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Policy on preventing discrimination based on creed

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Approved by the OHRC: September 17, 2015
PDF recommended for assistive technology
This document replaces the *Policy on creed and the accommodation of religious observances* (1996)

Summary

Introduction

The rights to be treated equally based on creed, and to freely hold and practice creed beliefs of one's choosing, are fundamental human rights in Ontario, protected by the Ontario *Human Rights Code* (the *Code*) and the *Canadian Charter of Rights and Freedoms*. Also protected is the right to be free from religious or creed-based pressure.

The right to be free from discrimination based on creed reflects core Canadian constitutional values and commitments to a secular, multicultural and democratic society. People who follow a creed, and people who do not, have the right to live in a society that respects pluralism and human rights and the right to follow different creeds.

> ÒWhen we ask people to be tolerant of others, we do not ask them to abandon their personal convictions. We merely ask them to respect the rights, values and ways of being of those who may not share those convictions. The belief that others are entitled to equal respect depends, not on the belief that their values are right, but on the belief that they have a claim to equal respect regardless of whether they are right.Ó Đ Supreme Court of Canada in *Chamberlain v. Surrey School District No. 36* [2002].

Under the *Code*, creed rights are protected in five areas (called social areas): housing, services, employment, contracts, unions and professional associations.

Policy on preventing discrimination based on creed

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Creed resources

Creed and human rights (2015 brochure)

Creed and human rights for Indigenous peoples (2015 brochure)

This policy clarifies the nature and scope of rights and responsibilities based on creed in these five areas, and helps individuals and organizations to better identify, address and prevent discrimination based on creed, so that each person Đ whatever their creed Đ can take part in, contribute to and feel included in the community and province.

The CommissionÕs *Policy on preventing discrimination based on creed* also recognizes that there are limits on rights based on creed, as there are on all grounds protected under OntarioÕs *Human Rights Code*. Limits can for example arise if creed rights interfere with the human rights of others.

What is creed?

The *Code* does not define creed, but the courts and tribunals have often referred to religious beliefs and practices. Creed may also include non-religious belief systems that, like religion, substantially influence a personÕs identity, worldview and way of life. The following characteristics are relevant when considering if a belief system is a creed under the *Code*. A creed:

- Is sincerely, freely and deeply held
- Is integrally linked to a personÕs identity, self-definition and fulfilment
- Is a particular and comprehensive, overarching system of belief that governs oneÕs conduct and practices
- Addresses ultimate questions of human existence, including ideas about life, purpose, death, and the existence or non-existence of a Creator and/or a higher or different order of existence
- Has some ÒnexusÓ or connection to an organization or community that professes a shared system of belief.

Given the breadth of belief systems that have been found to be a creed under the *Code* Đ from Raelianism to the Òspiritual cultivation practicesÓ of Falun Gong Đ organizations should generally accept in good faith that a person practices a creed, unless there is significant reason to believe otherwise, considering the above factors.

Historical context

People experience discrimination based on creed in many different ways. All people may experience creed-based discrimination at some point in their lives, whether or not they personally have a creed. Historically in Ontario, belonging to what was seen as the Òwrong creedÓ could seriously affect peopleÕs standing, treatment and opportunities in society. This was especially the case for Indigenous peoples who were forced into residential schools, which operated in Ontario from 1880 to 1990.

Jewish people were barred from entry to the country, including at times of greatest need fleeing Nazi Germany in WWII, and were routinely denied access to jobs, facilities and services, because of virulent antisemitism. As well, much of the past religious conflict and discrimination in Ontario occurred between members of different Christian denominations, at a time when having no religious creed was socially unacceptable. Some of these legacies continue today.

Discrimination today

Despite the many legal advances in protections for people against discrimination

Creed and the duty to accommodate: A checklist for accommodation providers (2015)

Op-ed by Chief Commissioner Renu Mandhane (2015)

Human rights and creed research and consultation report (2014)

Summary of human rights and creed survey findings (2013)

Creed case law review (2012)

Creed, freedom of religion and human rights - Special issue of Diversity Magazine (2012)

Human rights and creed: Legal workshop papers (2012)

based on creed since the introduction of the *Code* and *Charter*, the OHRCÕs research and consultation revealed that prejudice and discrimination based on creed remain a problem in todayÕs Ontario society. New and more severe forms of creed-based prejudice, antisemitism and Islamophobia have emerged in recent times, often shaped by international events and transmitted through media.

PeopleÕs experiences of discrimination based on creed often intersects with discrimination based on other *Code* grounds, such as race, ethnic origin, citizenship, ancestry, place of origin and sex.

Indigenous peoples in Ontario continue to face significant barriers practicing OntarioÕs longest standing religious and spiritual traditions. This has sometimes been due to a lack of understanding of Indigenous Spirituality as a whole way of life, and a corresponding failure to recognize and accommodate Indigenous Spirituality in its diverse forms and expressions. It has also been shaped by the ongoing impact of the colonial past on the present.

Atheists, agnostics and persons with no creed, as well as members of newer or lesser known creed communities also face various forms of stigma, prejudice and discrimination. New forms of prejudice against religious people in general have also emerged in recent times, as the numbers of people identifying with no religion continues to grow and increasingly shape public culture and morality.

Discrimination based on creed and corresponding protections

To establish *prima facie* discrimination (discrimination on its face) under the *Code*, a person must show:

1. They have a characteristic protected from discrimination under the Code
2. They have experienced negative treatment or an adverse impact within a social area protected by the Code
3. The protected characteristic was a factor in the negative treatment or adverse impact.

Once a prima facie case of discrimination has been established, the burden shifts to the respondent to provide a credible, non-discriminatory explanation or to justify the conduct within the framework of the exemptions available under the Code (*e.g. bona fide* requirement defence). If it cannot be justified, discrimination will be found to have occurred.

Creed needs to only be a factor in someoneÕs differential treatment for it to be discrimination under the *Code*.

The *Code* has primacy Đ or takes precedence Đ over all other provincial laws in Ontario. Where a law conflicts with the *Code*, the *Code* will prevail, unless the other law says otherwise.

Discrimination based on creed may take many forms. For example, it can happen when someone is:

- Negatively affected by an organizational requirement, rule or standard that prevents them from practicing their creed (without being accommodated)
- Pressured or compelled to do or believe something based on creed
- Harassed or subjected to a poisoned work environment because of negative comments or conduct relating to creed

- Racially profiled because of their creed
- Treated differentially and unfairly in a social area protected by the *Code*, due at least in part for reasons relating to creed.

The *Code* also prohibits discrimination because of creed in situations where:

- A person is targeted and treated unequally because of their perceived creed, absence of a creed, or association with an individual or group with a particular creed (or lack thereof)
- There is no intention to discriminate, but rules, requirements or standards negatively affect persons based on their creed
- People are negatively affected based on their creed due to the operation of a system as a whole (this includes rules and regulations and organizational culture and practices as a whole)
- Neither the person discriminated against nor the person discriminating follows a creed.

While discrimination based on creed can sometimes take very overt and direct forms (for example, involving harassment and even violence), less obvious and more indirect forms of discrimination are more common, often related to the failure to inclusively design or accommodate people based on creed in employment, services or housing.

The duty to accommodate creed beliefs and practices

Section 11 of the *Code* prohibits discrimination that results from requirements, qualifications or factors that may appear neutral but have an adverse effect on people identified by *Code* grounds. This is known as ÒconstructiveÓ or Òadverse effectÓ discrimination. Constructive or adverse effect discrimination violates the *Code* unless the requirement, qualification or factor is reasonable and *bona fide* in the circumstances, and cannot be accommodated short of undue hardship.

Employers, service providers, unions and housing providers have a legal duty to accommodate peopleÕs beliefs and practices to the point of undue hardship where these are:

- Adversely affected by a standard, rule or requirement of the organization
- Sincerely (honestly) held
- Connected to a creed.

For creed protections, a personÕs creed belief needs only to be sincerely held. The focus is on the personÕs sincerely held personal or subjective understanding of their creed**.** They do not need to show that their belief is an essential or obligatory element of their creed, or that it is recognized by others of the same creed (including religious officials).

Not every adverse impact on a personÕs creed may be discrimination under the *Code*. Interference with creed practices or beliefs that are only marginally significant or peripherally connected to a person's creed may not necessarily receive protection. For example, not being able to take part in volunteer activities at a church or take part in other social activities connected to a religion or creed, due to work-related obligations, have been found to not necessarily violate creed rights under the *Code*.

Determining whether or not a creed right has been engaged can sometimes require sensitive forms of inquiry into a personÕs creed belief or practice, where this is

relevant to assessing accommodation needs. As a general rule, accommodation providers should:

- Take requests for accommodation in good faith (unless there is evidence the request is not genuine)
- Limit requests for information to those reasonably related to establish the existence of rights and duties, assess needs, limitations or restrictions, and make the accommodation
- Make sure that information related to accommodation is kept confidential and shared only with people who need the information to put the accommodation in place.

Asking about a person's sincerity of belief, where there is a legitimate reason to doubt this, should be as limited as possible. It need only establish that an asserted creed belief is Òin good faith, neither fictitious nor capricious, and that it is not an artificeÓ (*Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 at para. 52). Organizations may also sometimes need to evaluate objective evidence to decide whether a belief is in fact connected to a creed, or that a requirement, rule or practice actually negatively affects a person based on their creed.

Fulfilling the duty to accommodate requires that the most appropriate accommodation be determined and provided, short of undue hardship. The most appropriate accommodation is the one that most:

- Respects dignity (including autonomy, comfort, and confidentiality)
- Responds to a personÕs individualized needs
- Allows for integration and full participation.

Inclusive design (design with everyone in mind) that removes barriers up front is a preferred approach to removing barriers after they become apparent, or making Òone-offÓ accommodations. The one-off approach assumes that existing structures are fine or only need slight modifications to make them acceptable. The Supreme Court of Canada has affirmed organizationsÕ obligations to be aware of differences between individuals and groups, including based on creed, and wherever possible to build in concepts of equality into standards, rules or requirements.

The duty to accommodate is about more than providing the most appropriate accommodation in the circumstances (the substantive component). It is also about engaging in a meaningful, good-faith process to assess needs and find appropriate solutions (the procedural component). Failing to carry out either component appropriately may be discriminatory.

Everyone involved in the accommodation process has a duty to cooperate to the best of their ability. While the accommodation provider is ultimately responsible for putting
in place solutions and leading the process, persons seeking accommodation must cooperate in the process. In some cases, an organization may have fulfilled its duty to accommodate because the person may not have taken part in the process.

Specific cases and issues

This policy provides individuals and organizations with specific guidance about rights and responsibilities for accommodating:

- Indigenous spiritual practices
- Creed-based holidays, leaves and ritual observances

- Dress codes and appearance rules and standards
- Displaying religious or creed-based symbols
- Photos and biometrics
- Food restrictions
- Exemptions from activities that adversely affect a personÕs creed
- Creed issues in recruitment and hiring.

Limits and defences

Human rights protections for creed do not extend to practices and observances that are hateful or incite hatred or violence against other individuals or groups, or contravene criminal law. The duty to accommodate creed beliefs and practices may also be limited where it:

- Causes undue hardship for an organization, considering factors of cost and of health and safety
- Interferes with the rights of others under the *Code* or *Charter*
- Announces an intention to discriminate in a social area as prohibited under section 13 of the *Code*.

> The OHRC's *Policy on competing rights* provides organizations with a framework for making sure that rights are appropriately balanced when they conflict with one another. The framework follows several key principles including that no right is absolute (all rights may be limited where they interfere with the rights of others), and there is no hierarchy of rights.

The duty to accommodate people's creed beliefs and practices should not be limited or denied because of such factors as the impact on employee morale, third-party preferences, business inconvenience, or collective agreements or contractual terms. The duty to accommodate also is not negated simply because a person or organization thinks a belief or practice is unreasonable or objectionable, or because an organization operates in the secular public sphere. The Supreme Court of Canada has said that a secular state respects and accommodates religious differences, instead of trying to extinguish them.

Sometimes, an organizational requirement that negatively affects a person based on their creed belief or practice may be a *bona fide* (legitimate) requirement in the circumstances. For example, a high-risk environment subject to poisonous gases may have a legitimate requirement for people to wear safety masks, even if this requires persons to be clean-shaven for the mask to properly seal, which may adversely affect persons whose creed requires them to grow facial hair. However, organizations are still required to explore alternative options to accommodate people to the point of undue hardship.

The *Code* also provides organizations with certain defences that allow behaviour that would otherwise be discriminatory. For example, such exemptions in the *Code* apply to special programs, special interest organizations (including religious organizations), special employment, solemnization of marriage by religious officials, and separate school rights. An example might be restricting employment in a Sunday school to a teacher of the same faith. Many of these exceptions recognize and protect the associational rights of creed-based groups in certain circumstances to enact or abide by creed-based standards and requirements. Organizations will still need to show that they meet the requirements of the exception.

Preventing and responding to discrimination based on creed

The ultimate responsibility for maintaining an environment free from discrimination and harassment rests with employers, housing providers, service providers and other responsible parties covered by the *Code*. They must make sure they maintain accessible, inclusive, discrimination and harassment-free environments that respect human rights.

Organizations should develop broader strategies to prevent and address discrimination based on creed. A complete strategy should include:

- A barrier prevention, review and removal plan
- Anti-harassment and anti-discrimination policies
- An education and training program that, among other things, increases cultural competence in dealing with creed diversity
- An internal complaints procedure
- An accommodation policy and procedure.

All of society benefits when people of diverse creed backgrounds are encouraged and empowered to take part at all levels. All Ontarians also benefit from a society that respects diversity and pluralism, and affords equal rights, opportunity and dignity to all.

Attachments

Attachment	Size
Policy on preventing discrimination based on creed (2015)	18.04 MB
Policy on creed and the accommodation of religious observances (1996)	240.3 KB

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