



Ontario
Human Rights Commission
Commission ontarienne des
droits de la personne

Policy on HIV/AIDS-related discrimination

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resulting from the *Human Rights Code Amendment Act,
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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*.^{*} 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.^{**} 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,^{***} applied to the facts of the case before the court or Tribunal, and quoted in the decisions of these bodies.^{****}

^{*} 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.

^{**} 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 OHRC.

^{***} 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 (4th 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.

^{****} 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 to 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

A society is judged by how it responds to those in greatest need. A tragedy such as the HIV epidemic brings a society face to face with the core of its established values, and offers an opportunity for the reaffirmation of compassion, justice and dignity.

James D. Watkins, Chair
Presidential Committee on the
Human Immunodeficiency Virus Epidemic Report
Report of June 24, 1988

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.

The *Code* provides for equal treatment without discrimination because of disability. AIDS (Acquired Immunodeficiency Syndrome) and other medical conditions related to infection by the Human Immunodeficiency Virus (HIV) are recognized as disabilities within the meaning of the *Code*. All persons who have or have had, or who are believed to have or have had, or are perceived to have, AIDS or HIV-related medical conditions, including those who do not show symptoms of AIDS or AIDS-related illnesses, are entitled to the protection of the *Code* in employment, services, housing, contracts and membership in trade unions.

HIV is transmitted through very limited ways. It is most commonly transmitted through unprotected sexual activity and through contact with infected blood and other body fluids. A person may become infected with HIV by receiving blood transfusions or using blood contaminated needles. It is important to recognize that today, the risk of transmitting HIV through blood transfusions has been minimized in North America. Since 1985, blood banks across Canada and the United States have implemented routine procedures for comprehensive HIV antibody screening.

AIDS is much more than just a medical/scientific phenomenon. It challenges our fundamental values such as a commitment to a compassionate society, to justice and to the elimination of all aspects of discrimination that undermines these values.

Policy and Guidelines on Disability and the Duty to Accommodate, available at:
www.ohrc.on.ca/en/resources/Policies/PolicyDisAccom2

Purpose of this Policy

This policy clarifies the scope of the *Code's* protection for persons who are or are perceived to be infected with HIV or who have contracted HIV-related illnesses. The guidelines contained in this policy are based on extensive consultations between the OHRC and a wide-ranging number of interest and advocacy groups, employer groups, services providers, and members of the medical community, including hospital administrators.

Relevant sections of the Code

HIV/AIDS as a disability (section 10)

The OHRC recognizes that AIDS and other HIV-related medical conditions are disabilities under the *Code*. "Disability" is defined under section (s.) 10 of the *Code*. All persons infected with HIV or with HIV-related illness, or who are believed to have the virus, including those who are asymptomatic, are fully protected against discrimination in services (s. 1); housing (s. 2); contracts (s. 3); employment (s. 5); and membership in trade unions (s. 6).

Protection under the *Code* is also extended to persons on the ground of "sexual orientation." Persons identified by this prohibited ground of discrimination are often believed to be at high risk of contracting AIDS or to be carriers of HIV. The erroneous perception of AIDS as a "gay disease" is a form of stereotyping that the *Code* prohibits. Discrimination on the grounds of sexual orientation is unlawful.

Protection against discrimination and harassment (s. 10)

Persons who have or have had, or are believed to have or have had, AIDS or HIV-related medical conditions are protected from discrimination and harassment in employment, housing, services, contracts and membership in trade unions. Harassment is defined under s. 10 of the *Code* and means:

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

Discrimination because of association (s. 12)

The *Code* also protects against discrimination on the basis of "association." Section 12 of the *Code* states that:

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

This means that a person who is associated with anyone who is identified by a prohibited ground of discrimination, such as a co-worker, a friend or a relative of the person who is HIV-positive, cannot be discriminated against because of this association.

Example: A rental property manager would be in breach of the *Code* if she refuses to rent a house to a representative of an AIDS advocacy organization because of the organization's association with persons identified by their disability.

Duty to accommodate

In addition to the specific grounds of prohibited discrimination mentioned above, s. 17 of the *Code* sets out a broad duty to accommodate the needs of persons with disabilities, short of undue hardship.

Example: An employer is obliged to accommodate the needs of a person with AIDS in order to assist the person in "performing or fulfilling the essential duties or requirements" of the job. This might involve taking steps to redefine work duties and providing temporary work assignments to accommodate health-related absences.

"Short of undue hardship" is a standard that is applied to the person required to make the accommodation. It takes into consideration costs, available sources of funding, as well as health and safety factors (see further the OHRC's *Policy and guidelines on disability and the duty to accommodate*).

It is well established in human rights case law that customer or third party preferences are not to be considered in assessing undue hardship.

Example: It is discriminatory for an employer to claim that customers and/or other employees would object to hiring a person who is HIV positive.

Application of the Code

This policy is intended to provide particular guidance to those responsible for formulating and implementing infection control procedures in health-care settings and anti-harassment/anti-discrimination policies in the workplace, in housing and in services.

Keeping with the spirit of *Code*, any health protection and promotion policies should be introduced in a manner that respects the individual's privacy. Treating persons with HIV-related illness in an arbitrary or discriminatory manner that is not supported by current medical or scientific knowledge may be a violation of the *Code*.

Spirit of the Code

The spirit of the *Code* requires that persons who are HIV positive and those with HIV-related illness are to be given the opportunity to remain integral members of society and to maintain their social, employment and other relationships. This implies that any assessment of a person's illness must be based on his or her current abilities and on the situation's current risks, rather than on abilities or risks which may arise in the future. The *Code's* accommodation requirements are designed to ensure integration and sensitivity to the needs of persons with disabilities as they may change over time.

Respecting the dignity of the person

The *Code* prohibits, in all but exceptional circumstances, infection control techniques where the person with an HIV-related illness is isolated or quarantined. Current scientific knowledge on the transmission of the AIDS virus indicates that such measures do not prevent the spread of infection and are also inappropriate except in rare cases. Moreover, the fear of isolation may simply deter persons who have participated in high risk activities from seeking voluntary testing and counselling.

Universal precautions

"Universal precautions" are a set of risk reduction measures employed at all times by medical and health-care professionals and workers whenever they encounter blood or other identified body fluids. The concept of universal precautions relates to the proper handling of sharp items, and the use of barriers, such as gloves and masks, to protect the person handling the blood or body fluids. It can be adapted to different medical settings depending on the medical procedure required.¹

Example: Dentists are expected to use the appropriate eye-wear, masks and gloves *etc.* when dealing with *all* patients.

With universal blood and body-fluid precautions widely in place, there is no need for using additional precautions for patients who are known or believed to have illnesses that can be transferred by blood.

Testing

Testing for HIV infection would constitute a medical examination. It is the OHRC's position that any medical examination carried out for employment purposes should focus on verifying whether or not an individual is able to perform the essential duties of a particular job.

Employers considering any form of employment-related medical testing should refer to the OHRC's *Human rights at work*, 3rd Ed. (2008) and the *Policy on employment-related medical information*.

The following are the main principles of the latter policy:

1. Employment-related medical examinations or inquiries, conducted as part of the applicant screening process, are prohibited under subsection 23 (2) of the *Code*.
2. Any employment-related medical examinations or inquiries are to be limited to determining the individual's ability to perform the essential duties of a job.
3. Medical examinations, if determined to be necessary to assess an individual's ability to perform the essential duties of a job should only be undertaken after a conditional offer of employment has been made, preferably in writing.
4. If the applicant or employee requires accommodation in order to enable him or her to perform the essential duties of the job, the employer is required to provide such accommodation unless to do so would cause undue hardship.

The *Policy on Employment-Related Medical Information* does not allow employers to subject job applicants to any type of medical examination before a conditional offer of employment is made. After the person is hired, medical tests designed to identify employees with disabilities may constitute a breach of the *Code* if the disability being tested for is not a reasonable and *bona fide* concern with regard to the job performed.

In most work settings, it is unlikely that testing for HIV infection or other protective measures would be necessary or justifiable. Several studies have conclusively demonstrated that persons with HIV infection or HIV-related medical conditions pose virtually no risk to those with whom they interact.²

The U.S. Public Health Service guidelines state that workers infected with HIV should not be restricted from using telephones, office equipment, toilets, eating facilities, or water fountains. There are no documented instances of HIV transmission from the serving or preparation of food or beverages. For non-sexual household contact, of 30,000 cases of AIDS reported to the U.S. Centre for Disease Control, none has occurred in family members of patients with AIDS, unless the members have partaken in other recognized risk-related behaviour.³

Ensuring privacy and confidentiality

It is essential to ensure the maximum degree of privacy and confidentiality when medical information is legitimately required for health protection and promotion or other purposes. This applies in all situations and circumstances including hospitals, health clinics, insurance company records, employee's files, etc.

In employment settings, all health assessment information, including HIV testing results, should remain exclusively with the examining physician and away from an employee's personnel file in order to protect the confidentiality of the information.

Relevant Ontario *Human Rights Code* provisions

Freedom from discrimination

- 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.
- 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.
- (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.
- 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.
- 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.
- (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.

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.

Section 10 (1) "Disability" means,

- (a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,
- (b) a condition of mental impairment or a developmental disability,
- (c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
- (d) a mental disorder, or
- (e) an injury or disability for which benefits were claimed or received under the insurance plan established under the Workplace Safety and Insurance Act, 1997; ("handicap")

(3) The right to equal treatment without discrimination because of disability includes the right to equal treatment without discrimination because a person has or has had a disability or is believed to have or to have had a disability.

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 17 (1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability.
- (2) No tribunal or court shall find a person incapable unless it is satisfied that the needs of the person 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.
- Section 23 (1) The right under s. 5 to equal treatment with respect to employment is infringed where an invitation to apply for employment or an advertisement in connection with employment is published or displayed that directly or indirectly classifies or indicates qualifications by a prohibited ground of discrimination.
- (2) The right under s. 5 to equal treatment with respect to employment is infringed where a form of application for employment is used or a written or oral inquiry is made of an applicant that directly or indirectly classifies or indicates qualifications by a prohibited ground of discrimination.

Functions of the OHRC

- Section 29 The functions of the Commission are to promote and advance respect for human rights in Ontario, to protect human rights in Ontario and, recognizing that it is in the public interest to do so and that it is the Commission's duty to protect the public interest, to identify and promote the elimination of discriminatory practices and, more specifically,
- (a) to forward the policy that the dignity and worth of every person be recognized and that equal rights and opportunities be provided without discrimination that is contrary to law;
 - (b) to develop and conduct programs of public information and education to,

- (i) promote awareness and understanding of, respect for and compliance with this Act, and
 - (ii) prevent and eliminate discriminatory practices that infringe rights under Part I;
- (c) to undertake, direct and encourage research into discriminatory practices and to make recommendations designed to prevent and eliminate such discriminatory practices;
- (d) to examine and review any statute or regulation, and any program or policy made by or under a statute, and make recommendations on any provision, program or policy that in its opinion is inconsistent with the intent of this Act;
- (e) to initiate reviews and inquiries into incidents of tension or conflict, or conditions that lead or may lead to incidents of tension or conflict, in a community, institution, industry or sector of the economy, and to make recommendations, and encourage and co-ordinate plans, programs and activities, to reduce or prevent such incidents or sources of tension or conflict;
- (f) to promote, assist and encourage public, municipal or private agencies, organizations, groups or persons to engage in programs to alleviate tensions and conflicts based upon identification by a prohibited ground of discrimination;
- (g) to designate programs as special programs in accordance with section 14;
- (h) to approve policies under section 30;
- (i) to make applications to the Tribunal under section 35;
- (j) to report to the people of Ontario on the state of human rights in Ontario and on its affairs;
- (k) to perform the functions assigned to the Commission under this or any other Act.

For more information

For more information about the OHRC or this policy statement, please visit our website at www.ohrc.on.ca .

Please visit 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

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

¹ Royal College of Dental Surgeons of Ontario, *Guidelines Respecting Infection Control in the Dental Office*, June 1995. The College notes that its guidelines can be used by other health professional bodies in determining whether appropriate standards of practice and professional responsibilities have been maintained.

² The Canadian Medical Association released its policy on HIV in the workplace in May 1993, which includes the following statement:

There have been no instances in Canada of HIV infections in patients resulting from exposure to infected health care workers...Health care workers with HIV infection should be afforded the opportunity to compete for jobs and continue to work at their usual occupation as long as they meet acceptable performance standards and are mentally and physically able to perform the essential components of work safely, efficiently and reliably.

³ *Biggs v. Hudson* (1988) 9 C.H.R.R. D/834 (B.C. Human Rights Council).