

# BIOETHICS MATTERS ENJEUX BIOÉTHIQUES

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## **CPSO Draft Document on Professional Obligations and Human Rights**

*Moira McQueen, LLB, MDiv, PhD*

The College of Physicians and Surgeons of Ontario sent out a notice in the fall of 2014 advising physicians that it intends to make changes to its original policy, *The Physicians and the Ontario Human Rights Code*, and will name its new policy document, *Professional Obligations and Human Rights*.<sup>1</sup> The College asked for input from physicians and from the general public, and the two main changes they wish to make are:

- Following what is said to be the Ontario Human Rights Commission's interpretation of discrimination, patients should be accommodated in receiving procedures that the physician, because of personal values and beliefs, thinks are morally wrong
- If physicians refuse to treat a patient on such grounds, a referral to someone who will provide such treatments should be given, again to accommodate the patient

The College is being requested to change its policy by the Ontario Human Rights Commission. It had already issued a similar request for physician compliance on accommodation in 2012, but many people responded that they were not in favour of the change, and it was not implemented. The

latest request for input by the College appears to be another attempt to comply with the Commission's approach to this matter. It is unclear whether the College is making these proposals under its own inner direction, or whether there is some sort of pressure on the College by the Commission to comply with the latter's views on discrimination and protection of conscience.

At present, refusal to provide or perform certain procedures is protected under Canadian Charter rights of freedom of conscience and freedom of religion.<sup>2</sup> These rights are being challenged in the College's draft because they are based on what is termed "physician's personal values and beliefs."<sup>3</sup> The implication is that if physicians do not accommodate patients on those particular grounds, they could be subject to charges of discrimination.

### USE OF LANGUAGE IN THE DRAFT: BELIEFS, MORALS, CONSCIENCE

The use of the term "personal beliefs" and what it seems to conjure up is very different from an individual's moral stance based on conscience. Many people think of beliefs only in conjunction with a religious stance, but this is not necessarily the case. Some people believe in ghosts and astrological signs, for example, but neither has anything to do with religion.

A moral stance, on the other hand, is based on reason, and is a stance that can be explained in terms of observation and judgment of good done or evil avoided. *Everyone* has a moral stance, while some people's moral stance will also be reinforced by their religious faith. "Personal beliefs" and "moral stances" are not in the same category, and, for that reason, the term "beliefs" should not be used in policy documents such as the College's draft, since it is inadequate: "moral stance" or "informed conscience" is more to the point. "Personal beliefs" also seem to be more easily dismissed by society, since they can be categorized as purely individual and highly subjective, and therefore somehow unreasonable.

The term "conscience" does not appear in the draft until Page 4, where the *Canadian Charter of Rights and Freedoms* is also first mentioned. The draft itself states that "...physicians have this freedom (of conscience, and religion) under the Charter..." and then reminds us that "... this freedom can be limited..."<sup>4</sup> There is no argument against the latter part, and no one is suggesting that these freedoms are absolute, since they exist in relation to other rights and freedoms which have to be correlated, interpreted and considered. The College must, however, be urged to continue to recognize in its reformulated policy that, as it says itself, physicians already have this freedom under the Charter, and that it should continue to protect it.

While the practice of religion may vary, conscience is an innate human faculty, therefore universal, and is recognized as the core of the person's freedom and

individuality: we become who we are as human beings because we follow our own conscience, not someone else's demands. (Think of Robert Bolt's play, *A Man for all Seasons*, where Sir Thomas More says, "I think that when statesmen forsake their own private conscience...for the sake of their public duties...they lead their country by a short route to chaos.")<sup>5</sup>

Conscience is much more than simply a faculty for decision-making, although it is that, too. It should always be respected and protected, and no one should be compelled to act against a properly-formed conscience. The need for conscience to be properly formed reassures us that conscience decisions are reasonable and rational, in that they are open to discussion, factual evidence, challenge and sometimes change, or conversion. Conscience is our inner arbiter for deciding how we will act as individuals. Its conclusions are not and cannot be dismissed as mere "personal beliefs."

The absence of external compulsion is fundamental to the exercise of conscience and the freedom of the individual, and these factors establish it as a human right, and as a right that should always be protected. Freedom of conscience is a fundamental right upheld more or less globally, and it is recognized as a fundamental guarantee of individual freedom.<sup>6</sup> As such, it is or should be protected in every relevant policy document, provincially, nationally and internationally.

#### DISCRIMINATION

The Ontario Human Rights Commission Code defines this as the right to treatment regardless of "...race, ancestry, place of

origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.”<sup>7</sup>

Interpreting discrimination on this basis, a physician could be charged if a refusal to treat or refer were to be made on the basis of any of the listed characteristics of the person making the request. In following one's conscience, however, decisions are NOT based on any of these personal characteristics, but on the nature of the procedure requested. The physician's moral stance, therefore, has nothing to do with any individual patient. Cardinal Collins of the Archdiocese of Toronto emphasized this point in his response in 2008 to the CPSO's earlier consultation on conscience and what constitutes discrimination.<sup>8</sup>

The interpretation of discrimination will be, in any event, for the courts to decide if charges were to be laid, and are not the responsibility of the College.

#### LIMITS TO THE DUTY OF ACCOMMODATION

Re procedures: the draft says that “The duty to refrain from discrimination does not prevent physicians from limiting the health services they provide for legitimate reasons.”<sup>9</sup> This is an encouraging statement, and anyone writing to the College should encourage the College to emphasize this and also the right of a physician to limit provision of treatment on conscience grounds.

We could add that it is also important that rights themselves must never be limited in a one-sided manner in favour of the patient.

Both patient and physician should have protection.

Regarding referrals: the draft says that the duty to refer “**must**” be provided to the patient.<sup>10</sup> This is a newer part of the movement towards limiting physician's rights, and goes far beyond accommodation: there would appear to be no balancing of rights intended here. To order physicians to make a referral ignores conscience rights and rests on compulsion. We must encourage the College to insist that a physician must not be compelled against conscience to accommodate someone else's rights, and, again, that both patient and physician deserve protection.

#### FINAL NOTE

The words “unwilling to provide” are used in the draft, implying some negativity on the part of physicians.<sup>11</sup> We can let the College know that this is not simply a matter of will and compliance: it is a matter of knowledge of the consequences of procedures (intellect), and a moral evaluation resulting in a moral stance (conscience). Any “unwillingness to provide” results from repugnance to the procedure requested, because it is seen as contrary to conscience.

#### SUGGESTED KEY POINTS FOR LETTERS, E-MAILS, ETCETERA

- Thank the CPSO for being open to consultation with the public.
- Be appreciative that the College accepts existing Charter rights of freedom of religion and conscience, and urge them to maintain that moral stance.

- Emphasize that moral stances based on conscience are rational and evidence-based, often reinforced by religious beliefs, and deserve protection.
- Point to the inclusion of freedom of religion and conscience rights in other documents and insist that Canadian documents follow suit (Cf., Canadian Charter; the United Nations' *Universal Declaration of Human Rights*, Article 1 states: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."(sic)
- Recognize that there should always be a balancing of rights, but request that both patient and physician rights be respected; accommodation should not be one way.
- Point out that a physician should never be compelled to act against rational

conscience decisions, and that compulsion goes against Charter and human rights.

- Point out that refusing to provide or perform some procedures is not discriminatory when it is based on a properly informed conscience: this has nothing to do with the patient requesting a procedure, and everything to do with the physician's decision about the wrongness of those. ■

*Moira McQueen, LLB, MDiv, PhD, is the Executive Director of the Canadian Catholic Bioethics Institute. Prof. McQueen also teaches moral theology in the Faculty of Theology, University of St. Michael's College.*

*In September 2014 Pope Francis appointed Dr McQueen as a new member to the International Theological Commission for a five-year term.*

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<sup>1</sup>Draft Policy "Professional Obligations and Human Rights," College of Physicians and Surgeons of Ontario website:

[http://policyconsult.cpso.on.ca/?page\\_id=5165](http://policyconsult.cpso.on.ca/?page_id=5165)

<sup>2</sup> Canadian Charter of Rights and Freedom, Part 1 of The Constitution Act, 1982: 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.

<sup>3</sup> Draft, P. 1

<sup>4</sup> Draft, P.4

<sup>5</sup> Robert Bolt, *A Man for all Seasons*, (1966) Act 1, Scene 2 (replying to Cardinal Wolsey, who has accused More of obstructing matters for the sake of his 'own, private conscience')

<sup>6</sup> United Nations' *Universal Declaration of Human Rights*, 1948. Cf, Article 1: Article 1. "All human

beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood" and Article 2: Article 2. "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty."

<sup>7</sup> Draft, P.2

<sup>8</sup> Letter from Thomas Cardinal Collins to the Chair of the CPSO, September, 2008

<sup>9</sup> Draft, P.3

<sup>10</sup> Draft. P.5

<sup>11</sup> Draft, P.6