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# Ontario's *Human Rights Code*

Heather Conklin | Research Officer

ONTARIO HUMAN RIGHTS CODE  
The Ontario Human Rights Code came into effect on June 15,  
established equal rights and freedom from discrimination as primary

Ontario's *Human Rights Code* (the *Code*) establishes a right to equal treatment and freedom from discrimination in relation to five social areas. This paper provides an overview of the rights and corresponding duties established under the *Code* and describes Ontario's human rights system.

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Ontario's *Human Rights Code*

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## Introduction

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The Ontario [Human Rights Code](#) (the *Code*) was enacted in 1962 with the purpose of recognizing the dignity and worth of every person by providing for equal rights and opportunities without discrimination. The *Code* is quasi-constitutional in nature, meaning that it has a special importance, above other provincial laws. Because of its special status, the *Code* [takes precedence](#) over any other statute of Ontario, unless that statute specifically states that it applies despite the *Code*.

The aim of the *Code*, as identified in its [Preamble](#), is

the creation of 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 able to contribute fully to the development and well-being of the community and the Province.

## Prohibited Grounds of Discrimination

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To this end, the *Code* provides that every person has a right to freedom from discrimination on the basis of a number of grounds in relation to five social areas:

- [services, goods, and facilities](#)
- [accommodation \(housing\)](#)
- [contracts](#)
- [employment](#)
- [vocational or professional associations, trades, or trade unions](#)

Prohibited grounds of discrimination (also sometimes referred to as “protected grounds”) include race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status, and disability.<sup>1</sup>

Additionally, in the social area of [employment](#), individuals have a right not to be discriminated against because of a “record of offences” (meaning either a criminal offence for which a pardon has been granted, or any provincial offence).<sup>2</sup> As well, in the social area of [accommodation](#), individuals have a right not to be discriminated against because they receive public assistance (e.g., Ontario Works or Ontario Disability Support Program benefits).

The *Code* also prohibits harassment on the basis of prohibited grounds and sexual harassment in accommodation and in employment.<sup>3</sup> Harassment is defined as “a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.”<sup>4</sup>

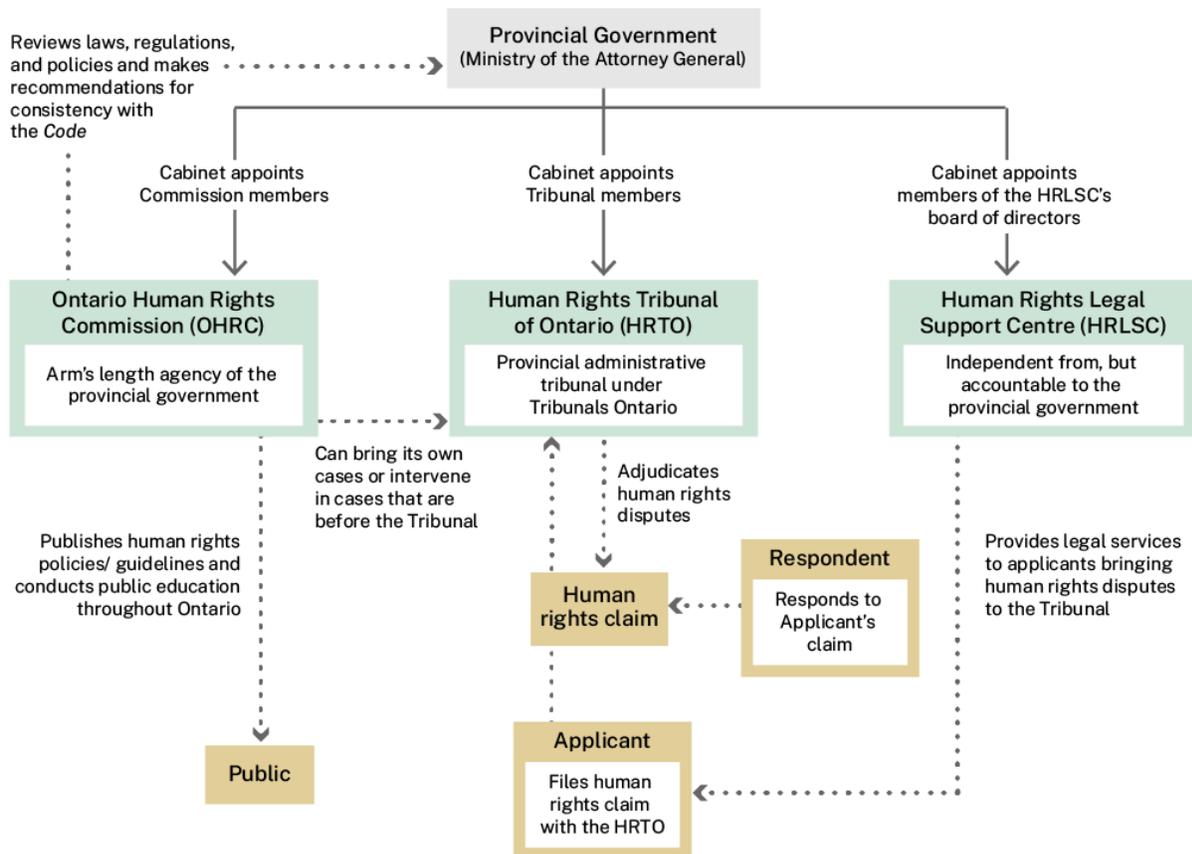
The *Code* also [prohibits reprisals](#) against individuals (e.g., intimidation, dismissal, or other penalizations) for claiming and enforcing their rights under the *Code*, or for refusing to infringe a right of another person.

Importantly, unlike the [Canadian Charter of Rights and Freedoms](#), which applies only to government action (including government employers and service providers, as well as government policies, programs, and laws), the *Code* applies to both public and private sector organizations.<sup>5</sup>

## Ontario's Human Rights System

Ontario's human rights system consists of the Human Rights Tribunal of Ontario (HRTO), the Ontario Human Rights Commission (OHRC), and the Human Rights Legal Support Centre (HRLSC).

**Figure 1: Ontario's Human Rights System**



## Human Rights Tribunal of Ontario

The [Human Rights Tribunal of Ontario](#) is an adjudicative tribunal that resolves claims of discrimination and harassment brought under the *Code*. The provincial Cabinet appoints Tribunal members in accordance with a competitive selection process using criteria set out in [Part IV](#) of the *Code*.

Individuals who believe they have experienced discrimination or harassment on the basis of a prohibited ground can file an application with the HRTO. The Tribunal handles applications according to its own [Rules of Procedure](#), which provide for mediation assistance and also allow hearings to be held in person, in writing, by telephone, or by other electronic means. HRTO proceedings must allow parties the opportunity to make oral submissions, and adjudicators must give written reasons for final decisions.<sup>6</sup>

Remedies for a finding of discrimination or harassment can include monetary compensation, a non-monetary award (e.g., human rights training, building an accessible entrance), and/or an order to promote future compliance with the *Code* (e.g., developing human rights policies).<sup>7</sup>

A more detailed explanation of the application and hearing process is available on Tribunals Ontario's [Application and Hearing Process](#) webpage. The [Canadian Legal Information Institute](#) publishes the decisions of the HRTO.

The courts have also found that other provincial administrative tribunals have jurisdiction to consider the *Code* (e.g., in relation to matters raised at the Landlord and Tenant Board or before the Social Benefits Tribunal). This includes authority to find that a provision of an Act does not apply if it conflicts with the *Code*.<sup>8</sup> For example, in the leading case of [Tranchemontagne v. Ontario \(Director, Disability Support Program\)](#), the Supreme Court held that the Social Benefits Tribunal (SBT) could decide whether provisions of the *Ontario Disability Support Program Act, 1997* (ODSPA) that prevented applicants from qualifying for benefits on the sole basis of alcohol or drug addiction were discriminatory.<sup>9</sup>

## Ontario Human Rights Commission

The [Ontario Human Rights Commission](#) is an arm's-length agency of government with a broad mandate to promote and advance human rights in Ontario. Commission members are appointed by the provincial Cabinet and must have "knowledge, experience or training with respect to human rights law and issues."<sup>10</sup>

Section 29 lists the OHRC's [specific functions](#). The OHRC explains that it "develops policies and provides targeted public education, monitors human rights, does research and analysis, and conducts human rights inquiries." In matters that affect the broad public interest, the OHRC can also bring its own cases to the HRTO, or intervene in human rights cases that are before the Tribunal.<sup>11</sup>

[Section 30](#) authorizes the OHRC to prepare, approve, and publish [human rights policies](#) to provide guidance on interpreting *Code* provisions. According to the OHRC, the Commission's policies and guidelines "set standards for how individuals, employers, service providers and policy-makers should act to ensure compliance with the *Code*." They also represent the OHRC's interpretation of the *Code* at the time of publication.

The OHRC is required to make [annual reports](#) and can also make other [reports](#) about the state of human rights in Ontario. The [2020–2021 Annual Report](#) highlighted the OHRC's top outcomes, including the publication of its [Policy statement on a human rights-based approach to managing the COVID-19](#)

[pandemic](#). The OHRC has also developed a series of [Questions and Answers](#) on individuals' human rights and obligations during the COVID-19 pandemic.

## Human Rights Legal Support Centre

[Part IV.1](#) of the *Code* establishes the [Human Rights Legal Support Centre](#) with a mandate to provide legal services throughout Ontario to applicants bringing human rights disputes to the HRTO. The HRLSC is independent from, but accountable to, the provincial government. It operates under the direction of a board of directors appointed by the provincial Cabinet, and must make [annual reports](#).<sup>12</sup>

The HRLSC is empowered to establish policies and priorities for the provision of its services and has developed an [eligibility criteria guideline](#) to inform decisions about the level of service it will provide to applicants, on a case-by-case basis.<sup>13</sup>

According to the guideline, every applicant receives initial support, including advice about whether their claim falls within the Tribunal's jurisdiction. In general, the HRLSC explains that it prioritizes applicants with meritorious claims who would face barriers to self-representing—especially where the application is complex, raises public interest issues, or could have a broad impact on other human rights claims.

## The Duty to Accommodate

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The rights and protections afforded by the *Code* impose a corresponding duty on service providers, employers, housing providers, and others to make genuine efforts to accommodate *Code*-related needs. As explained by the OHRC, without the [duty to accommodate](#), human rights would be “functionally meaningless.”

The duty to accommodate recognizes that people may need different solutions in order to gain equal access and treatment in areas like public and private services, housing, and employment. The duty to accommodate only applies to *Code*-protected grounds.<sup>14</sup>

It is also important to note that the duty to accommodate is not unlimited. Rather, organizations and individuals must provide accommodation up to the point of [undue hardship](#) (meaning an unreasonable or disproportionate burden), considering cost, outside sources of funding, and health and safety requirements.

What might constitute undue hardship on a business or other organization would depend on individual facts and circumstances.

## Establishing Discrimination

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“Discrimination” is not defined by the *Code*. Instead, case law has established the elements of discrimination. In order to prove that they have been discriminated against, a person must generally be able to show that

- they have a characteristic that is protected from discrimination;
- they have experienced a negative treatment or impact within a protected social area; and
- the protected characteristic was a factor in the negative impact.<sup>15</sup>

Intent is irrelevant (i.e., discrimination can be inadvertent). A claimant must be able to demonstrate on a “balance of probabilities” that discrimination took place. This means that, considering the particular circumstances, discrimination is “more reasonable and probable than not.”<sup>16</sup>

In some cases, discrimination may be obvious. However, in many cases, proving that a person has been discriminated against on the basis of a prohibited ground can be challenging. This is often the case when there is no direct statement or written document explicitly demonstrating that a protected characteristic was a reason for negative treatment. Courts and tribunals have recognized that cases of discrimination can be shown through an analysis of all relevant factors, including evidence that is circumstantial (also often referred to as indirect evidence). Relying on circumstantial evidence, a claimant can argue that related facts or events, when taken together, “make it reasonable to conclude or ‘infer’ that discrimination was at play.”<sup>17</sup>

As well, human rights case law has established that to make a finding of discrimination, a *Code* ground need only be one factor (of possibly several) in the decision or treatment at issue.<sup>18</sup>

Once a claimant has established discrimination, the burden shifts to the respondent (e.g., service or housing provider, employer) to show that the conduct fits within one of the defences and exceptions outlined in the *Code*.

## Defences and Exceptions

As the OHRC explains, the *Code* includes specific defences and exceptions that allow behaviour that would otherwise be discriminatory.<sup>19</sup> For example, in situations where a requirement, such as a job qualification, might appear to be neutral, but actually results in a negative impact on members of a protected group (often referred to as “adverse effect” or constructive discrimination), [section 11](#) allows the responsible person or organization to demonstrate that the requirement at issue is reasonable and *bona fide*—meaning genuine or real—in the circumstances. In such cases, the organization is also required to accommodate the individual’s needs up to the point of undue hardship (as discussed above).

The OHRC provides the example of an employer requiring all male employees to be clean shaven. While not intended to exclude Sikh men (who may refrain from shaving as a requirement of their religion) from employment, the rule has this effect and therefore would be considered discriminatory.<sup>20</sup>

The OHRC explains that in the above example, the requirement could be genuine if the goal is to ensure hygiene when preparing food; however, in that case, “Sikh men can easily be accommodated by allowing them to wear a net to cover their beard, which should not cause the employer undue hardship.”<sup>21</sup>

The *Code* also allows “[special programs](#)” that are designed to relieve hardship or economic disadvantage, or to help historically disadvantaged persons or groups achieve equal opportunity (sometimes referred to as “affirmative action” programs).<sup>22</sup> The *Code* also recognizes Canada’s constitutional [separate school rights](#) and explicitly states that requirements, such as a [minimum drinking age](#), are not discriminatory, among other exemptions.

[Section 24](#) of the *Code* establishes certain exemptions that are specific to employment. For example, the right to equal treatment is not infringed where a religious, philanthropic, educational, or social organization that serves persons identified by their race, ancestry, place of origin, colour, ethnic origin, creed, sex, age, marital status, or disability gives preference in employment to similarly identified persons, if the qualification is reasonable and genuine because of the nature of the employment.<sup>23</sup>

This section also permits discrimination based on age, sex, record of offences, or marital status if the age, sex, record of offences, or marital status of the applicant is a reasonable and *bona fide* qualification because of the nature of the employment (often referred to as a *bona fide* occupational requirement or “BFOR”). In order for such discrimination to qualify as a BFOR, any reviewing tribunal or court must be satisfied that the employer cannot accommodate the employee without undue hardship.<sup>24</sup>

For example, this provision has supported [mandatory retirement](#) policies in physically demanding and/or high-risk professions, such as policing and suppression firefighting.

The Supreme Court of Canada has developed the following three-part legal test for an employer to demonstrate that a discriminatory standard or qualification (whether the discrimination is direct or adverse effect) is a *bona fide* occupational requirement:

- The purpose of the requirement must be rationally connected to the performance of the job.
- The employer must have adopted the requirement “in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose.”
- The requirement must be reasonably necessary to the accomplishment of that legitimate work-related purpose. (In order to demonstrate that the requirement is “reasonably necessary,” the employer must demonstrate that they cannot accommodate the employee without undue hardship.)<sup>25</sup>

## Human Rights Best Practices

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The OHRC maintains a [guide to developing human rights policies and procedures](#) (Guide). Among other things, the Guide recommends that organizations undertake a proactive review of potential barriers related to *Code* grounds, including

- physical accessibility;

- organizational policies, practices, and decision-making; and
- organizational culture.

Once an organization has identified barriers to inclusion, they should then develop plans to remove them. A barrier removal plan should

- set specific, measurable goals and create clear timelines for achieving them;
- allocate adequate resources;
- ensure accountability and responsibility; and
- include a mechanism for regularly reviewing and evaluating progress towards the identified goals.<sup>26</sup>

## Conclusion

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Ontario's *Human Rights Code* has a special status, enshrining rights that are quasi-constitutional in nature. The right to be free from discrimination applies only to *Code*-protected grounds in relation to five social areas. The duty on service providers and employers to accommodate human rights-related needs can be limited by health and safety requirements, as well as cost. As well, certain defences and exceptions established under the *Code* allow behaviour and/or requirements that would otherwise be discriminatory.

The *Code* sets out the provincial human rights system, consisting of the Ontario Human Rights Commission, the Human Rights Tribunal of Ontario, and the Human Rights Legal Support Centre. The Commission provides resources and guidance about human rights matters in Ontario; the Tribunal adjudicates human rights disputes; and the Human Rights Legal Support Centre provides legal advice to applicants bringing human rights claims to the Tribunal.

## Notes

<sup>1</sup> [Human Rights Code](#), R.S.O. 1990, c. H.19 (Code), [Part I](#) ("Freedom from Discrimination"), ss. 1-6.

<sup>2</sup> Code, s. 10(1) (definition of "record of offences").

<sup>3</sup> Code, ss. 2(2), 5(2), and 7.

<sup>4</sup> Code, s. 10(1) (definition of "harassment").

<sup>5</sup> Ontario Human Rights Commission (OHRC), "[Policy on preventing discrimination based on creed](#)," [5. Legal framework](#).

<sup>6</sup> Code, ss. 40 ("Disposition of applications"), 43 ("Tribunal rules").

<sup>7</sup> Code, s. 45.2 ("Orders of Tribunal: applications under s. 34"); Human Rights Tribunal of Ontario, "[Application and Hearing Process](#)."

<sup>8</sup> Tribunals Ontario, Landlord and Tenant Board, "[Interpretation Guideline 17: Human Rights](#)"; see also [Walmer Developments v. Wolch](#), 2003 CanLII 42163 (ON SCDC) at para. 18 and [Tranchemontagne v. Ontario \(Director, Disability Support Program\)](#), 2006 SCC 14.

<sup>9</sup> The Social Benefits Tribunal subsequently found that the provisions discriminated on the basis of disability. That finding was upheld by the courts; see [Ontario \(Disability Support Program\) v. Tranchemontagne](#), 2010 ONCA 593 (CanLII). The provisions at issue ([s. 5\(2\)](#)) remain in the Act, but are not applied to ODSP applications; [legislation](#) passed in 2021 will repeal s. 5(2) of the ODSPA, once the relevant provision (Sched. 21, s. 25(1)) is proclaimed into force.

<sup>10</sup> Code, ss. 27(2)-(3).

<sup>11</sup> OHRC, "[The Human Rights System](#)." See also OHRC, *Ontario Human Rights Commission Strategic Plan 2017 – 2022*, "[Introduction](#)."

<sup>12</sup> Code, s. 45.11; see also Human Rights Legal Support Centre (HRLSC), "[Our Mission](#)."

<sup>13</sup> Code, s. 45.12(b).

<sup>14</sup> HRLSC, "[Understanding the Duty to Accommodate](#)."

<sup>15</sup> OHRC, "[Policy on ableism and discrimination based on disability](#)," [5. Establishing discrimination](#).

<sup>16</sup> *Ibid.*

<sup>17</sup> HRLSC, "Proving Discrimination," [7. What if there is no evidence that directly proves discrimination? What is circumstantial evidence?](#)

<sup>18</sup> OHRC, "Policy on ableism and discrimination based on disability."

<sup>19</sup> See for example, OHRC, "Policy on preventing discrimination based on creed," [8. Defences and exceptions](#); and "Policy on ableism and discrimination based on disability," [3. Legal framework](#).

<sup>20</sup> OHRC, "[Guide to your rights and responsibilities under the Human Rights Code](#)," [Constructive discrimination](#).

<sup>21</sup> OHRC, "Human Rights at Work 2008 – Third Edition," IV. Human rights issues at all stages in employment, [2. Setting job requirements](#).

<sup>22</sup> Code, s. 14. As well, s. 15 allows the age of sixty-five years or over as a qualification for preferential treatment.

<sup>23</sup> Code, s. 24(1)(a).

<sup>24</sup> Code, ss. 24(1)(b) and 24(2).

<sup>25</sup> [British Columbia \(Public Service Employee Relations Commission\) v. BCGSEU](#), [1999] 3 SCR 3, at para. 54.

<sup>26</sup> OHRC, "[A policy primer: Guide to developing human rights policies and procedures](#)," June 19, 1996 (revised December 2013), pp. 7-8.