



# Physicians and the Ontario *Human Rights Code*

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# Physicians and the Ontario Human Rights Code

## INTRODUCTION

Ontario's *Human Rights Code*<sup>1</sup> (the *Code*) articulates the right of every Ontario resident to receive equal treatment with respect to goods, services and facilities without discrimination based on a number of grounds, including race, age, colour, sex, sexual orientation, and disability.<sup>2</sup> This imposes a duty on all those who provide services in Ontario – which includes physicians providing medical services – to provide these services free from discrimination.

## PURPOSE

The goal of this policy is to help physicians understand the scope of their obligations under the *Code* and to set out the College's expectation that physicians will respect the fundamental rights of those who seek their medical services.

## SCOPE

This policy is applicable to all situations in which physicians are providing medical services.

## POLICY

Physicians must comply with the *Code* when making any decision relating to the provision of medical services. This includes decisions to accept or refuse individuals as patients, decisions about providing treatment or granting referrals to existing patients, and decisions to end a physician-patient relationship.

While the College does not have the expertise or the authority to make complex, new determinations of human rights law, physicians should be aware that the College is obliged to consider the *Code* when determining whether physician conduct is consistent with the expectations of the profession. Compliance with the *Code* is one factor the College will consider when evaluating physician conduct.

This policy is divided into two sections, each of which addresses physicians' obligations under the *Code*. The first addresses physicians' obligations to provide medical services without discrimination. The second addresses physicians' obligations to accommodate the disabilities of patients or individuals who wish to become patients.

### 1. Providing medical services without discrimination

The *Code* requires that physicians provide medical services without discrimination.

This means that physicians cannot make decisions about

whether to accept individuals as patients, whether to provide existing patients with medical care or services, or whether to end a physician-patient relationship on the basis of the individual's or patient's race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status and/or disability.<sup>3</sup>

This does not prevent physicians from making decisions or exercising professional judgment in relation to their own clinical competence. Physicians are always expected to practice medicine in keeping with their level of clinical competence to ensure they provide patients with quality health care in a safe manner. If physicians feel they cannot appropriately meet the health care needs of a patient or an individual who wishes to become a patient, they are not required to accept that person as a patient or to continue to act as that patient's physician, provided they comply with other College policies in so doing.<sup>4</sup>

## Guidelines

Although the Human Rights Commission and Tribunal have primary responsibility for interpreting and adjudicating human rights matters, the following guidance is intended to assist physicians in determining how to comply with the requirements of the *Code*. Physicians may also wish to seek guidance from a lawyer or the Canadian Medical Protective Association (CMPA).

### i) Clinical Competence

As stated above, the duty to refrain from discrimination does not prevent physicians from making decisions in the course of practicing medicine that are related to their own clinical competence.

Where a physician is not able to accept an individual as a patient, provide a patient with treatment, or must end a physician-patient relationship for reasons related to his or her own clinical competence, the College offers the following as guidance.

### Consider the Possibility of Referral

As a first step, physicians are encouraged to consider whether individuals or patients could be referred to other physicians for the elements of care that the physician is unable to manage directly.

### Consult College Policies

If physicians decide that referral is not an option, and that they must end a physician-patient relationship for reasons

1 R.S.O. 1990, c.H.19.

2 Section 1 of the *Human Rights Code*, R.S.O. 1990, c. H.19 states, 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. The Ontario Human Rights Commission's position is that the obligation not to discriminate on the basis of 'sex' includes an obligation not to discriminate on the basis of pregnancy, breastfeeding and gender identity.

3 *Human Rights Code*, R.S.O. 1990, c.H.19, section 1. This legal obligation is reflected in guidance contained in the Canadian Medical Association's *Code of Ethics*, paragraph 17.

4 See CPSO's policy *Ending the Physician-Patient Relationship*, and *The Practice Guide*.



related to clinical competence, they are expected to act in accordance with College expectations as set out in the *Ending the Physician-Patient Relationship* policy.

### Clear Communication

The College expects physicians to communicate decisions they make to end a physician-patient relationship, refrain from providing a specific procedure, or to decline to accept an individual as a patient, and the reasons for the decision in a clear, straightforward manner. Doing so will allow physicians to explain the reason for their decision accurately, and thereby avoid misunderstandings.

Where a physician's clinical competence may restrict the type of patients the physician is able to accept, physicians should communicate these restrictions as soon as is reasonable. This will enable individuals to have a clear understanding as to whether the physician will be able to accept them as a patient, or whether it will be in their best interests to try to find another physician.

Where a physician's clinical competence may restrict the type of services or treatment he or she can provide, the physician should inform patients of any limitations related to clinical competence as soon as it is relevant. That is, the physician should advise the patient as soon as the physician knows the patient has a condition that he or she is not able to manage.

### ii) Moral or Religious Beliefs

If physicians have moral or religious beliefs which affect or may affect the provision of medical services, the College advises physicians to proceed cautiously with an understanding of the implications related to human rights.

Personal beliefs and values and cultural and religious practices are central to the lives of physicians and their patients.

Physicians should, however, be aware that the Ontario Human Rights Commission or Tribunal may consider decisions to restrict medical services offered, to accept individuals as patients or to end physician-patient relationships that are based on physicians' moral or religious beliefs to be contrary to the *Code*.

### Ontario Human Rights Code: Current Law

Within the *Code*, there is no defence for refusing to provide a service on the basis of one of the prohibited grounds. This

means that a physician who refuses to provide a service or refuses to accept an individual as a patient on the basis of a prohibited ground such as sex or sexual orientation *may* be acting contrary to the *Code*, even if the refusal is based on the physician's moral or religious belief.<sup>5</sup>

The law in this area is unclear, and as such, the College is unable to advise physicians how the Commission, Tribunal or Courts will decide cases where they must balance the rights of physicians with those of their patients.

There are some general principles, however, that Courts have articulated when considering cases where equality rights clash with the freedom of conscience and religion.<sup>6</sup> They are as follows:

- There is no hierarchy of rights in the *Charter*; freedom of religion and conscience, and equality rights are of equal importance;<sup>7</sup>
- Freedom to exercise genuine religious belief does not include the right to interfere with the rights of others;<sup>8</sup>
- Neither the freedom of religion nor the guarantee against discrimination are absolute. The proper place to draw the line is generally between belief and conduct. The freedom to hold beliefs is broader than the freedom to act on them.<sup>9</sup>
- The right to freedom of religion is not unlimited; it is subject to such limitations as are necessary to protect public safety, order, health, morals, or the fundamental rights or freedoms of others;<sup>10</sup>
- The balancing of rights must be done in context. In relation to freedom of religion specifically, Courts will consider how directly the act in question interferes with a core religious belief. Courts will seek to determine whether the act interferes with the religious belief in a 'manner that is more than trivial or insubstantial.'<sup>11</sup> The more indirect the impact on a religious belief, the more likely Courts are to find that the freedom of religion should be limited.<sup>12</sup>

These principles appear to be generally applicable to circumstances in which a physician's religious beliefs conflict with a patient's need or desire for medical procedures or treatments. They are offered here to provide physicians with an indication of what principles may inform the decisions of Courts and Tribunals.

5 This could occur if the physician's decision to refuse to provide a service, though motivated by religious belief, has the effect of denying an individual access to medical services on one of the protected grounds. For example, a physician who is opposed to same sex procreation for religious reasons and therefore refuses to refer a homosexual couple for fertility treatment may be in breach of the *Code*.

6 *Canadian Charter of Rights and Freedoms*, Schedule B, *Canada Act 1982* (U.K.) 1982, c. 11, section 2(a).

7 *EGALE Canada Inc. v. Canada (Attorney General)* (2003), 13 B.C.L.R. (4th) 1 (B.C.C.A.), at paragraph 133.

8 *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772 at p.33.

9 *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772 headnote, and at para.36.

10 *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p 336-7; *Ross v. School District no. 15*, [1996] 1 S.C.R. 825 at p.868.

11 *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, at paragraphs 59-60.

12 *Ross v. School District no. 15*, [1996] 1 S.C.R. 825; In *Syndicat Northcrest v. Amselem*, [2004] 3 S.C.R. 698, the Court said that the religious belief must be interfered with in a manner that is more than trivial or insubstantial. (at paragraphs 59, 60)

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## College Expectations

The College has its own expectations for physicians who limit their practice, refuse to accept individuals as patients, or end a physician-patient relationship on the basis of moral or religious belief.

In these situations, the College expects physicians to do the following:<sup>13</sup>

- Communicate clearly and promptly about any treatments or procedures the physician chooses not to provide because of his or her moral or religious beliefs.
- Provide information about all clinical options that may be available or appropriate based on the patient's clinical needs or concerns. Physicians must not withhold information about the existence of a procedure or treatment because providing that procedure or giving advice about it conflicts with their religious or moral beliefs.
- Treat patients or individuals who wish to become patients with respect when they are seeking or requiring the treatment or procedure. This means that physicians should not express personal judgments about the beliefs, lifestyle, identity or characteristics of a patient or an individual who wishes to become a patient. This also means that physicians should not promote their own religious beliefs when interacting with patients, nor should they seek to convert existing patients or individuals who wish to become patients to their own religion.
- Advise patients or individuals who wish to become patients that they can see another physician with whom they can discuss their situation and in some circumstances, help the patient or individual make arrangements to do so.

The College will consider the extent to which a physician has complied with this guidance, when evaluating whether the physician's behaviour constitutes professional misconduct.

## 2. Accommodation of disability

### Legal Duty under the *Code*

Under the *Code*, the legal obligation not to discriminate includes a duty to accommodate short of undue hardship. The duty to accommodate is not limited to disability,<sup>14</sup> however, the information provided in this section will focus on accommodation of disability only.

When physicians become aware that existing patients or individuals who wish to become patients have a disability which may impede or limit access to medical services, the *Code* requires physicians to take steps to accommodate the needs of these patients or individuals. The purpose in doing so is to eliminate or reduce any barriers or obstacles that disabled persons may experience.

While physicians have a legal duty to accommodate disability, there are limits to this duty. Physicians do not have to provide accommodation that will cause them undue hardship.<sup>15</sup> Further explanation of 'undue hardship' is provided in the Human Rights Commission's *Policy and Guidelines on Disability and the Duty to Accommodate*.<sup>16</sup>

### Guidelines for Accommodation of Disability

Guidance on the specific steps that may be required to fulfil the duty to accommodate disability can be found in the Ontario Human Rights Commission's *Policy and Guidelines on Disability and the Duty to Accommodate* (section 3.4).

There is no set formula for accommodating the needs of persons with disabilities.

Accommodation of persons with disabilities should be provided in a manner that is respectful of the dignity, autonomy and privacy of the person, if to do so does not create undue hardship.<sup>17</sup>

Physicians are advised to approach situations where accommodation is required on a case-by-case basis, and to tailor the nature of the accommodation to the needs of the individual before them.

Examples of accommodation may include taking steps to ensure that a guide dog can be brought into an examination room, or that patients are permitted to have a sign language interpreter present during a physician-patient encounter.

<sup>13</sup> These points are consistent with the guidance provided by the General Medical Council in its document, *Personal Beliefs and Medical Practice*.

<sup>14</sup> The Ontario Human Rights Commission has stated that the duty to accommodate could arise in relation to other enumerated or protected grounds in the *Code*.

<sup>15</sup> *Human Rights Code*, R.S.O. 1990, c.H.19, section 17(2).

<sup>16</sup> *Policy and Guidelines on Disability and the Duty to Accommodate*, Ontario Human Rights Commission, November 2000.

<sup>17</sup> *Policy and Guidelines on Disability and the Duty to Accommodate*, Ontario Human Rights Commission, November 2000 (pp. 12, 13).



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