



Protection of Conscience Project

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Model Protection of Conscience Statute (Draft Legislation)

Introduction:

This proposed legislation was first drafted in 1988. It has since been updated to include references to procedures that were not significant issues at that time (for example: artificial reproduction and euthanasia).

In its current form the Model Statute is drafted as a piece of Canadian provincial legislation, but could be adapted to other jurisdictions. It takes a 'procedure specific' approach to protection of conscience, illustrating an alternative to more broadly worded laws suggested by some authors.

The Model Statute incorporates a number of provisions some commentators have deemed important. Readers will find other approaches to legislative drafting on the Project website.

An Act to Ensure Protection of Conscience in Health Care

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

Interpretation

2. In this act¹

"abortion" includes²

- a) the inducement or attempted inducement of the miscarriage of a female person, whether or not she is pregnant,
- b) the administration of drugs or devices to a female person or the manipulation of a female person to prevent the implantation of an early human embryo, whether or not conception has occurred,
- c) in the case of a multiple pregnancy, the killing of a human embryo or foetus in the womb to reduce the number of children to be carried to term;

"artificial reproduction"³ includes the use of any sexual or asexual means of bringing about, or attempting to bring about, the formation of a human embryo, apart from an act of sexual intercourse, such as artificial insemination and *in vitro* fertilization, or human genetic engineering techniques, including the manipulation of genetic materials, the use of artificial genetic materials, or any combination thereof;

"assisted suicide" means⁴ any act undertaken to help a person cause his own death, when the act that actually causes death is performed or meant to be performed by that person, with or without assistance;

"capital punishment" means the execution of a sentence of death in accordance with military law or the law of the place where sentence is passed or to be carried out;

"conception"⁵ means the fertilization of a human ovum by human sperm and the formation of a

¹The Act concerns *only* the defined activities. It does not, for example, concern blood transfusion or organ transplants.

²The word 'includes' (used here and elsewhere) means that the definition does not exclude similar meanings. Jurisprudence in some jurisdictions may require a different formulation (i.e., "including but not limited to").

³The definition of *artificial reproduction* is broad enough ("includes") to encompass cloning and any future technological developments.

⁴ Restricts the meaning of a word or phrase to that given in the definition, excluding other possible meanings.

⁵The definition of *conception* is the traditional scientific definition. [William J. Larsen, *Human Embryology* (New York: Churchill Livingstone, 1997) p. 1; Ronan O'Rahilly and Fabiola Müller, *Human Embryology & Teratology* (New York: Wiley-Liss, 1994) p. 19-20; Bruce M.

human embryo by artificial reproduction;

“**contraceptive services**” includes the provision of drugs, devices or surgery for the purpose of preventing the fertilization of a human ovum by sexual intercourse;

“**embryo transfer**” includes the removal of a living human zygote, foetus or embryo from the uterus or location where it was conceived;

“**embryocide**” means deliberately causing the death of a human zygote or embryo after conception and before implantation⁶ in the womb or a drug or device designed for that purpose;

“**embryonic experimentation**”⁷ includes any manipulation or surgical or pharmacological treatment of a human zygote, embryo or foetus at any time after conception, but does not include treatment which is intended to be directly therapeutic for the zygote, embryo or foetus itself;

“**eugenic testing**” includes any form of observation or measurement, one purpose of which may be to identify illness or unwanted characteristics in a human being or in a human zygote, foetus or embryo, so that the human being may be sterilized or killed, or the human zygote, foetus or embryo aborted or killed;

“**euthanasia**”⁸ means any act or omission, with or without the consent of the person who is the subject of the act or omission, which

- a) is apparently intended to cause the death of the person, or
- b) is apparently intended to accelerate the death of the person,

Carlson, *Human Embryology and Developmental Biology* (St. Louis, MO: Mosby, 1994) p. 31; Keith L. Moore and T.V.N. Persaud, *The Developing Human* (Philadelphia: W.B. Saunders Company, 1998) p. 2]. It is supplemented by reference to artificial reproduction.

⁶ See “abortion” for causing death after implantation.

⁷Embryonic and human experimentation are distinguished in the Act because some legal systems do not acknowledge the existence of a human being or legal person *in utero*, but will acknowledge the existence of the embryo.

⁸ The definition of *euthanasia* does not imply that a patient cannot legally refuse ordinary treatment or food and water. It simply ensures that health care professionals and others cannot be compelled to co-operate in killing a patient, especially when 'consent' is provided by someone other than the patient.

and includes the withdrawal⁹ or failure to provide artificial nutrition and hydration or ordinary¹⁰ medical treatment;

“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) in other cases, lying, deception or deliberate misrepresentation.

“human experimentation”¹¹ includes any manipulation or surgical or pharmacological treatment of a human being for the purpose of research, but does not include treatment which is intended to be directly therapeutic for that human being;

“inter-species breeding” includes fusing or attempting to fuse human gametes or genetic material with that of an animal;

“person” includes all juridical persons and all recognizable institutions, societies, associations, and formal or informal groups of persons, whether incorporated or not;

“reasons of conscience” includes adherence to

- a) religious doctrine or precept, or
- b) moral or ethical belief, or
- c) philosophical principle

that is understood by the adherent to make it wrongful for him to participate, directly or indirectly, in

⁹The *withdrawal or failure to provide artificial nutrition* refers only to a situation in which the intention is apparently to kill or accelerate the death of a patient.

¹⁰*Ordinary medical treatment* is not defined because of the difficulty in drafting a statutory definition which would reflect the variety of circumstances that might be faced. Further: the definition refers only to a situation in which the intention is apparently to kill.

¹¹Embryonic and human experimentation are distinguished in the Act because some legal systems do not acknowledge the existence of a human being or legal person *in utero*, but will acknowledge the existence of the embryo.

the activities referred to in Section 3.

"tissue trafficking" includes the handling, transfer, sale, barter, or giving of tissue obtained, directly or indirectly, by means of abortion, artificial reproduction, embryonic or human experimentation, embryo transfer, eugenic testing, euthanasia or inter-species breeding, or the provision of contraceptive services.

"torture" means 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.¹²

General protection

3(1) Every one commits an offence who, by an exercise of authority or by intimidation, compels another person¹³ to participate, directly or indirectly,

- a) in the performance of an abortion,
- b) in artificial reproduction, capital punishment, embryonic or human experimentation,

¹²The definition excludes pain or suffering attendant upon the provision of legitimate medical treatment, law enforcement or penal sanctions.

¹³Protection is not limited to health care workers. It is extended to anyone who might be pressured to facilitate the defined activities, on the principle that the conscience of the hospital janitor is no less worthy of consideration than that of the chief surgeon.

embryo transfer, eugenic testing, euthanasia, falsification or inter-species breeding, tissue trafficking, torture or the provision of contraceptive services,

c) in the advertising of the activities referred to in paragraphs (a) or (b), or

d) in the building, operation, maintenance, service or security of a facility where the activities referred to in paragraphs (a) or (b) take place or will take place, or

e) in the manufacture, advertising or sale of drugs or instruments intended to be used for the activities referred to in paragraphs (a) or (b), or

f) in the counselling or education of persons in a manner which indicates that the activities referred to in paragraphs (a) or (b) are morally neutral or acceptable,

when that person has indicated that he does not wish to participate for reasons of conscience.

3(2) For greater certainty, “participation” includes

a) prior consultation or planning, or

b) providing a professional opinion or rendering medical assistance in order to facilitate the procedure or make it more effective.

Intimidation of contractors, employees and members of unions and professional associations

4. Every one commits an offence who, for the purpose of inducing another person or class of persons to participate, directly or indirectly, in the activities referred to in Section 3,

a) intimidates or attempts to intimidate or influence that person or class of persons by threats or suggestions that

i) contracts, employment, advancement, benefits, pay, or

ii) membership, fellowship or full participation in a trade union or professional association may be adversely affected if they do not so participate,

b) disciplines, suspends or dismisses an employee or contractor, or reduces his pay or benefits or cancels his contract, or suspends or revokes or adversely affects his membership, fellowship or full participation in a trade union or professional association, for the reason that he failed or refused to participate or to agree to participate, directly or indirectly, in the activities referred to in Section 3.

Intimidation of applicants¹⁴

5. Every one commits an offence who

a) suggests that participation in the activities referred to in Section 3, whether direct or

¹⁴Prospective students and applicants for employment are particularly vulnerable to coercion.

indirect, is a condition of employment, contract, membership or full participation in a trade union or professional association, or of admission to a school of medicine or other educational programme,

b) refuses to employ a person or to admit him to a trade union, professional association, school of medicine or other educational programme for the reason that he refused or failed to agree to participate, directly or indirectly, in the activities referred to in Section 3.

c) refuses to employ a person or to admit him to a trade union, professional association, school of medicine or other educational programme for the reason that he refused or failed to answer questions about or to discuss his willingness to participate, directly or indirectly, in the activities referred to in Section 3.

d) adversely affects the opportunities of a person or class of persons to secure employment or admission to, or full participation in a trade union, professional association, school of medicine or other educational programme for the reason that

i) he refused or failed to agree to participate, directly or indirectly, in the activities referred to in Section 3, or

ii) he refused or failed to answer questions about or to discuss his willingness to participate, directly or indirectly, in the activities referred to in Section 3.

Intimidation of health care professionals

6. Every one commits an offence who, for the purpose of inducing a person or class of persons to participate, directly or indirectly, in the activities referred to in Section 3,

a) suggests that hospital admitting privileges, full participation in professional associations or trade unions, or other rights or privileges associated to the practice of medicine or nursing may be adversely affected if he does not so participate,

b) denies, restricts or revokes hospital admitting privileges, full participation in professional associations or trade unions, or other rights or privileges associated to the practice of medicine or nursing for the reason that he has failed or refused to agree to participate, directly or indirectly, in the activities referred to in Section 3, or

c) denies, restricts or revokes hospital admitting privileges, full participation in professional associations or trade unions, or other rights or privileges associated to the practice of medicine or nursing for the reason that he refused or failed to answer questions about or to discuss his willingness to participate, directly or indirectly, in the activities referred to in Section 3.

d) adversely affects hospital admitting privileges, full participation in professional associations or trade unions, or other rights or privileges associated to the practice of medicine or nursing for the reason that

i) he failed or refused to agree to participate, directly or indirectly, in the activities referred to in Section 3, or

ii) he failed or refused to answer questions about or to discuss his willingness to participate, directly or indirectly, in the activities referred to in Section 3.

Saving¹⁵

7(1) This Act does not apply when the activities referred to in Section 3

- a) are the principal duties of a position for which a person was hired or for which an employer is seeking an employee or contractor, or
- b) are required of a person in a position created or designated in order to accommodate the exercise of freedom of conscience by other employees or contractors,¹⁶ and
- c) the activities have been previously identified in writing as required in advertising, contracts, job descriptions, and other instruments referring to the position.

7(2) For the purpose of this section, activities are the principal duties of a position when

- a) the activities will or are reasonably expected
 - i) comprise more than 50% of the activities performed by the person holding that position, or
 - ii) generate more than 50% of the gross revenue for activities performed by the person holding that position.

7(3) Nothing in this Section shall be construed to suggest that employers or other persons in authority have a legal right to compel another person to participate in any activity to which that person has expressed objection for reasons of conscience.¹⁷

7(4) A person does not 'protest' within the meaning of the *Access to Abortion Services Act*¹⁸

¹⁵Nothing 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.

¹⁶ An employer may seek to ensure access to services while accommodating freedom of conscience, even if the activities are not the principal duties of an employee filling a designated position, but may not create or designate positions in order to avoid accommodation.

¹⁷The saving is not to be construed to concede a legal right by employers or other persons in authority to compel others to participate in activities to which they have conscientious objections.

¹⁸The *Access to Abortion Services Act* makes it an offence in British Columbia to express disapproval of abortion by any means within a legally designated access zone. Absent section 7(4), it would be illegal to refuse to participate in abortions in any hospital designated as an access zone. Similarly, it would be an offence for a priest or minister, having been asked for

- a) by asserting objections, based on reasons of conscience, to activities referred to in Section 3, in order to avoid participation in such activities, or
- b) by expressing objections or disapproval, based on reasons of conscience, to activities referred to in Section 3, in response to a request for counselling or advice.

Protection Against Negotiated Exemptions

8(1) No person shall circumvent this Act by negotiation of contracts or agreements contrary to it.

8(2) All agreements contrary to this Act are of no force or effect.

Penalty

9. Every one who commits an offence against this Act is liable

- 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.

Procedure on trial

10. 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 offence¹⁹ an amount by way of satisfaction or compensation for the loss of wages and benefits which resulted from the commission of the offence.

11. 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 described in Sections 3, 4, 5, or 6, 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.²⁰

Enforcement of judgement

12. Where an amount that is ordered to be paid under Section 9 or 10 is not paid forthwith, the

confession or counsel, to privately express any disapproval of abortion. The section would not be necessary in jurisdictions that do not have similar legislation.

¹⁹ Adapting a provision of the Criminal Code applicable to mischief.

²⁰The trial procedure allows for civil compensation 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.

victim 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 as if it were a judgement rendered against the accused in that court of civil proceedings.²¹

Limitation of Action²²

13. 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.

Restriction on judicial intervention

14. An order from a court directed to any person requiring participation in any of the acts defined in Section 3 shall be deemed not to apply to any person who objects, for reasons of conscience, to participation in such acts.

Protection from civil liability

15. A person who refuses to participate, directly or indirectly, for reasons of conscience, in the activities referred to in section 3,

- a) shall not be considered negligent,
- b) shall not be considered guilty of professional misconduct,
- c) does not thereby commit a tort,

and is not liable for any damages allegedly arising from the refusal.

²¹A procedure adapted from the Canadian Criminal Code allows the victim to enforce a judgement for compensation for loss of wages and benefits.

²²Most 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.