rendered against the accused in that court of civil proceedings.⁴¹

20. Limitation of action

No proceedings shall be commenced in respect of acts which are alleged to have contravened this Act more than 2 years after the date on which the acts are alleged to have taken place.⁴²

21. Restriction on judicial intervention

An order from a court directed to any person requiring participation in any contested service shall be deemed not to apply to any person who objects, for reasons of conscience, to participation in such services.

⁴¹ A procedure adapted from the Canadian *Criminal Code* §741(1) allows the victim to enforce a judgement for compensation for loss of wages and benefits. The provision would have to be modified in other jurisdictions.

⁴² Most Canadian provincial statutes require that a charge be laid within six months of the incident subject of the complaint. This can cause injustice when a complainant who has been victimized is unfamiliar with the law and learns of it too late to take legal action. The Act thus proposes a two year limitation of action. The provision would have to be modified in other jurisdictions