Ontario's Human Rights Code, Disability and the Duty to Accommodate

A Guide for Housing Workers and Tenants

Centre for Equality Rights in Accommodation

Purpose

On average, CERA receives over 600 calls each year from individuals facing discrimination in housing.. CERA's records reveal that over 15% of our intake calls come from persons with disabilities who are facing discrimination either accessing or maintaining their housing.

This guide is intended, therefore, to enhance the understanding of human rights law as it pertains to disability, housing and the duty to accommodate — with a view to ensuring that the systemic, structural and social barriers that preclude persons with disabilities from fully participating in society are identified and removed. More specifically, it is intended to assist housing workers with their advocacy on behalf of persons with disabilities.

Acknowledgements

The funding for this guide was generously provided by the Access and Equity Grant Program of the City of Toronto.

Resources

For a more detailed discussion of disability and the duty to accommodate, please see the Ontario Human Rights Commission's *Policy and Guidelines on Disability and the Duty to Accommodate* or the Ontario Human Rights Commission Website at: www.ohrc.on.ca.

Disclaimer

This booklet does not necessarily reflect the views of the funders of this project.

The content of this booklet is for information purposes only. The information is not legal advice and is not a substitute for legal advice. If you need legal advice please contact a lawyer or community legal aid clinic. CERA, its funders and the authors of this guide will not be held responsible for any loss or damage caused by reliance on any statement, made negligently or otherwise, contained in this booklet.

December 2003

What is the Human Rights Code?

The ***Human Rights Code*** (the Code) is one of the most important pieces of legislation in Ontario. As stated in section 47(2), the Code overrides all other pieces of legislation in the province, unless the contrary is explicitly stated. This means that if a particular provincial regulation, act or even by-law contains provisions that violate the *Human Rights Code*, **the Code will prevail**. A provincial law can take precedence over the Code **only** if it specifically states that it applies despite the Code.

Why has the Human Rights Code been given such legal prominence? The introduction to the Code itself gives an explanation. The purpose of the Code is to create:

> … 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.

The introduction further states that the aim of public policy in Ontario is:

> ... to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination….

The *Human Rights Code* is an attempt to realize these fundamental values and principles.

What areas of life in Ontario does the Code apply to?

The Code protects people in Ontario against discrimination in the following areas:

- employment
- occupancy of accommodation (housing)
- goods, services and facilities
- contracts, and
- membership in vocational associations and trade unions.

The essence of the Code is fairness and equality of opportunity. In its provisions concerning housing, the Code helps to ensure that all people in Ontario have equal opportunity to access accommodation, and equal opportunity to enjoy the benefits that come along with that housing.

What does the Human Rights Code say about housing?

Housing. The Code says that everyone is entitled to equal treatment and equal benefit when it comes to housing. Section 2(1) says:

> 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, same-sex partnership status, family status, **disability** or the receipt of public assistance.

Human rights law in Ontario—the Code—says that it is illegal to refuse to rent to someone or to treat someone unfairly because of a prohibited ground of discrimination. The prohibited grounds are:

Race	Ancestry	Place of origin
Colour	Ethnic origin	Citizenship
Creed (religion)	Sex (includes pregnancy)	Sexual orientation
Disability	Age	Marital status
Family status	Same-sex partnership status	Receipt of public assistance (in housing only).

Harassment. It is also illegal to harass a person because of a prohibited ground of discrimination:

> 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, same-sex partnership status, family status, **disability** or the receipt of public assistance.

This means, when it comes to housing, that it is illegal for a housing provider (landlord, property manager, superintendent or building owner) to harass a resident on the basis of one of the "grounds" listed above. Even if one resident is harassing another—because of a protected ground—it is the housing provider's responsibility to ensure that the harassment stops. If no attempt is made to stop the harassment, the housing provider could be the subject of a human rights complaint.

Reprisal. It is important to know that everyone in Ontario has the right to claim and enforce their human rights under the Code. Therefore, it is also illegal for a housing provider to try to "get revenge" or "get even" because a resident has tried to claim or enforce their human rights. Negative behaviour directed toward a resident because that resident has made a human rights complaint is called reprisal and a housing provider could be the subject of an *additional* ground of complaint.

What is discrimination?

A person experiences discrimination under the Code when they are treated unfairly, denied a benefit, or excluded from something because of their disability or because of any other of the prohibited grounds of discrimination in the Code.

Direct Discrimination. Direct discrimination is what we most commonly think of when we think of discrimination. It is the most obvious form of discrimination and it happens, for example, when a housing provider says something like "I will not rent to you because I don't want someone with a disability living here" or "I am not going to build a ramp, it will be expensive and it will ruin the look of the front of the building—find somewhere else to live." This type of discrimination is overt, and thus, fairly easy to identify. Other forms of discrimination, however, are more subtle.

Constructive Discrimination. Constructive discrimination or "adverse effect" discrimination is an equally illegal, but more subtle form of discrimination. Section 11(1) of the Code defines constructive discrimination as follows:

> 11(1) A right of a person … 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….

Constructive discrimination refers to rules, policies or practices, which may not be intentionally or obviously discriminatory, but which have a discriminatory effect on a group or groups which are protected under the Code. It is very important to know that intent is irrelevant when it comes to constructive discrimination. So, even if a housing provider says that he or she did not mean to discriminate, it does not matter if the effect or outcome of the rule, policy or practice was discriminatory. It is still discrimination.

When has discrimination occurred?

Generally, a person has experienced discrimination under the law if he or she has experienced differential treatment because of a "prohibited ground" under the Code — for example: a person who is black (race), a pregnant woman (sex) or a person with a disability (disability) — and that differential treatment imposed a burden on or denied a benefit from that individual.

What does the Code say about disability and housing?

It is against the law to deny someone housing or to treat them unfairly because of a disability — whether the disability is visible or invisible. Persons with disabilities have the right to equal treatment when it comes to accessing and maintaining housing. The Code defines disability as:

(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) 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.

The Ontario Human Rights Commission, in its paper *Policy and Guidelines on Disability and the Duty to Accommodate* (2000), says that although this section delineates various types of disabilities, it is intended to be illustrative and not an exhaustive list of what constitutes disability. Moreover that disability "may be the result of a physical limitation, an ailment, a perceived limitation or a combination of all these factors." The Commission also gives examples of disabilities that are non-evident or invisible, but nonetheless constitute a disability. These include, chronic pain, chronic fatigue syndrome, epilepsy, and environmental or chemical sensitivities.

The Supreme Court of Canada — the highest court — has also recognized that there is a social component to disability. It has called this social component "social handicapping." What this means is that society's response to persons with disabilities is often the cause of the "handicap" that persons with disabilities experience. For example:

- **elevators without Braille or transit systems without sound systems that prevent persons who are blind or deaf from using them independently**
- **a housing provider who refuses to install, for instance, an accessible shower that forces a person who could otherwise live independently to rely on caregivers**
- **restaurants without ramps for access that preclude persons who rely on mobility aids from participating in social functions at a restaurant of their choice.**

These "handicaps" are not caused by being blind or deaf, the need for an accessible shower or the use of a wheelchair, but instead are caused by the absence of Braille and the lack of an appropriate shower or ramp. The exclusion in society of persons with disabilities is not the result of the disability, but instead, the social and physical barriers that prevent independent and inclusive living

What are the obligations of housing providers to persons with disabilities?

Under the Code, housing providers are not permitted to discriminate against persons with disabilities, and in fact, have a "duty to accommodate" persons with disabilities—short of undue hardship. The next section of this guide will look at what this means in practice.

The duty to accommodate

The duty to accommodate means that structures, rules, policies or practices that discriminate may have to be changed in order to ensure that persons with disabilities are able to fully enjoy equal benefit, equal treatment, equal rights and equal access with respect to housing, employment, or services, etc. These changes must be made in a *reasonable and acceptable* time-frame.

What are the obligations of the person requiring the accommodation?

The person who requires the accommodation must establish that discrimination has occurred and must make a request for accommodation. The individual will also need to provide some evidence as to why the accommodation is required. This does not necessarily require disclosure of the *type* of disability (see Page 8—on confidentiality).

What are the principles underlying the duty to accommodate?

1) Respect for Dignity 2) Individualized Accommodation 3)Integration and Full Participation

The Supreme Court of Canada has recognized the limitations of the accommodation principle. It has said that:

> Accommodation does not go to the heart of the equality question, to the goal of transformation, to an examination of the way institutions and relations must be changed in order to make them available, accessible, meaningful and rewarding for the many diverse groups of which our society is composed. Accommodation seems to mean that we do not change procedures or services, we simply "accommodate" those who do not quite fit. We make some concessions to those who are "different", rather than abandoning the idea of "normal" and working for genuine inclusiveness... Its goal is to try to make "different" people fit into existing systems (Meiorin).

The legal framework within which we must work is "accommodation." However, the true spirit and goal of the Code and all human rights law is to achieve genuine inclusiveness and a society where differences are valued and appreciated and **full integration is the norm.**

The Principles underlying the duty to accommodate

Respect for Dignity. This means that any accommodation provided must be done so in a manner that most respects the dignity of the person. Dignity includes consideration of how the accommodation is provided and the individual's own participation in the process of accommodation. The Ontario Human Rights Commission has said that respect for dignity can be defined in the following way:

> Human dignity encompasses individual self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. It is harmed when individuals are marginalized, stigmatized, ignored or devalued. Privacy, confidentiality, comfort, autonomy, individuality and self-esteem are important factors as well as to whether an accommodation maximizes integration and promotes full participation in society (Policy Paper on Disability, 2000).

For example: *A ramp built at the back of an apartment building that requires a person with a disability to access their home through the building garbage room does not respect the human dignity of the individual.*

Individualized Accommodation. This means that each person must be considered, assessed and individually accommodated. Moreover, that each person's needs are unique and must be considered on an individualized bases if a request for accommodation is made. There is no set formula for accommodating people with disabilities.

For example: *A claim by a housing provider that a barrier free entry is not necessary because only one person in a large building requires it, would not meet this principle of "individualized accommodation." Critical mass is not a prerequisite to the principle of "individualized accommodation". In addition, two residents with the same condition may require different accommodations to address their particular needs.*

Integration and Full Participation. In order to achieve genuine inclusiveness for persons with disabilities, structures and social attitudes must be barrier free and inclusive. Integration and full participation for persons with disabilities means that they should be able to access housing or employment, etc. equally and without impediment. If barriers do exist, and removal is not possible, then accommodation should be provided short of undue hardship. Segregated treatment in services, employment, or housing for individuals with disabilities is less dignified and is unacceptable, unless it can be shown that integrated treatment would pose undue hardship or that segregation is the only way to achieve equality.

For example: *Sometimes a housing provider will say to a prospective tenant, "This is not an accessible building. I have another building that is accessible—you can apply for an apartment there." Equal treatment with respect to housing, and more specifically integration and full participation, mandate that the person with the disability should have equal access to all the buildings—just like persons applying who do not have disabilities. It is the responsibility of the housing provider to ensure that all of his or her buildings are accessible.*

What about confidentiality in the accommodation process for the person with a disability?

Persons with disabilities are not necessarily required to disclose private or confidential matters. They are required to disclose information to the person obligated to provide accommodation, but only as it pertains to the need for accommodation. The person required to provide the accommodation should also keep medical documentation provided in relation to the request for accommodation in a file that is separate from the general file. For example, a person with HIV who requires some form of accommodation with respect to their housing or employment need not disclose that he or she has HIV. They would simply state that a disability requires that they need accommodation in order to access or maintain their housing or be able to do their job.

Are there any limitations for housing providers related to the duty to accommodate?

Yes, there is a limit to the accommodation that a housing provider must provide. The legal limit is "undue hardship."

What is undue hardship?

Generally, a landlord could argue undue hardship if accommodating a person with a disability would seriously threaten the viability of his/her business or enterprise.

Whose responsibility is it to show undue hardship?

In order to claim undue hardship as a defense for refusing to accommodate a person with a disability, the housing provider has an onus of proof. It is not the responsibility of the person requesting the accommodation to show that the accommodation will not pose undue hardship.

What a housing provider must show to prove undue hardship

Three factors are considered in assessing whether an accommodation would result in undue hardship:

1. **Cost**
2. **Outside Sources of Funding, or**
3. **Health and Safety Requirements**.

Although housing providers often raise other issues as reason for a failure or refusal to accommodate persons with disabilities—third-party preference, business inconvenience, alternate contracts, morale—**these are not valid justifications under the law**. ONLY the three factors listed above may be considered. As well, evidence to show undue hardship must be **objective**, and thus, will include such things as:

- financial statements and budgets
- scientific data, information and data resulting from empirical studies
- expert opinion
- detailed information about the activity and the requested accommodation, information about the conditions surrounding the activity and their effects on the person or group with a disability.

Cost. The cost of the accommodation must be:

- quantifiable
- shown to be related to the accommodation, and
- so substantial that it would alter the essential nature of the enterprise, or so significant that it would substantially affect its viability.

It is important to note that this test will apply whether the accommodation is for an individual or a group of persons.

Outside Sources of Funding. Other sources of funding must be considered before any claim of undue hardship can be made. There are three potential sources of outside funding:

- funds that are available to the individual (i.e. through the March of Dimes)
- funds that would assist to defray costs – usually these are available when there are overlapping responsibilities between the housing provider and another agency
- funds available to the organization or corporation.

Health and Safety Requirements. Health and safety risks will amount to undue hardship if the degree of risk that remains after the accommodation has been made outweighs the benefits of enhancing equality for persons with disabilities. The health and safety requirement may be formal or informal.

Persons that are responsible for accommodation should also take steps to minimize the cost of the undue hardship by, for example:

- distributing the cost across the entire organizational budget (mandatory)
- spreading the cost out over time
- exploring the possibility for tax deductions
- establishing a reserve fund
- creative design solutions
- expert assessment

Finally, if undue hardship can be established, the person with the disability should be given the opportunity to pay for the portion of the accommodation that results in undue hardship to the housing provider.

CERA

Centre for Equality Rights in Accommodation

Toronto Office:
340 College Street
Unit 101A, Box 23
Toronto, Ontario M5T 3A9
Phone: 416-944-0087
Toll Free (Canada): 1-800-263-1139
Fax: 416-944-1803

Windsor Office
420 Devonshire Road
Windsor, Ontario N8Y 4T6
Phone: 1-519-252-9301
Fax: 416-352-5507

Website: www.equalityrights.org/cera
Email: cera@equalityrights.org