

POLICY ON SEXUAL HARASSMENT AND INAPPROPRIATE GENDER-RELATED COMMENTS AND CONDUCT

**ONTARIO
HUMAN RIGHTS
COMMISSION**

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PLEASE NOTE

This policy reflects the Commission's interpretation of the *Ontario Human Rights Code* provisions and should be read in conjunction with the specific provisions of the *Code*. Any questions regarding this policy should be directed to the staff of the Ontario Human Rights Commission.

POLICY GUIDELINES ON SEXUAL HARASSMENT AND INAPPROPRIATE GENDER-RELATED COMMENT AND CONDUCT

INTRODUCTION

The Ontario *Human Rights Code* (the "*Code*"), states that it is public policy in Ontario to recognize the inherent dignity and worth of every person and to provide for equal rights and opportunities without discrimination. The provisions of the *Code* are aimed at creating a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and feels able to contribute to the community.

Inherent in this objective is the goal of ensuring that everyone can live and work in an environment which is free from harassment based on a prohibited ground of discrimination under the *Code*. The *Code* establishes the right to equal treatment without discrimination based on sex. Freedom from sexual harassment and other forms of unequal treatment expressed through demeaning comments and actions based on gender¹ is, therefore, a fundamental human right.²

Discrimination based on sex includes what is commonly referred to as sexual harassment or inappropriate comments and actions of a sexual nature.³ The protection provided by the *Code* covers five areas of social interaction, namely, services, goods and facilities, occupancy of accommodation, contracts, employment, and membership in vocational associations such as trade unions.

Harassment and discrimination based on sex may not always be of a sexual nature. Sex discrimination may also include harassing comments or conduct made to a person because of his or her gender.⁴

Example: A supervisor may continuously interrupt a female employee during meetings or comment on her physical appearance in a way that sets her apart from male employees as not being a fully participating equal in the organization, or by making such statements as "women don't belong in the boardroom".

The comments or conduct do not have to be made with the intention to discriminate to be in violation of the *Code*.

PURPOSE OF THE GUIDELINES

The purpose of these guidelines is to assist individuals, community organizations and business establishments to understand the scope of the protection provided by the *Code* with regard to sexual harassment and inappropriate gender-related comments and conduct. This policy makes a clear distinction between accepted social interaction or consensual relations, and behaviour which is known or ought reasonably to be known to be unwelcome.

The policy also provide a framework for educational initiatives such as the development of training materials, anti-harassment policies and internal human rights complaint resolution mechanisms by employers and other establishments.

THE ONTARIO *HUMAN RIGHTS CODE* AND SEXUAL HARASSMENT

Sexual harassment and inappropriate gender-related comments and conduct are complex issues which often involve one person's attempt to assert power over another. Sexual harassment and unequal treatment based on gender typically, but not exclusively, involves the exercise of power and authority over women, resulting in the reinforcement of a woman's subordinate status in relation to men.⁵ It is important to note that sexual harassment and inappropriate gender-related comments and conduct are prohibited regardless of the gender of the persons involved. The Commission has received complaints by men against women, as well as complaints involving persons of the same sex.

This power relationship can be particularly evident in employment situations. However, women tend to be more vulnerable to harassment by men, because relative to men, more women hold lower paying, lower authority and lower status positions in the workplace. At the same time, even women in positions of authority are not free from sexual harassment or inappropriate gender-related behaviour.

Regardless of her position, this type of behaviour can diminish a woman's status and image in the eyes of other employees. Inappropriate gender-related comments or conduct can also endanger the continued employment of the harassed individual by negatively affecting her or his work performance, or undermining her or his sense of personal dignity, or in some cases causing physical and emotional illness.

THE CODE

Sections 1, 2, 3, 5, 6 and 9 of the *Code* set out the basic right to equal treatment without discrimination because of sex in the areas of services, goods and facilities, occupancy of accommodation, contracts, employment, and vocational associations.

As stated earlier, sex discrimination includes inappropriate comments or conduct that are not, narrowly speaking, entirely sexual in nature.

The *Code* also includes provisions that specifically address sexual harassment in employment and accommodation, as well as sexual solicitation and reprisal for refusing a sexual advance.

1. The Definition of "Harassment" Under The Code

Section 10(1)(f) of the *Code* defines "harassment" as meaning:

engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.

a) A Course of Vexatious Comment or Conduct

According to the definition of harassment in subsection 10(1)(f) of the *Code*, more than one event, or a "**course** of vexatious⁶ comment or conduct" [emphasis added], must take place for there to be a violation of the *Code*. However, one incident could be significant or substantial enough to be interpreted by the Commission as constituting a breach of sections 1, 2, 3, 5 or 6 of the *Code*. Such an incident could be interpreted by the Commission as having an impact that is substantial enough to create a "poisoned environment" for some individuals because of their sex.

b) Ought Reasonably To Be Known To Be Unwelcome

Comment or conduct "that is known or **ought reasonably to be known to be unwelcome**" [emphasis added] contains a subjective and an objective element. First, the harasser's own knowledge of how his or her behaviour is being received is part of the test. Second, from the point of view of a reasonable third party as well, *i.e.* how such behaviour might generally be received. In other words, the Commission or the board of inquiry can conclude on the basis of the evidence before it, that an individual knew, or should have known that his or her actions were unwelcome.⁷

Traditionally, the standard for judging such knowledge was based on the perspective of a "reasonable person", with "reasonable person" being drawn primarily from a male

perspective. It included stereotypical notions of what forms of behaviour are, or are not, acceptable.

The proper objective standard should reflect full substantive equality.⁸ The standard used to determine what the harasser ought to know is still gauged from the perspective of the "reasonable person".⁹ However, the concept of the "reasonable person" has evolved to take into account the specific perspective of the *person who is harassed*: this means considering factors that ought reasonably to be known about the harassed person and his or her perspective as a member of a group protected under the *Code*.

Example: A supervisor's ongoing questions to a woman about when she is going to marry and start having children may make this employee feel uncomfortable for a number of reasons. Her discomfort may be related to her own cultural background, a fear of losing her job, or to reasons related to other prohibited grounds of discrimination under the *Code*, such as creed, sexual orientation, or age.

As noted above, other prohibited grounds of discrimination such as race, creed, marital status, or disability, may be intertwined with issues of gender. For persons who are members of more than one protected group certain forms of behaviour could have a particularly adverse impact.¹⁰

Example: Women with disabilities may feel particularly vulnerable to harassment and sexual assault. Inappropriate comments or conduct related to gender which may not necessarily be considered by some as problematic, may be viewed as particularly offensive or threatening by a woman with a disability.

It can reasonably be understood that some types of comments or behaviour are unwelcome based on the response of the person subjected to the behaviour, even when the person does not explicitly object. An example could be a person walking away in disgust after a co-worker has asked questions of a sexual nature.

As previously noted, a person does not have to make explicit reference to another person's gender or be explicitly sexual for the behaviour to be contrary to the *Code*. Someone could indirectly harass a female employee in his area, with the intent of discouraging or driving her away¹¹ from continuing her employment in a particular position, because she is a woman.

2. Harassment In Accommodation and Employment

Subsections 7(1) and (2) of the *Code* establishes a person's right to be free from sexual harassment and inappropriate gender-related comments and conduct in occupancy of accommodation and employment. Section 7(1) states:

Every person who occupies accommodation has a right to freedom from harassment because of sex by the landlord or an agent of the landlord or by an occupant of the same building.

Section 7(2) states:

Every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee.

3. Sexual Solicitation or Advance

Subsection 7(3)(a) of the *Code* sets out a person's right to be free from unwelcome sexual advance or solicitation from an individual who is in a position to grant or deny a benefit to the person. The subsection states that:

Every person has a right to be free from a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome.

This provision of the *Code* is violated when the person making the solicitation or advance knows, or should reasonably know, that such behaviour is unwelcome.

Example: A professor or teacher makes an unwelcome sexual advance to a student and implies or explicitly makes it known that if s/he does not accept, she or he would likely not obtain passing grades. In a rental accommodation situation, a building superintendent makes granting a tenant's request for a transfer to a larger unit conditional upon receipt of sexual favours.

Sexual solicitation or advances covered by subsection 7(3)(a), can also occur between co-workers where one person is in a position to grant or deny an employment-related benefit to the other.

Example: A situation could develop in which one worker makes the sharing of important job-related information with a colleague conditional upon the receipt of sexual favours from that colleague.

4. Reprisal

Subsection 7(3)(b) of the *Code* sets out a person's right to be free from reprisal or threats of reprisal for rejecting a sexual solicitation or advance by someone who is in a position to grant or deny a benefit. Subsection 7(3)(b) states that:

Every person has a right to be free from a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.

Example: A manager who fires an employee, or denies her or him a promotion because the employee refused a sexual proposition would be violating the employee's rights under subsection 7(3)(b). Similarly, a social worker who threatens to prepare a negative report which would disqualify a welfare recipient who has refused a sexual advance by the worker would also be in violation of subsection 7(3)(b) of the *Code*.

Section 8 of the *Code* provides additional protection against reprisal for claiming and enforcing one's rights under the *Code*. Section 8 states that:

Every person has a right to claim and enforce his or her rights under this Act, to institute and participate in proceedings under this Act, and to refuse to infringe a right of another person under this Act, without reprisal or threat of reprisal for so doing.

5. Association

Section 12 of the *Code* protects the rights of a person who is associated with a person who is member of a group identified by the *Code*. It states that:

A right under Part I is infringed where the discrimination is because of relationship, association or dealings with a person or persons identified by a prohibited ground of discrimination.

6. Poisoned Environment

As noted above, a specific instance of sexual harassment or inappropriate gender-related comments or conduct might not meet the literal definition of harassment under the *Code*. However, there could be circumstances in which a single incident of inappropriate behaviour may be significant or substantial enough to constitute a breach of the *Code*, by creating a "poisoned environment" for some individuals because of their sex. In other words, there could be circumstances in which unequal treatment does not have to occur continually or repeatedly for there to be a violation of the *Code*.

Sections 1, 2, 3, 5 and 6 of the *Code*, which provide protection from sex discrimination in general, can be the basis for a claim that the inappropriate behaviour was substantial enough to create a "poisoned environment", resulting in unequal terms and conditions in employment, occupancy of accommodation, the provision of services, contracting, or membership in a vocational association. In an employment situation, for example, a poisoned environment can cause emotional or psychological stress for some persons in a particular environment because of their sex. Such stress could have a significant negative impact on the person's overall health and/or performance on the job.

The concept of a poisoned environment as a form of harassment or discrimination is based on the impact of the comments or conduct on an individual because of her or his sex, rather than the number of times the behaviour occurs. A poisoned environment can be created by the comments or actions of any person regardless of his or her position of authority or status in a given environment, including a co-worker, supervisor, manager, co-tenant, etc.

Example: A single action giving rise to a poisoned environment could be a statement made by a union representative, expressing the belief that women in general, or women of a certain race or ethnic background, are not suitable as union representatives. Similarly, a poisoned environment may be created by the distribution or publishing of written materials on a college campus by male students about women which are seen to have a threatening or intimidating content.¹²

Even if the comments or conduct are not directed at one person, another individual may still experience a poisoned environment because she or he is also a member of the group targeted. A person whose co-worker receives this unequal treatment or who hears someone tell an offensive joke to another may view the behaviour as poisoning the environment.¹³

As earlier indicated, sexual harassment is often interpreted as objectionable comments or conduct of a "sexual" nature. However, sexual harassment, in the broader context of unequal treatment based on gender, may refer to instances where the behaviour is not

overtly sexual in nature, but is related to the person's gender, and demeans or causes personal humiliation or embarrassment to the recipient.

Examples of sexual harassment and inappropriate gender-related behaviour within the meaning of the *Code* include, but are not limited to, comments, gestures and non-verbal behaviour, visual materials, and physical contact. The following is not an exhaustive list but should assist in identifying what may constitute sexual harassment or inappropriate gender-related comments and conduct:

- i) gender-related comments about an individual's physical characteristics or mannerisms;
- ii) unwelcome physical contact;
- iii) suggestive or offensive remarks or innuendoes about members of a specific gender;
- iv) propositions of physical intimacy;
- v) gender-related verbal abuse, threats, or taunting;
- vi) leering or inappropriate staring;
- vii) bragging about sexual prowess;
- viii) demands for dates or sexual favours;
- ix) offensive jokes or comments of a sexual nature about an employee, client, or tenant;
- x) display of sexually offensive pictures, graffiti, or other materials;
- xi) questions or discussions about sexual activities;
- xii) paternalism based on gender which a person feels undermines his or her self-respect or position of responsibility;
- xiii) rough and vulgar humour or language related to gender.

A situation could arise in which particular comments or actions might not be intended to offend another person, but result in a violation of that person's rights under the *Code*. The reason for this is that intent is not a prerequisite to establishing that the treatment is discriminatory.¹⁴ Rather, the Commission looks to the effect or the result of the comments or actions on the recipient.

Example: Even the best intentioned "compliments" regarding a woman's appearance, hair, clothes *etc.*, if made on a repeated basis in the work environment, or during a formal business meeting, can set a woman apart as different. Such comments also undermine her credibility as a professional.

BURDEN OF PROOF: EVIDENTIARY ISSUES

Sexual harassment and inappropriate gender-related comments and conduct do not frequently occur in full public view. Since there are often no witnesses or material evidence

to these comments or conduct, issues of evidence and credibility often arise in complaints alleging sexual harassment.¹⁵

Under the *Code*, the onus of proving an allegation of sexual harassment or inappropriate gender-related behaviour rests with the complainant. After a matter is referred to a board of inquiry the Commission has to demonstrate before the board that, on a "balance of probabilities", there was a contravention of the *Code*. The burden of proof for demonstrating harassment under the *Code* is not as onerous as the proof required for establishing guilt in criminal cases.

Proving a case on a "balance of probabilities" is a civil burden of proof, meaning that there is evidence to support the allegation that the comments or conduct "more likely than not" took place, and that the behaviour constituted sexual harassment or inappropriate gender-related comments or conduct within the meaning of the *Code*.

Example: An investigation into a complaint may reveal that the complainant did not welcome or consent to the behaviour alleged to have occurred. It is then up to the respondent to demonstrate that the behaviour did not occur or did not constitute a violation of the *Code*. The respondent may introduce evidence that the complainant is mistaken, or misinterpreted the comments or conduct.

In the absence of independent witnesses or corroborating evidentiary material, complaints alleging sexual harassment often turn on the credibility of the parties. Boards of inquiry have accepted that it is difficult sometimes to make a finding based on credibility only, but acknowledge that boards often have to rely on subjective evidence presented.

Where credibility is at issue, similar fact evidence¹⁶ may be introduced to show that a pattern of behaviour might have occurred.

Example: Similar fact evidence could include testimony from others who indicate that they have been treated similarly, based on their gender, by the alleged harasser. It may also show intent or wilfulness, which could call into question the credibility of a respondent whose defence is that the conduct was intended to be a joke, or was a mistake or the result of a misunderstanding.

CORPORATE LIABILITY

Section 45 of the *Code* establishes that a corporation is liable for the actions of an officer, official, employee or agent of the corporation, when such actions are done in the course of their employment. Section 45 also provides an exception to this corporate liability with

regard to the harassment provisions of subsections 2(2) and 5(2), and s. 7. In instances of harassment within the framework of subsections 2(2) or 5(2), or s. 7 of the *Code*, the corporate respondent¹⁷ may not necessarily be liable where it can be established that the respondent was unaware of, or had no reason to believe that there was a problem relating to sexual harassment.

However, the liability of the corporation with regard to subsections 2(2) or 5(2), or s. 7 is restored, if the offending party is a part of or is the actual "directing mind" of the corporation.¹⁸ In such a situation, a "directing mind" represents the persona of the corporation itself, as if the two were the same, and the latter becomes liable because it is deemed to have breached the *Code*.

Therefore, corporate liability may be found:

- a) where the employer's personal action, either directly, or indirectly infringes a protected right, or authorizes or condones, the inappropriate behaviour; or
- b) where an employee responsible for the harassment or inappropriate behaviour, or who knew of the sexual harassment or inappropriate gender-related behaviour, or that a poisoned environment existed, but did not attempt to remedy the situation is part of the "directing mind" of the corporation.¹⁹

1. "Directing Mind": An Employer or its Agents

Employees with supervisory authority may be viewed as part of a corporation's "directing mind", if they function, or are seen to function as a representative of the organization itself. Generally speaking, an employee who performs management duties is part of the "directing mind" of the corporation.²⁰ If an employee is part of the "directing mind" of the corporation and a violation of the *Code* occurs while this person is carrying out corporate duties, the act of the employee becomes an act of the corporation.

A person who is a central decision-maker in a service provision or accommodation-related situation may also be liable if she or he knew of the harassment or inappropriate gender-related comment or conduct and did not address it. A community centre supervisor or a superintendent of a rental accommodation facility are examples of persons who may be seen as part of the "directing mind" of an organization.

Persons who are not identified as supervisors *per se*, including members of the bargaining unit, may also be "directing minds" if they have supervisory authority or have significant responsibility for the guidance of employees.

Example: A head chef has the responsibility to address such problems if they arise among the kitchen staff.

Example: A lead-hand who is part of the bargaining unit would have "directing mind" authority with regard to union members.

A corporate employer may also be responsible for a supervisor's actions where the employer had, or should have had, knowledge of the harassment and failed to take immediate and appropriate action to correct the situation.

On being made aware of such inappropriate comments or conduct, an employer is required to take immediate action to remedy the situation. In particular, where the employer is satisfied that the allegation has been substantiated, the employer should consider both disciplinary action and preventative steps including the development and introduction of policy statements and educational initiatives. Depending on the fact situation, disciplinary measures could range from a verbal warning or a letter of reprimand to termination of employment.

It should be noted that an employer may also be held liable for incidents of sexual harassment or inappropriate behaviour in situations involving activities or events which occur outside of normal business hours or off business premises, but are linked to the workplace and employment.

Example: An employer may be held liable for incidents that take place during business trips, company parties, or other company-related functions.

2. Obligation to Maintain a Harassment-Free Environment

Employers, rental accommodation providers, service providers, professional associations, and unions all have an obligation to ensure that their respective environments are free from behaviour that could constitute sexual harassment. An employer may be responsible for harassment by supervisors, managers, co-workers, and in some cases non-employees, who are present in the workplace, particularly if the employer knew or should have known about the alleged harassment and failed to take remedial action.

Liability on the part of an organization for harassment of its employees by non-employees, such as customers, will depend on the facts of a particular situation, including the employer's knowledge of and control over the situation, and what corrective measures might be available.

Example: A fitness club owner, on learning of female or male staff being sexually harassed by a patron or someone who is a member of the club, has an obligation to address this problem. If the allegations can be substantiated the owner may decide to

suspend or not renew the harasser's membership. Membership agreements usually contain clauses permitting the club to deal with members in such circumstances.

Example: The superintendent or manager of a building, on becoming aware that female tenants are being harassed by non-residents in the unlocked laundry, is under an obligation to take steps to correct the situation, such as securing the laundry room from non-tenants.

REMEDIES UNDER THE *CODE*

The purpose of human rights legislation is not to find fault but to eliminate discrimination and to provide redress. It is meant to be preventative and remedial, rather than punitive.²¹ A remedy to a complaint might include restoring the complainant to a position the individual would have held had the *Code* not been violated. It may consist of compensation for loss of earnings or job opportunities, or damages for mental anguish suffered as a result of the violation.

Human rights remedies also address issues of public interest. This may include requiring changes to an organization's policies, the implementation of training initiatives, the establishment of internal human rights complaint resolution mechanisms, introduction of anti-harassment policies, a written apology, *etc.*

FILING A COMPLAINT

When a person believes that she or he has been subjected to sexual harassment or other forms of inappropriate gender-related comments or conduct, the individual should seek to resolve the problem through any internal policies or resolution mechanisms the organization may have in place. However, while many companies now have internal human rights complaint resolution mechanisms, these procedures do not replace an individual's right to file a complaint with the Commission. A complaint filed with the Commission may be withdrawn at any time during the complaint process. Under section 34 of the *Code*, the Commission has the discretion to refuse to deal with certain complaints, where the matter: (1) can be more appropriately dealt with under another provincial statute; (2) is "trivial, frivolous, vexatious or made in bad faith"; (3) is not within the Commission's jurisdiction or (4) is based on facts which are more than six months old.

Example: The Commission may exercise its discretion to not deal with a complaint if it appears to the Commission that the person is bringing the complaint in order to embarrass an organization or another person, or if the allegations relate to

events that occurred more than 6 months before the person files a complaint with the Commission, or where there is a grievance procedure in place under a collective agreement to address complaints of discrimination in the workplace.

COLLECTIVE AGREEMENTS AND COMPANY POLICIES

As many sexual harassment complaints arise in the context of employment, the Commission encourages employers and organizations to take responsibility for preventing and remedying incidents of sexual harassment and inappropriate gender-related comments and conduct. The Commission encourages organizations to develop and adopt in-house anti-harassment policies and to ensure that the workplace is properly informed and educated about the nature, effects, and cost of this type of behaviour.

1. Collective Agreements

An increasing number of collective agreements and company policies include specific clauses relating to the prevention and resolution of incidents of discrimination and sexual harassment in the workplace. Employers and labour representatives are recognizing their liabilities under the *Code*, as well as their shared responsibility to maintain workplace environments that are free from sexual harassment.

Persons are not obligated to exhaust an internal complaint resolution mechanism before considering other avenues of complaint such as approaching the Commission or filing a grievance. An individual may elect to file two complaints at the same time - one under the employer's internal policy and one with the Commission. However, if there is a grievance procedure in place under a collective agreement, the Commission may elect to exercise its discretion under s. 34 of the *Code*, and decide to not deal with a complaint. This is because section 48(12)(j) of the *Labour Relations Act* allows labour arbitrators to interpret and apply human rights legislation.

2. Internal Policies

Internal anti-harassment and anti-discrimination policies do not fall under provincial legislation and therefore the Commission does not consider them in the same way as the grievance procedure under a collective agreement. This means that there is the option of contacting the Commission if the resolution obtained through the in-house process is not satisfactory. In which case, the complaint **should** be filed within the six-month limitation period which begins from the time of the alleged harassment. Failure to do so could result in the Commission deciding not to deal with the complaint, subject to section 34(1)(d) of the *Code*.

FOR FURTHER INFORMATION

To assist employers in developing in-house policies on any or all of the protected grounds under the *Code*, the Commission has developed the publication *Developing Procedures to Resolve Human Rights Complaints Within Your Organization*. This publication outlines the elements which ought to be taken into account by organizations when developing or reviewing internal anti-harassment and anti-discrimination policies.

For more information about the Ontario Human Rights Commission or this policy statement, please call 1-800-387-9080 (toll free) or in Toronto (416) 326-9511 (TTD (416) 314-4535), during regular office hours from Monday to Friday. You can also visit our web site at www.ohrc.on.ca.

If a Human Rights Complaint is Made Against You

1. If the Commission receives a complaint against you, Commission staff will contact you to discuss the matter.
2. Commission staff will explain how the *Code* applies to the situation and how the complaint procedure works. Commission staff will work with you and the person making the complaint to try and resolve the concerns. The Commission also offers mediation services.
3. If the concerns cannot be resolved and mediation is not successful, the complaint may proceed to the investigation stage.
4. You can ask the Commission not to deal with the complaint under section 34 of the *Code* if:
 - a) another Ontario Law would be better suited to deal with the situation, such as the *Labour Relations Act*.
 - b) you believe that the person making the complaint has no reasonable basis to support a claim of discrimination, or that the complaint is in bad faith, or that a remedy has already been obtained by the complainant somewhere else;
 - c) the matter is outside the Commission's legal authority;
 - d) the person making the complaint waited longer than 6 months from the last incident of discrimination to file a complaint.
5. The Commission is neutral and does not take sides in the complaint. Commission Staff will assist you with questions about the complaint procedure. However, if you require legal representation or advice, please contact a lawyer.

If You Have a Human Rights Complaint

1. If you have a human rights complaint, you may contact the general inquiries line at 1-800-387-9080 or in Toronto at (416) 326-9511 from Monday to Friday during office hours. A Commission staff person will tell you if your concerns are covered by the *Ontario Human Rights Code* (the "*Code*").
2. Commission staff will explain how the *Code* applies to your situation and how the complaint procedure works. Commission staff will work with you and the other party to resolve the concerns. The Commission also offers mediation services.
3. If you want the Commission to address your concerns, you should file a complaint within 6 months from the last incident of discrimination. This time limit is set out in section 34 of the *Code*.
4. "Filing a complaint" means that you have completed the Commission's complaint form and provided all requested details. You must have signed, dated and returned the form to the Commission.
5. When you file a complaint, Commission staff will work with you and the person/company you have filed against, to try and resolve the complaint through mediation.
6. The Commission may consider not to deal with a complaint under section 34 if:
 - a) another Ontario Law would be better suited to deal with the situation, such as the *Labour Relations Act*.

- b) you have no reasonable basis to support a claim of discrimination, or that you have made the complaint in bad faith, or that you have already obtained a remedy somewhere else;
 - c) the matter is outside the Commission's legal authority;
 - d) you have waited longer than 6 months from the last incident of discrimination to file a complaint.
- 7) The Commission is neutral and does not take sides in the complaint. Commission Staff will assist you with questions about the complaint procedure. However, if you require legal advice, please contact a lawyer.

RELEVANT HUMAN RIGHTS CODE PROVISIONS

- Section 1 Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or handicap.
- Section 2 (1) Every person has a right to equal treatment with respect to the occupancy of accommodation, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status, handicap or the receipt of public assistance.
- (2) Every person who occupies accommodation has a right to freedom from harassment by the landlord or agent of the landlord or by an occupant of the same building because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, marital status, family status, handicap or the receipt of public assistance.
- Section 3 Every person having legal capacity has a right to contract on equal terms without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or handicap.
- Section 5 (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offenses, marital status, family status or handicap.
- (2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offenses, marital status, family status or handicap.

Section 6 Every person has a right to equal treatment with respect to membership in any trade union, trade or occupational association or self-governing profession without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or handicap.

Section 7 (1) Every person who occupies accommodation has a right to freedom from harassment because of sex by the landlord or an agent of the landlord or by an occupant of the same building.

(2) Every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee.

(3) Every person has a right to be free from:

(a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome.

(b) a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.

Section 8 Every person has a right to claim and enforce his or her rights under this Act, to institute and participate in proceedings under this Act, and to refuse to infringe a right of another person under this Act, without reprisal or threat of reprisal for so doing.

Section 12 A right under Part I is infringed where the discrimination is because of relationship, association or dealings with a person or persons identified by a prohibited ground of discrimination.

Section 34 (1) Where it appears to the Commission that,

(a) the complaint is one that could or should be more appropriately dealt with under an Act other than this Act;

(b) the subject-matter of the complaint is trivial, frivolous, vexatious or made in bad faith;

(c) the complaint is not within the jurisdiction of the Commission; or

(d) the facts upon which the complaint is based occurred more than six months before the complaint was filed, unless the Commission is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay,

the Commission may, in its discretion, decide to not deal with the complaint.

Section 45 (1) For the purposes of this Act, except subsection 2(2), subsection 5(2), section 7 and subsection 44(1), any act or thing done or omitted to be done in the course of his or her employment by an officer, official, employee or agent of a corporation, trade union, trade or occupational association, incorporated association or employers' organization shall be deemed to be an act or thing done or omitted to be done by the corporation, trade union, trade or occupational association, unincorporated association or employers' organization.

(2) At the request of a corporation, trade union, trade or occupational association, unincorporated association or employers' organization, a board of inquiry in its decision shall make known whether or not, in its opinion, an act or thing done or omitted to be done by an officer, official, employee or agent was done or omitted to be done with or without the authority or acquiescence of the corporation, trade union, trade or occupational association, unincorporated association or employers' organization, the opinion does not affect the application of subsection (1).

ENDNOTES

1. Gender is a cluster of social characteristics that are attributed to each sex. Based on stereotypes about what constitutes femaleness or maleness gender discrimination can take many forms. For example, calling a woman a "fat cow" may, in some circumstances, imply sexual unattractiveness.
2. *Re Canada Post Corp. and Canadian Union of Postal Workers* (1988), 34 L.A.C. (3d) 27.
3. *Bell v. Ladas* (1980), 1 C.H.R.R. D/158 (Ont. Bd. of Inq.).
4. *Shaw v. Levac Supply Ltd.* (1990), 14 C.H.R.R. D/36 (Ont. Bd. of Inq.).
5. *Cuff v. Gypsy Restaurant* (1987), 8 C.H.R.R. D/3972 (Ont. Bd. of Inq.).
6. "Vexatious conduct or comment" refers to actions or words that provoke, irritate, threaten, annoy, insult or demean, or result in some other form of discomfort.
7. *Reed v. Cattolica Investments Ltd. and Salvatore Ragusa* (March 26, 1996), McNeilly, G., unreported (Ont. Bd. of Inq.).
8. The substantive model of equality looks to the effect or result of the differential treatment rather than treating everyone in the same manner.
9. The question to be asked is: "Would a person on the street, who is a member of the protected group (such as an Asian woman or a lesbian), and who experiences the behaviour in question, share the view that the behaviour was inappropriate?" Note that not all members of a group have to agree that the behaviour was inappropriate.
10. See further *Cuff v. Gypsy Restaurant* at note 5.
11. See further *Shaw v. Levac* at note 4.
12. *Saskatchewan (Human Rights Commission) v. Engineering Society* (1989), 10 C.H.R.R. D/5636 (Sask. Bd of Inq.).
13. Depending on the fact situation, a human rights complaint may be filed under Part I of the *Code*, or be based on discrimination because of association (section 12).

- See further, Judith Keene, *Human Rights in Ontario* (Toronto: Carswell, 1992) at 145.
14. W.S. Tarnopolsky, *Discrimination and the Law in Canada* (Toronto: De Boo, 1982), at 109 - 122.
 15. *Phillips v. Hermiz* (1985), 5 C.H.R.R. D/2450 (Sask. Bd. of Inq.).
 16. "Similar fact evidence" is evidence of past similar conduct by the alleged harasser which may be relied upon to support an allegation of harassment. The usefulness of this kind of evidence in supporting a claim of harassment depends mostly on whether the past incidents of misconduct are sufficiently similar to the kind of harassment alleged by the complainant. For example, were other female employees in receipt of similar comments or treatment by the respondent?
 17. "Corporate respondent" is the business entity which may be held responsible for conduct of persons who are associated with the business and who are alleged to have contravened the *Code*.
 18. *Edilma Olarte et al. v. Rafael deFilippis and Commodore Business Machines Ltd.* (1983), 4 C.H.R.R. D/1744 [4] and [5], affirmed (1984), 14 D.L.R. [4th] 118 (Div. Ct.).
 19. *Kerryann Henwood v. Gerry Van Wart Sales Inc. and Claudio Saggese* (February 21, 1995), Anand, R., unreported (Ont. Bd. of Inq.).
 20. *Michael Naraine v. Ford Motor Company of Canada Ltd., et al.* (July 25, 1996), Backhouse, C., unreported (Ont. Bd. of Inq.).
 21. *Robichaud v. Canada (Treasury)* [1987] 8 C.H.R.R. D/4326 (CHRT).