



Ontario  
Human Rights Commission  
Commission ontarienne des  
droits de la personne

# Policy on discrimination and language

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## Purpose of OHRC Policies

Section 30 of the Ontario *Human Rights Code* (*Code*) authorizes the Ontario Human Rights Commission (OHRC) to prepare, approve and publish human rights policies to provide guidance on interpreting provisions of the *Code*.<sup>\*</sup> The OHRC's policies and guidelines set standards for how individuals, employers, service providers and policy-makers should act to ensure compliance with the *Code*. They are important because they represent the OHRC's interpretation of the *Code* at the time of publication.<sup>\*\*</sup> Also, they advance a progressive understanding of the rights set out in the *Code*.

Section 45.5 of the *Code* states that the Human Rights Tribunal of Ontario (the Tribunal) may consider policies approved by the OHRC in a human rights proceeding before the Tribunal. Where a party or an intervenor in a proceeding requests it, the Tribunal *shall* consider an OHRC policy. Where an OHRC policy is relevant to the subject-matter of a human rights application, parties and intervenors are encouraged to bring the policy to the Tribunal's attention for consideration.

Section 45.6 of the *Code* states that if a final decision or order of the Tribunal is not consistent with an OHRC policy, in a case where the OHRC was either a party or an intervenor, the OHRC may apply to the Tribunal to have the Tribunal state a case to the Divisional Court to address this inconsistency.

OHRC policies are subject to decisions of the Superior Courts interpreting the *Code*. OHRC policies have been given great deference by the courts and Tribunal,<sup>\*\*\*</sup> applied to the facts of the case before the court or Tribunal, and quoted in the decisions of these bodies.<sup>\*\*\*\*</sup>

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<sup>\*</sup> The OHRC's power under section 30 of the *Code* to develop policies is part of its broader responsibility under section 29 to promote, protect and advance respect for human rights in Ontario, to protect the public interest, and to eliminate discriminatory practices.

<sup>\*\*</sup> Note that case law developments, legislative amendments, and/or changes in the OHRC's own policy positions that took place after a document's publication date will not be reflected in that document. For more information, please contact the Ontario Human Rights Commission.

<sup>\*\*\*</sup> In *Quesnel v. London Educational Health Centre* (1995), 28 C.H.R.R. D/474 at para. 53 (Ont. Bd. Inq.), the tribunal applied the United States Supreme Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (4<sup>th</sup> Cir. 1971) to conclude that OHRC policy statements should be given "great deference" if they are consistent with *Code* values and are formed in a way that is consistent with the legislative history of the *Code* itself. This latter requirement was interpreted to mean that they were formed through a process of public consultation.

<sup>\*\*\*\*</sup> Recently, the Ontario Superior Court of Justice quoted at length excerpts from the OHRC's published policy work in the area of mandatory retirement and stated that the OHRC's efforts led to a "sea change" in the attitude towards mandatory retirement in Ontario. The OHRC's policy work on mandatory retirement heightened public awareness of this issue and was at least partially responsible for the Ontario government's decision to pass legislation amending the *Code* to prohibit age discrimination in employment after age 65, subject to limited exceptions. This amendment, which became effective December 2006, made mandatory retirement policies illegal for most employers in Ontario: *Assn. of Justices of the Peace of Ontario v. Ontario (Attorney General)* (2008), 92 O.R. (3d) 16 at para. 45. See also *Eagleson Co-Operative Homes, Inc. v. Théberge*, [2006] O.J. No. 4584 (Sup.Ct. (Div.Ct.)) in which the Court applied the OHRC's

## Introduction

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.

This policy statement sets out the OHRC's position on language-based discrimination in the areas of employment, accommodation, services, contracts, and membership in trade unions, trades, occupational associations or self-governing professions.

The *Code*, like most other provincial human rights legislation in Canada, does not include "language" as a prohibited ground of discrimination.<sup>1</sup> For the Tribunal to have jurisdiction, the discriminatory action or behaviour must be in relation to a prohibited ground of discrimination in the *Code*.

Although the *Code* does not explicitly identify "language" as a prohibited ground of discrimination, the Human Rights tribunal of Ontario may consider claims under a number of related grounds, such as ancestry, ethnic origin, place of origin and in some circumstances, race.<sup>2</sup> In the Commission's experience, language can be an element of a complaint based on any of these grounds.<sup>3</sup>

## Language-related grounds of discrimination: ancestry, ethnic origin, place of origin, race

The first language we learn is frequently the language spoken by our parents or guardians and others who take care of us as children. There is almost inevitably a link between the language we speak or the accent with which we speak a particular language on the one hand, and our ancestry, ethnic origin or place of origin on the other.<sup>4</sup>

A person's accent is also often associated with her or his "mother tongue" or place of origin. Because a person's accent is usually related to her or his ancestry, ethnic origin or place of origin, the *Code* can be infringed when someone is denied employment, service, housing, or is otherwise discriminated against because of an accent. In these kinds of situations, the underlying discrimination is often actually based on ancestry, place of origin and, or ethnic origin.

**Example:** After an interview for a job as a school bus driver, a woman from Quebec, whose first language is French, was told she would not be hired for the position because she does not speak English fluently.

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*Policy and Guidelines on Disability and the Duty to Accommodate*, available at:  
[www.ohrc.on.ca/en/resources/Policies/PolicyDisAccom2](http://www.ohrc.on.ca/en/resources/Policies/PolicyDisAccom2)

She believed that she did have adequate command of English, but that she was turned down because her first language is French. Fluency in English was not identified as an essential feature of the job. Since one's "mother tongue" is closely associated with ancestry,<sup>5</sup> to deny a person employment because she is French-speaking could constitute a violation of the *Code* on the ground of "ancestry". Also, as she is from Quebec, "place of origin" could be cited as a secondary ground in the claim.<sup>6</sup>

**Example:** A teacher, originally from Poland, was on a school board's substitute teacher's list from which individuals are selected for short-term assignments. A period of time went by when he was not selected from this list for temporary assignments. The teacher learned that a note had been attached to his file which said that he did not speak English. The teacher filed a human rights application, and at a hearing before the Tribunal, the respondent indicated that the note should have stated that the complainant spoke English with an "accent" and therefore should not be assigned to substitute for teachers in English or Social Studies classes. The Tribunal ruled that the teacher was discriminated against because of his accent which is directly related to his ancestry or place of origin.<sup>7</sup>

There can also be situations in which the issue of fluency in a language or a person's accent in speaking a particular language, can be used to mask discrimination based on race.

**Example:** An African Canadian woman grew up in North Africa, speaking Italian. She had also studied in Italy. She applied for a position as a social worker with a community organization. The job description stated that, in addition to the technical skills and experience as a social worker that would be required for the job, competence in speaking "Italian, Portuguese or Chinese would be an asset". Although she was the best qualified applicant, she was denied the position because the agency felt that its client group would not be able to relate to "how" she spoke Italian, that is, her accent. She felt that her race was the real reason she was not hired and subsequently filed an application with the Tribunal.

## Harassment and “poisoned environment”

### 1. Harassment

Harassment is defined in Section (s.) 10(1) of the *Code* as "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome".<sup>8</sup> Harassment because of language or accent, may be a form of discrimination on the grounds of ancestry, ethnic origin, place of origin or in some situations race, contrary to the *Code*.

**Example:** A manager supervises a group of workers whose first language is Arabic. He gets angry when they speak among themselves in Arabic

during their breaks. The manager orders these employees to speak "Canadian" while they are at work, and threatens to terminate their employment if they continue speaking Arabic. Unless the manager can demonstrate that speaking English at all times at the workplace is a reasonable and *bona fide* requirement in the circumstances, his behaviour could constitute harassment under s. 5 of the *Code*.

## 2. "Poisoned environment"

There are situations in which a single incident may be significant or substantial enough to constitute a breach of the *Code* by creating a "poisoned environment" for some individuals. Unequal treatment, in the form of offensive behaviour, does not have to occur continuously or repeatedly for there to be a violation of the *Code*.

Sections 1, 2, 3, 5, 6 and 9 of the *Code*, provide protection from discrimination because of race, ancestry, place of origin or ethnic origin. Any one of these sections can be the basis for a claim that a single incident was substantial enough to create a "poisoned environment".

In determining whether a "poisoned environment" has been created for persons identified by a prohibited ground of discrimination, you should look at the impact of the behaviour rather than the number of times the behaviour occurs. A "poisoned environment" can arise when a person or a group of people are treated differently for reasons related to the language they speak. Language is often a pretext for indirectly discriminating against someone because of her or his ancestry, place of origin or ethnic origin.<sup>9</sup>

**Example:** A law professor tells his class that those who speak English with a "foreign" accent do not make "good lawyers", and should not be admitted to law schools in Ontario to occupy spaces that should be held by Canadians. This remark in itself may be sufficient to poison the environment for those students in the class whose first language is not English, or those whose first language may be English but come from a country other than Canada and speak English with an accent. It may also have an impact on students whose ancestors came from, for example, Asia or Africa, because the comment targets new Canadians, many of whom now emigrate from these regions of the world.

## Constructive discrimination

Under s. 11 of the *Code*, constructive discrimination may occur where there is a requirement, qualification or factor that is not discriminatory on its face, but when applied, results in the exclusion, restriction or preference of a group of persons identified by a prohibited ground of discrimination in the *Code*.<sup>10</sup>

Section 11(1)(a) further provides that a requirement, qualification or factor will not be found to be discriminatory if it can be established that it is reasonable

and *bona fide* in the circumstances. Section 11(2) states, "The Commission, the Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any."

If an employer refuses to hire or promote an employee, if a sales clerk chooses to serve only particular customers, or a building manager is consistently rude to certain tenants because of a characteristic that is closely related to grounds under the *Code*, these actions may give rise to a human rights claim. Language is a characteristic that is often closely associated with ancestry, ethnic origin or place of origin. Thus, the *Code* may be breached where a language requirement, such as "proficiency" in English,<sup>11</sup> excludes, gives preference to, or restricts persons because of their ancestry, ethnic origin or place of origin.

### **1. *Bona fide* occupational requirement**

The Commission recognizes that proficiency in a certain language may be a reasonable and legitimate requirement for employment. For example, if English-language proficiency is required for a position, it should be established as a *bona fide* occupational requirement. The test for determining if a qualification is *bona fide* must be an objective one. The requirement for English proficiency, and the degree of proficiency required,<sup>12</sup> must bear an objective relationship to the essential requirements of the job, and be a *bona fide* occupational requirement that is imposed in good faith.<sup>13</sup>

**Example:** A supervisor in British Columbia refused to hire a South Asian man for an entry level position in a lumber mill. According to the supervisor, the applicant "could not speak English". A tribunal found that the requirement of proficiency in English was not a *bona fide* occupational requirement for the position, and that the complainant's level of English was good enough to allow him to complete a course on lumber grading in English and obtain high marks. The tribunal went on to find that the supervisor's refusal to hire the complainant was in fact motivated by race and place of origin, not lack of proficiency in English, and therefore constituted an infringement of his rights under the (British Columbia) *Human Rights Act*.<sup>14</sup>

Fluency in a particular language could be a *bona fide* requirement in some employment or service situations.

**Example:** An agency that serves persons from Central America requires support workers who can also act as refugee advocates. The functions of the position include providing support to clients at refugee board hearings. Fluency in Spanish in addition to English (or French) would likely be considered a *bona fide* requirement for the position.

In these circumstances, the requirement for the position must focus on the particular language needed to function in the job, and not on the place of origin, ancestry, ethnic origin or race of candidates for the position. In the above example, if an applicant is qualified and speaks fluently in Spanish and English, but does not come from a Central America country, she could not be denied the position unless the agency could justify a defence under s. 24(1)(a) of the *Code*.

## **Relevant Code provisions**

### **Services, goods and facilities**

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 disability.

### **Accommodation**

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, disability or the receipt of public assistance.

### **Harassment in accommodation**

Section 2: (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, disability or the receipt of public assistance.

### **Contracts**

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 disability.

### **Employment**

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 offences, marital status, family status or disability.

### **Harassment in employment**

Section 5: (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 offences, marital status, family status or disability.

### **Vocational associations**

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 disability.

### **Reprisals**

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.

### **Infringement prohibited**

Section 9: No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

### **Constructive discrimination**

Section 11: (1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

- a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or
- b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.

### **Special employment**

Section 24: (1) The right under s. 5 to equal treatment with respect to employment is not infringed where,

- a) a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by their race, ancestry, place of origin, colour, ethnic origin, creed, sex, age, marital status or disability employs only, or gives preference in employment to, persons similarly identified if the qualification is a reasonable and *bona fide* qualification because of the nature of the employment.

## **For more information**

Please visit [www.ontario.ca/humanrights](http://www.ontario.ca/humanrights) for more information on the human rights system in Ontario.

The Human Rights System can also be accessed by telephone at:

Local: 416-326-9511

Toll Free: 1-800-387-9080

TTY (Local): 416-326 0603

TTY (Toll Free) 1-800-308-5561

To file a human rights claim, please contact the Human Rights Tribunal of Ontario at:

Toll Free: 1-866-598-0322

TTY: 416-326-2027 or Toll Free: 1-866-607-1240

Website: [www.hrto.ca](http://www.hrto.ca)

To talk about your rights or if you need legal help with a human rights claim, contact the Human Rights Legal Support Centre at:

Toll Free: 1-866-625-5179

TTY: 416-314-6651 or Toll Free: 1-866-612-8627

Website: [www.hrlsc.on.ca](http://www.hrlsc.on.ca)

## Endnotes

<sup>1</sup> At the time of the initial publication of this Policy, Quebec and the Yukon Territory are the only Canadian jurisdictions which specifically state that language is a prohibited ground of discrimination in the area of employment.

<sup>2</sup> Sign language is not included in this policy as it is directly related to the ground of "disability" which is protected under the *Code*. Issues relating to persons who sign are addressed in the Commission's *Policy and Guidelines on Disability and the Duty to Accommodate*, available at [www.ohrc.on.ca](http://www.ohrc.on.ca).

<sup>3</sup> The *Code* is to be given a fair, large and liberal interpretation. See *Cousens v. Canadian Nurses Association* (1981), 2 C.H.R.R. D/365 (Ont. Bd. of Inq.).

<sup>4</sup> *Espinoza v. Coldmatic Refrigeration of Canada Inc. et al.*, March 31, 1995, unreported, Harman, R. (Ont. Bd. of Inq.).

<sup>5</sup> "Mother tongue": see further *Supra, note 3, Cousens*. It should also be noted that there may be a violation of the *Code*, based on "place of origin", when English as a "mother tongue" is a job requirement.

<sup>6</sup> Discrimination against a regional accent may also constitute an infringement of the *Code* on the basis of "place of origin." "Place of origin" may cover situations where the characteristics of a person are, to the respondent, strongly associated with a particular region, that trigger discrimination. For example, an Aboriginal man from Northern Ontario and a woman from Newfoundland may both speak with an accent typical of the regions where they live. If they are denied employment because of their accent, they may file an application with the Tribunal on the basis of "place of origin". (see further Judith Keene, *Human Rights in Ontario* (2d) (Toronto: Carswell, 1992) at 53.

<sup>7</sup> *Gajecki v. Surrey School District* (No. 36)(1989) 11 C.H.R.R. D/326 (B.C. Council of H.R.). See also *Segula v. Ferrante, Ball Packaging Products Inc.* (March 3, 1995), (unreported), Leighton, D. (Ont. Bd. of Inq.).

<sup>8</sup> The subjective element of this definition assumes that the person responsible for the behaviour knows that his/her comments or actions are unwelcome. The objective element is based on the assumption that the person should reasonably know that his/her behaviour is unwelcome.

<sup>9</sup> The Supreme Court of Canada upheld the concept of "poisoned environment" in *Attis v. The Board of School Trustees, District No. 15 and The Human Rights Commission of New Brunswick et al.* (April 3, 1996), (S.C.C.) [unreported].

<sup>10</sup> *R. v. Bushnell Communications Ltd. et al.* (1974) 1 O.R. (2d) 442; aff'd (1974) O.R. (2d) 288.

<sup>11</sup> Studies have shown that there is a significant relationship between English-language proficiency and discriminatory experiences, and that these experiences are not limited to employment (see further *Racism and Chinese-Canadian Business Participation*, prepared for the Chinese Information and Community Services, Toronto, March 1996). That is, persons with low levels of language skills are more likely to experience discrimination in employment, services and in housing accommodation.

<sup>12</sup> The degree of proficiency required must be objectively determined. There may also be situations where a certain level of language requirement is justifiable for a particular position.

**Example:** A store clerk should have sufficient language skills to be able to communicate with customers. Other occupations may require only a basic understanding of English and if there is no contact with the public limited communication skills may be adequate for the position. In these situations, requiring a high level of English-language proficiency would not be a *bona fide* occupational requirement.

On the other hand, a politician may need to hire an executive who is fluent in several Chinese dialects in order to serve her large Chinese-speaking constituency. In which case, fluency in particular Chinese dialects may be a *bona fide* occupational requirement.

<sup>13</sup> *Ontario (Human Rights Commission) v. Etobicoke (Borough)* [1982] 1 S.C.R. 202.

<sup>14</sup> *Dhaliwal v. B.C. Timber Ltd.* (1983), 4 C.H.R.R. D/1520 (B.C. Bd. of Inq.).