

POLICY ON HUMAN RIGHTS AND RENTAL HOUSING

**ONTARIO
HUMAN RIGHTS
COMMISSION**

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Overview

Housing is a human right

Housing is a human right. International law states that Canada must work towards making sure everyone has access to adequate and affordable housing. But some people, based on factors such as race, ancestry, disability, sex, family status and social and economic status, do not receive the housing rights they are entitled to. When multiple factors intersect, the disadvantage increases and people are at even greater risk of discrimination, poverty and even homelessness.

In Ontario, the *Human Rights Code* applies to both tenants and landlords.¹ Under the *Code*, everyone has the right to equal treatment in housing without discrimination and harassment. And landlords are responsible for making sure housing environments are free from discrimination and harassment.

People cannot be refused an apartment, harassed by a housing provider or other tenants, or otherwise treated unfairly because of one or more of the following Ontario *Human Rights Code* grounds:

- race, colour or ethnic background
- religious beliefs or practices
- ancestry, including individuals of Aboriginal descent
- place of origin
- citizenship, including refugee status
- sex (including pregnancy and gender identity)
- family status
- marital status, including those with a same-sex partner
- disability
- sexual orientation
- age, including individuals who are 16 or 17 years old and no longer living with their parents
- receipt of public assistance.

People are also protected if they face discrimination because of being a friend or relative of someone identified above.

Where do housing rights apply?²

The right to equal treatment without discrimination applies when renting a unit (for example, in a high rise apartment, condo, co-op or house). It covers processes for choosing or evicting tenants, occupancy rules and regulations,

¹ More detailed information is available in subsequent sections of this *Policy*.

² While the *Code* protects against discrimination in a broad range of situations relating to housing, this *Policy* focuses on residential tenancies, or rental housing arrangements. See footnote 11 for more detailed information.

repairs, the use of related services and facilities, and the general enjoyment of the premises.

Housing providers are not the only people responsible for making sure tenants' human rights are respected. Government legislators, policy makers, planners and program designers, tribunals and courts must also make sure their activities, strategies and decisions address discrimination in housing.

Choosing tenants

A regulation to the *Code* sets out what business practices are acceptable and what information can be used when choosing tenants:

- Rental history, credit references and/or credit checks may be requested. A lack of rental or credit history should not be viewed negatively.
- A landlord can ask for income information, but they must also ask for and consider together any available information on rental history, credit references and credit checks (such as through Equifax Canada).
- Income information can only be considered on its own when no other information is made available.
- Income information should be limited to confirming that the person has enough income to cover the rent.
- It is illegal for housing providers to apply a rent-to-income ratio such as a 30% cut-off rule. However, income information alone and rent-to-income ratios may be considered when tenants are applying for subsidized units where the rent amount is geared to income level.
- Housing providers can also ask for a "guarantor" to sign the lease – but only if the landlord has the same requirements for all tenants, not just for people identified by *Code* grounds, such as recent immigrants or people receiving social assistance.
- Regulation 290/98 under the *Code* permits no other inquiries.

Accommodating tenant needs

Landlords have a legal duty to accommodate tenants when legitimate concerns arise based on *Code* grounds. If tenants have special needs related to, for example, a disability, landlords may need to make changes to units, a building entrance, sidewalks or parking areas to accommodate the tenant's situation. These types of changes can also improve accessibility for other people, including families with small children or older persons.

Not all accommodations involve physical facilities. Some tenants may need changes to rules and practices to accommodate changing family situations or religious practices. Sometimes a landlord may have to take steps to help a tenant who may be unwell or who is disruptive towards others, either because of a disability or due to that person being the target of discrimination themselves.

The duty to accommodate involves giving serious attention to requests or needs that are already known or may be suspected. Both the housing provider and the tenant, and possibly others, have a shared responsibility to cooperate in the process, each to the best of their ability. This might involve providing relevant medical or other personal information. A housing provider has a duty to keep this information private.

Sometimes, one tenant's needs or conduct may conflict with or have a negative impact on others. Landlords must balance and manage the legitimate concerns of all tenants, while not tolerating any discriminatory views and preferences. Even if a tenant's behaviour is disruptive, a landlord is expected to take steps to determine whether the situation can be resolved by accommodating a *Code*-related need.

Even when appropriate accommodation is identified, it may not always be possible to provide without resulting in undue hardship in terms of cost or the health and safety of the tenants' living environment. When the best possible accommodation would cause undue hardship, there is still a duty to put in interim or next-best solutions. Whatever steps are decided on, landlords need to put the accommodation in place as quickly as possible.

Examples of discrimination

Here are just a few examples of the many ways people can experience discrimination in housing:

- A landlord proceeds with an eviction even after learning a tenant has been in hospital for a long time after a work accident.
- A superintendent makes unwelcome sexual gestures and suggestive comments to a female tenant about how she wears her clothes and hair.
- While building security quickly investigates harassment complaints involving most tenants, they never follow up when a transgender tenant raises similar concerns.
- A landlord streams new immigrants and single mothers into older buildings and units that need fixing, because he wrongly thinks these groups are less responsible than other tenants.
- A neighbourhood residency group lobbies for zoning by-laws to keep social housing for psychiatric survivors out of their neighbourhood.
- A woman, who is White, but who has two racialized children, is deeply offended after trying to rent an apartment from a landlord who comments that one of her "house rules" is that tenants not associate with "coloured people."
- A rental ad reads "suits a working person" implying that people who receive social assistance or are unable to work due to a disability, or other *Code* ground, are not welcome or need not apply.

Special programs and circumstances for housing

Under the *Code*, special programs are permitted if they would help a group of people who are disadvantaged based on *Code* grounds. Examples would include setting up housing designed for older people, people with disabilities or university students with families.

When the Code does not apply

The *Code* does not apply in the case of a “personality conflict” with the landlord or another tenant unrelated to a *Code* ground, or if a tenant shares a bathroom or kitchen with the owner or the owner’s family.

Landlords can advance human rights in housing

Housing providers can take a number of steps to prevent and address human rights in rental housing by developing:

- anti-discrimination and anti-harassment policies
- plans for reviewing and removing barriers
- procedures for responding to accommodation requests
- procedures for resolving disputes quickly and effectively
- education and training programs.

It is important to make sure that organizational rules, policies, procedures, decision-making processes and culture do not serve as barriers, and are not having a discriminatory impact. Areas where barriers could exist include wait-list and eligibility criteria, and occupancy rules including guest policies and “persons per bedroom” ratios.

The best approach is to follow some key human rights principles:

- design inclusively, and create no new barriers
- identify and remove existing barriers
- maximize integration
- assess and accommodate individual needs short of undue hardship by exploring ideal, interim and next-best solutions using a cooperative process that maximizes respect, dignity and confidentiality.

I. Introduction

The international community has long recognized that housing is a fundamental and universal human right that must be protected in law. Both the *Universal Declaration of Human Rights*³ and the *International Covenant on Economic, Social and Cultural Rights* (the *ICESCR*)⁴ recognize the right to housing.⁵ Other international treaties that have affirmed the right to housing include the *International Convention on the Elimination of All Forms of Racial Discrimination*, the *Convention on the Elimination of All Forms of Discrimination Against Women* and the *Convention on the Rights of the Child*.

Canada has ratified all of these treaties, and in doing so, has endorsed the view that housing is a human right. The challenge for Canada is to make these high-level principles a lived reality for Canadians. Human rights bodies across Canada play a key role in making this happen. In Ontario, the Ontario Human Rights Commission (the OHRC) has a special responsibility to help Canada fulfill its international human rights commitments. In this *Policy*, the OHRC brings the principles contained in international covenants into communities and homes across Ontario. By looking at the factors that can cause discrimination in creating, finding and maintaining rental housing, this *Policy* is a major step towards making international rights lived rights for all Ontarians.

Affordable, adequate housing is a necessity for everyone in Ontario. There is an undeniable link between affordable and adequate housing and quality of life. Housing provides the foundation for interacting with the broader community and for general well-being and social inclusion. Adequate housing facilitates access to suitable employment, community resources and supports, and educational opportunities for all Ontarians.

Ontario is one of the wealthiest jurisdictions in the world. Yet, many Ontarians do not have access to adequate and affordable housing. It is even more troubling that access to appropriate housing is inequitable for many groups identified by prohibited grounds of discrimination including race, disability and family status. International human rights groups have severely criticized Canada's housing situation numerous times. For example, in 2006, the United Nations referred to homelessness in Canada as "a national emergency."⁶ In 2007, Miloon Kothari,

³ *Universal Declaration of Human Rights*, signed Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

⁴ *International Covenant on Economic, Social and Cultural Rights*, (1976) 993 U.N.T.S. 3, Can. T.S. 1976 No. 46.

⁵ The United Nations General Assembly adopted and proclaimed the *Universal Declaration of Human Rights* in 1948. The *ICESCR* was adopted by the United Nations in 1966 and entered into force in 1976. Canada ratified the *ICESCR* in 1976.

⁶ See "Canada's Poor Face 'Emergency': UN" *The Toronto Star* (May 23, 2006), that reported that the United Nations Committee on Economic, Social and Cultural Rights again criticized Canada in its 2006 Annual Report for its inaccessible employment insurance program, its meagre minimum

the former United Nations Special Rapporteur on adequate housing, described Canada's housing situation as "very stark and very disturbing" and amounting to a "national crisis".⁷

There appear to be several reasons for the dire state of the housing situation in Canada, including a severe shortage of a range of forms of adequate and affordable housing⁸, low social assistance and minimum wage rates, and the discriminatory practices of some housing providers.

While many landlords and housing providers in Ontario take their human rights responsibilities seriously, the OHRC has been hearing for some time that human rights violations are taking place in some residential tenancy arrangements. In addition to informal reports from community groups and individuals, numerous incidents and practices have led to formal human rights claims being filed. Also, in its own consultations on age discrimination⁹ and discrimination based on family status¹⁰, the OHRC heard about specific human rights issues that arise in rental housing based on these grounds.

As a result, the OHRC decided to do a formal public consultation to more fully explore discrimination issues in rental housing.¹¹ To this end, in May 2007, the

wages, and the fact that it has let homelessness and inadequate housing amount to a "national emergency."

⁷ Kothari, Miloon, United National Special Rapporteur on adequate housing, "Preliminary Observations at the end of his Mission to Canada 9 – 22 October 2007," A/HRC/7/16/Add.4 (*Preliminary Observations*). In May 2008, Ms. Raquel Rolnik (*Brazil*) was named as the new Special Rapporteur on adequate housing.

⁸ Steps have been taken in recent years to address housing supply. For example, in March 2009, the provincial government announced it would invest \$620 million to match federal funds under the Canada/Ontario Affordable Housing Agreement, to renovate 50,000 social housing units and build 4,500 affordable housing units, with housing for seniors and people with disabilities as priorities. At the time of publication, the Ministry of Municipal Affairs and Housing is holding consultations to assist in the development of a long-term affordable housing strategy, as part of the Government of Ontario's broader Poverty Reduction Strategy.

⁹ The OHRC's 2001 report, *Time for Action: Advancing Human Rights for Older Ontarians*, outlines housing issues that affect older Ontarians:

www.ohrc.on.ca/en/resources/discussion_consultation/TimeForActionsENGL

¹⁰ In 2007, the OHRC released *The Cost of Caring*, a consultation report that reported the feedback received from participants in the family status consultation, and included information relating to discriminatory practices in the housing sector:

www.ohrc.on.ca/en/resources/discussion_consultation/famconsult/view

¹¹ While the *Code* protects against discrimination in a broad range of situations relating to housing, this *Policy*, like the OHRC's housing consultation, will focus on residential tenancies, or rental housing arrangements. Social housing and not-for-profit co-operative housing arrangements are included within this definition. Housing studies show that people who live in rental housing are people, typically, who have lower incomes and who are disproportionately vulnerable to discrimination and therefore identified by the *Code*. As such, the *Policy* does not cover discrimination in purchasing property or negotiating mortgages, for example, or, human rights issues that affect owners in condominium living arrangements, such as discriminatory restrictions on the use of shared spaces. However, such practices would also constitute violations

OHRC released a background paper entitled *Human Rights and Rental Housing in Ontario*.¹² This paper relied on legal research, social science findings, and Canada's international human rights obligations to set out a framework for discussing discrimination in rental housing. The OHRC later released a consultation paper¹³ that asked the public for input on specific human rights issues that arise in rental housing.

In the summer and fall of 2007, the OHRC held its public consultation. Almost 130 organizations and over 100 individuals took part in meetings across the province. The OHRC also received more than 60 formal submissions, and over 100 people wrote in or completed an on-line survey. In July 2008, the OHRC released a consultation report entitled, *Right at Home: Report on the Consultation on Human Rights and Rental Housing in Ontario*, which reported on the feedback it received through its consultation. The report also made recommendations to responsible parties for addressing discrimination in rental housing, and included OHRC commitments.¹⁴

The analysis and examples used in this *Policy* are based on the OHRC's research on discrimination in rental housing, international standards, human rights claims that have come before the OHRC and the Human Rights Tribunal of Ontario, court decisions, and the extensive input of individuals and organizations throughout the OHRC's consultation process.¹⁵

The *Policy* sets out the OHRC's position on discrimination in the area of rental housing as it relates to the provisions of the Ontario *Human Rights Code* (the *Code*), and to Canada's international human rights obligations. It deals primarily with issues that fall within the *Code* and could be the subject of a human rights claim. At the same time, the *Policy* interprets the protections of the *Code* in a broad and purposive manner. This approach is consistent with the principle that the *Code*'s quasi-constitutional status requires that it be given a liberal interpretation that best ensures its anti-discriminatory goals are reached.

OHRC policy statements contribute to creating a culture of human rights in Ontario. The *Policy* is intended to help the public understand the *Code* protections against discrimination and harassment in the area of rental housing. It is also meant to help individuals, housing providers, policy-makers, decision-

of the *Code*, and a housing or service provider who engages in these behaviours is vulnerable to having a human rights claim filed against it.

¹² The OHRC's background paper on discrimination in rental housing is available at: www.ohrc.on.ca/en/resources/news/housingback

¹³ The OHRC's consultation paper on discrimination in rental housing is available at: www.ohrc.on.ca/en/resources/discussion_consultation/housingconsult

¹⁴ The OHRC's housing consultation report, *Right at Home*, is available at: www.ohrc.on.ca/en/resources/discussion_consultation/housingconsultationreport

¹⁵ For a full understanding of how the OHRC arrived at the positions it takes in this *Policy*, this *Policy* should be read together with the documents referenced above.

makers, where appropriate, and other pertinent organizations to understand their responsibilities and act appropriately to ensure compliance with the *Code*.

In addition to the *Policy*, the OHRC will continue with promotion and advancement initiatives to address systemic discrimination in housing. At the same time, the OHRC recognizes that effective solutions to the problems that exist in housing in Ontario will come only with the joint efforts and cooperation of multiple partners. This *Policy* is intended to be part of a coordinated effort on the part of the OHRC, government, decision-makers, community partners, policy-makers and housing providers to improve equal access to adequate and affordable housing for all Ontarians.

II. Purpose of OHRC's policies

Section 30 of the *Code* authorizes the OHRC to prepare, approve and publish human rights policies to provide guidance on interpreting provisions of the *Code*.¹⁶ 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.¹⁷ 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

¹⁶ 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.

¹⁷ 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 Ontario Human Rights Commission.

Tribunal¹⁸, applied to the facts of the case before the court or Tribunal, and quoted in the decisions of these bodies.¹⁹

It was evident from the feedback that the OHRC received in its housing consultation that many Ontarians are unaware of their rights and obligations under the *Code* when it comes to housing. This *Policy* is intended to explain how the *Code* applies to rental housing issues. By clarifying the rights and responsibilities of people under the *Code*, the *Policy* has the potential to reduce tension and conflict between tenants and housing providers and to prevent human rights violations before they occur.

III. The Ontario *Human Rights Code*

1. Status and purpose of the *Code*

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. As stated in its Preamble, 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 feels able to contribute to the community. Every person in Ontario has a right to equal treatment with respect to housing²⁰ without discrimination.

The *Code* has primacy over all other legislation in Ontario, unless the other legislation specifically states that it applies despite the *Code*.²¹ This means that if

¹⁸ 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.

¹⁹ 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 *Policy and Guidelines on Disability and the Duty to Accommodate*, available at: www.ohrc.on.ca/en/resources/Policies/PolicyDisAccom2

²⁰ The *Code* refers to the social area of "occupancy of accommodation," also known more simply as "housing." The *Code*'s protections against discrimination in housing include the denial of a housing opportunity, imposing different standards during a tenancy, harassment, or threats of eviction.

²¹ Subsection 47(2) of the Ontario *Human Rights Code*, R.S.O. 1990, c. H. 19.

another piece of legislation contains a provision that conflicts with or contravenes the *Code*, the *Code* will prevail.

This primacy is recognized specifically in the context of rental housing. The *Residential Tenancies Act* (the *RTA*) contains a provision that states that the *Act* will override any other *Act* that may conflict with it, except for the *Code*.²² As well, several Ontario Rental Housing Tribunal decisions have recognized the *Code*'s supremacy and special status in their rulings.²³

1.1 Protections

The *Code* aims to ensure that everyone has the equal opportunity to access housing and its attendant benefits without discrimination on any of the grounds identified by the *Code*. Subsection 2(1) of the *Code* states:

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.

Subsection 2(2) prohibits harassment in accommodation:

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.

While “sexual orientation” is not specifically listed as a ground in subsection 2(2) of the *Code*, it is the OHRC’s policy position that sexual orientation is included in the protection against harassment.

Subsection 4(1) provides protection to 16- or 17-year-olds in specific circumstances:

Every sixteen or seventeen year old person who has withdrawn from parental control has a right to equal treatment with respect to occupancy of and contracting for accommodation without discrimination because the person is less than eighteen years old.

Subsection 4(2) states that such contracts are enforceable as if the person were 18 years old.

²² Subsection 3(4) of the *Residential Tenancies Act*, 2006, S.O. 2006 c.17.

²³ See, for example, *Karoli Investments Inc. v. Reid*, [2006] O.R.H.T.D. No. 8 at para. 75 and *Hillhurst Park Apartments v. Wolstat*, [2005] O.R.H.T.D. No. 33.

Subsection 7(1) specifically addresses sexual harassment by a landlord, agent of the landlord or co-tenant:

Every person who occupies accommodation has a right to freedom from harassment because of sex by the landlord or agent of the landlord or by an occupant of the same building.

Sexual solicitation by a person in a position of relative power with a tenant is prohibited by subsection 7(3):

- (3) Every person has a right to be free from,
- (a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or
 - (b) a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.

In the context of private rental housing, the person in a position to confer or deny a benefit would most likely be a landlord, superintendent, building manager, *etc.* of a residential dwelling, or, in the case of social or co-op housing, it might be a service manager, Board member, *etc.*

1.2 Defences, exceptions and reprisal²⁴

Section 18 of the *Code* offers a defence for some housing providers:

The rights under Part I to equal treatment with respect to services and facilities, with or without accommodation, are not infringed where membership or participation in a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination is restricted to persons who are similarly identified.

This means that certain types of organizations are allowed to limit participation or membership based on *Code* grounds. For example, a religious, philanthropic, educational, fraternal or social institution or organization that mainly serves the interests of older people, or older people who belong to a particular religious or ethnic community, and that provides housing accommodation as part of their services may be able to restrict that housing to people who are similarly identified. However, to rely on this defence, providing accommodation alone is not sufficient. Some other “service or facility” must be provided.

²⁴ See also the section of this *Policy* entitled “Special Programs and Special Interest Organizations.”

Section 21 of the *Code* sets out three exceptions to the equality rights with regard to housing:

(1) **Shared accommodation**

The right under section 2 to equal treatment... is not infringed by discrimination where the residential accommodation is in a dwelling in which the owner or his or her family reside if the occupant or occupants of the residential accommodation are required to share a bathroom or kitchen facility with the owner or family of the owner.

This subsection allows an owner of a residence to select occupants of his or her choice where the owner or his or her family will be living in the same residence and sharing a bathroom or kitchen with the occupants.

(2) **Restrictions on accommodation, sex**

The right under section 2 to equal treatment ... without discrimination because of sex is not infringed by discrimination on that ground where the occupancy of all the residential accommodation in the building, other than the accommodation, if any, of the owner or family of the owner, is restricted to persons who are of the same sex.

This subsection is an exception to the rule that housing must be offered without discrimination based on sex. It allows an owner of a residence to restrict who lives there to men only or women only (excluding the part of the residence, if any, occupied by the owner or his or her family).

(3) **Prescribing business practices**

The right under section 2 to equal treatment with respect to the occupancy of residential accommodation without discrimination is not infringed if a landlord uses in the manner prescribed under this *Act* income information, credit checks, credit references, rental history, guarantees or other similar business practices that are prescribed in the regulations made under this *Act* in selecting prospective tenants.

The regulations related to subsection 21(3) permit landlords to use income information, credit checks, credit references, rental history, guarantees or other similar business practices for selecting prospective tenants. The *Code* is clear, however, that none of these assessment tools may be used in an unfair way to screen out prospective tenants based on *Code* grounds. The criteria must be used in a genuine and non-discriminatory way. For more detailed information, see the section of this *Policy* entitled “Income Requirements” under “Rental Criteria.”

A person who believes their rights have been violated may choose to exercise their rights under the *Code*, and this may include filing a human rights claim. A person cannot be punished or threatened with punishment for doing so. Any attempt or threat to punish someone for exercising their human rights is called a “reprisal” and is prohibited under section 8 of the *Code*.

2. Grounds of discrimination

The *Code* contains provisions to help make sure that everyone has the equal opportunity to access housing, and the benefits that go along with it, without discrimination or harassment based on the following grounds:

- race
- colour
- ancestry
- creed (religion)
- place of origin
- ethnic origin
- citizenship
- sex (including pregnancy, gender identity²⁵)
- sexual orientation
- age
- marital status (including same-sex partnerships)
- family status
- disability
- receipt of public assistance.

This protection extends to access to rental opportunities, renting, being evicted, building rules and regulations, repairs, maintenance, harassment, the use of services and facilities, *etc.*

To date, housing discrimination has not been researched to the same extent as discrimination in employment, for example. However, based on its own research, human rights claims filed, and extensive feedback from its housing consultation, the OHRC has developed a clearer picture of the ways that discrimination takes place in rental housing.

For example, the OHRC knows that low social and economic status is a common factor in many types of housing discrimination. People identified by *Code* grounds are disproportionately likely to have low incomes. The shelter allowance rates for people and families who receive social assistance are far below market levels. This, together with a limited supply of adequate and affordable housing in

²⁵ Under the *Code*, claims based on pregnancy or gender identity may be filed under the ground of sex.

many parts of the province, puts such people at a significant disadvantage when seeking shelter.

What follows is a brief discussion of some of the main ways that people identified by specific *Code* grounds experience discrimination in rental housing. The sections that follow are not meant to cover all scenarios where discrimination may take place under the ground in question. Instead, they are intended to give an overview of common forms of discrimination relating to a specific ground or combination of grounds. Where applicable, examples relating to discrimination based on specific grounds are used throughout the *Policy*.

2.1 Intersection of *Code* grounds

Discrimination issues in rental housing often arise because of a combination of human rights grounds. For example, a young lone mother receiving social assistance who is looking for rental housing might experience discrimination based on her sex, age, family status and receipt of social assistance. If she is a racialized person or has a disability, her experience of discrimination may change or be compounded.

The OHRC has explored this “contextualized” or “intersectional”²⁶ approach to discrimination analysis at length in its Discussion Paper entitled *An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims*.²⁷

The OHRC has identified the intersection of protected grounds as an important consideration in all of its work. It is the OHRC’s position that an intersectional approach is needed to make sure that a claimant’s rights and a landlord or service provider’s obligations under the *Code* are given full force and effect, and to fully understand the complex and multifaceted ways that many people experience discrimination in rental housing.

Tribunals and courts have increasingly used an intersectional approach in the human rights cases they hear. For example, in one case alleging discrimination in housing where the claimant was a young racialized man, the tribunal stated:

I conclude that [the landlords’] reactions to the requests for assistance by [the claimant] were affected by their perception of him as an angry and threatening young Black man. I am satisfied that the intersection of his race, colour, age and sex were at least a factor in this perception. In my

²⁶ The concept of “intersectionality” has been defined as “intersectional oppression [that] arises out of the combination of various oppressions that, together, produce something unique and distinct from any one form of discrimination standing alone...” M. Eaton, “Patently Confused, Complex Inequality and *Canada v. Mossop*” (1994) 1 Rev. Cons. Stud. 203 at 229.

²⁷ Ontario Human Rights Commission, *An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims* (Toronto: Queen’s Printer, 2001): www.ohrc.on.ca/en/resources/discussion_consultation/DissIntersectionalityFtnts/view

view, [the claimant] would not have been treated in the same way based on his age and sex alone. It was the combination of those factors with his race and colour that led to the discrimination.²⁸

Although the following sections discuss each ground individually, it is important to be aware of the potential for more than one ground to be at issue at the same time, and for these grounds to intersect.

2.2 Race, creed and related Code grounds

The *Code* prohibits discrimination in rental housing based on race and several related grounds, including colour, ethnic origin, ancestry, place of origin, citizenship and creed (religion).²⁹

Racial discrimination in rental housing may take a variety of forms. It is likely that the most common problem that racialized³⁰ people continue to face is the denial of opportunities to apply for rental housing or to view properties. Landlords may use subtle screening methods to bypass certain people in the tenant selection process. There have been cases where racialized people are advised that an apartment has already been rented only to have a White friend inquire and be told that it is still available.³¹

This kind of discriminatory treatment is often the result of negative attitudes and stereotypes on the part of the housing provider. In one case, a human rights tribunal found that a landlord had discriminated against a Black woman because of her race, when he refused to rent her an apartment. The tribunal found that the

²⁸ *Monsson v. Nacel Properties Ltd.* (2006), CHRR Doc. 06-743, 2006 BCHRT 543 at para. 33.

²⁹ Depending on the circumstances, a human rights claim of discrimination based on race may cite race alone or may include one or more related ground(s). However, as a social construct, the ground of race is capable of encompassing the meaning of all of the related grounds, and any characteristic that is racialized and used to discriminate.

³⁰ "Racialization" is the process by which societies construct races as real, different and unequal in ways that matter to economic, political and social life. The term "racialized" is widely preferred over descriptions such as "racial minority," "visible minority" or "person of colour" as it expresses race as a social construct rather than as a description of people based on perceived characteristics. See Ontario Human Rights Commission, *Policy and Guidelines on Racism and Racial Discrimination*, available at: www.ohrc.on.ca/en/resources/Policies/RacismPolicy/view.

³¹ See *Watson v. Antunes* (1998), CHRR Doc. 98-063 (Ont. Bd. Inq) in which a human rights tribunal held that the respondent discriminated against the claimants, a Black woman seeking to rent an apartment and her mother who was helping her, when she reluctantly showed them the apartment and then misled the mother about it being taken when she later called to rent it. Also, in *Baldwin v. Soobiah* (1983), 4 C.H.R.R. D/1890 (Ont. Bd. Inq.), a human rights tribunal held that a *prima facie* case of discrimination in housing rental was established when the respondent made statements to potential tenants of a certain race that a property was rented, but then stated to potential tenants of another race that the apartment was still available. In other words, a pattern of refusals on the part of a landlord to rent to people of a particular ethnic origin was found to be evidence of unlawful discrimination.

landlord made assumptions about the woman based on negative stereotypes about Black people.³²

Specific people may be singled out for differential treatment based on their creed and/or their ethnic origin. For example, people identified as, or perceived to be, Muslim, Arab, Middle Eastern and/or South Asian have been subjected to increased Islamophobia in the rental housing market since the terrorist attacks of September 11, 2001. Islamophobia can be described as stereotypes, bias or acts of hostility towards individual Muslims or followers of Islam in general, or people who are perceived to be Muslim. In addition to individual acts of intolerance and racial profiling, Islamophobia leads to viewing Muslims as a greater security threat on an institutional, systemic and societal level.³³

Other racialized groups have also been subjected to racial stereotypes. Aboriginal people, for example, may face discriminatory stereotypes in the rental housing market. In a recent case, a tribunal found that the director of a housing provider stated that “Indians are the dirtiest people to rent to.”³⁴ In another case³⁵, a tribunal found that when a respondent owner discovered the claimant was an Aboriginal lone mother, he refused to rent to her by avoiding her phone calls, and then telling her he was looking to rent to a married couple instead. The tribunal recognized the intersectional nature of the case and found that the housing provider had based his decision not to rent to the woman on the characteristics he attributed to Aboriginal people, combined with his stereotypical views of lone mothers as being unable to shoulder childcare responsibilities alone.

Racialized people may be subjected to unequal rental requirements. For example, housing workers have reported that new Canadians are sometimes asked to pay their rent up to 12 months in advance, despite such practices being illegal.³⁶ Some have speculated that the practice of requesting unaffordable deposits may in itself be a tactic to deter tenants that a landlord does not deem “desirable.” Legitimate rental requirements, such as a request for a rental history, may have an adverse impact on new Canadians, most of whom will not be able to meet this requirement.³⁷ For a more detailed discussion of rental

³² See *Richards v. Waisglass* (1994), 24 C.H.R.R. D/51 (Ont. Bd. Inq.).

³³ See OHRC’s *Racial Discrimination Policy*, *supra* note 30, at section 1.4.

³⁴ *Starr v. Karcher Holdings Ltd.*, (2007), CHRR Doc. 07-569 (Sask. H.R.T.).

³⁵ *Flamand v. DGN Investments* (2005), 52 C.H.R.R. D/142 (HRTO).

³⁶ F. Barahona. “Immigrants hit with ‘illegal’ rents: Landlord demands up to year’s rent from newcomers” *Toronto Star* (July 29, 2001); “Forum hears of discrimination in housing: Would-be tenants say they were victims of racism” *Toronto Star* (March 21, 2002). The OHRC also heard about these unlawful practices throughout its housing consultation.

³⁷ The *Code* and Regulation 290/98 permit landlords to request information about a prospective tenant’s rental history. However, based on the decision in *Ahmed v. 177061 Canada Ltd.* (2002), 43 C.H.R.R. D/379 (Ont. Bd. Inq.), treating the lack of a rental history in the same way as a negative rental history results in discrimination where the lack of a rental history is related to a *Code* ground.

requirements and their impact on people identified by the *Code*, see the section of this *Policy* entitled “Rental criteria” under “Discrimination patterns in rental housing.”

Racialized people may also experience unequal access to housing-related services or may otherwise be subjected to different treatment during their tenancies. For example, a racialized tenant may be subjected to substandard living conditions or a failure to carry out repairs and/or maintenance.³⁸

Discrimination may occur as a result of issues being made about the cultural practices of racialized tenants. For example, cooking odours have been the subject of tribunal decisions. In one case³⁹, a tribunal found that South Asian tenants were denied an apartment because of stereotypes about cooking odours. In another case⁴⁰, the claimant was found to have cooked foods in her home, that were an expression of her ethnicity and ancestry, that produced odours. She experienced differential treatment when she was ordered to cease producing these odours or face eviction. The right to express and enjoy one’s ethnicity and ancestry was found to be central to one’s dignity. Also, the landlord was not found to have a reasonable and *bona fide* justification for its conduct.

2.3 Sex

Women will often experience sex discrimination in housing combined with discrimination on one or more *Code*-protected ground(s), for example, family or marital status, race or race-related characteristics, age or disability. A lone woman with children, for example, may be denied a housing opportunity because a landlord has views about lone mothers not being desirable tenants based on negative stereotypes.⁴¹

Lone mothers, young women, older women, racialized women, Aboriginal women, and women with disabilities, for example, are disproportionately poor. Landlords may deny a woman a housing opportunity both because of her sex and, by association, her perceived financial situation.⁴²

Low social and economic status, combined with few adequate housing opportunities, worsens the power imbalance that already exists between tenants and landlords, and makes many women vulnerable to possible sexual harassment by some housing providers. The OHRC has been informed of various cases where women have been subjected to sexual harassment in their

³⁸ See *Ontario (Human Rights Comm.) v. Elieff* (1996), 37 C.H.R.R. D/248 (Ont.Ct. (Gen. Div.)), rev’g in part (1994), 25 C.H.R.R. D/163 (Ont. Bd. Inq.).

³⁹ *Fancy v. J & M Apartments Ltd.* (1991), 14 C.H.R.R. D/389 (B.C.C.H.R.).

⁴⁰ *Chauhan v. Norkam Seniors Housing Cooperative Association* (2004), 51 C.H.R.R. D/126, 2004 BCHRT 262. For a related case, see *Peroz v. Yaremko*, (2008), CHRR Doc. 08-769 (Sask. H.R.T.).

⁴¹ See *Conway v. Koslowski* (1993), 19 C.H.R.R. D/253 (Ont. Bd. Inq.).

⁴² See *Turanski v. Fifth Avenue Apartments* (1986), 7 C.H.R.R. D/3388 (B.C.C.H.R.).

homes. These situations have often led to the filing of human rights claims.⁴³ For more detailed information, see the section in this *Policy* entitled “Sexual harassment” under “Forms of discrimination in rental housing.”

For a woman trying to leave an abusive relationship, the shortage of affordable, adequate housing options will create a significant obstacle. In many cases, she will not have a credit rating and/or landlord references - information required by most housing providers. Many women are unable to leave abusive relationships because they lack other options.

A woman’s situation may be even more precarious if she is pregnant and/or has children. In one case, upon learning that a tenant had become pregnant, the landlord asked her if she was “intending to give the baby up for adoption” and said that the owners “didn’t want kids in the building.” A human rights tribunal found that the claimant had been discriminated against because of her sex and family status. In the tribunal’s view, one of the main reasons she was evicted “was her pending motherhood.”⁴⁴

Transgender people are protected from discrimination and harassment under the ground of sex. This includes protection from degrading comments, insults or unfair treatment because of gender identity, and applies to all aspects of the rental housing relationship, from applying for tenancies, to occupying housing, to being evicted.

Men may also be discriminated against based on negative gender stereotypes. Some housing providers prefer female tenants due to a belief that women are cleaner and more responsible as tenants.⁴⁵

2.4 Marital status

The *Code* protects people against discrimination in housing based on their marital status. Justice L’Heureux-Dubé has stated the following about the situation of unmarried people in relationships:

Persons involved in an unmarried relationship constitute an historically disadvantaged group. There is ample evidence that unmarried partners have often suffered social disadvantage and prejudice. Historically, in our society, the unmarried partner has been regarded as less worthy than the

⁴³ See, for example, *Kertesz v. Bellair Property Management* (2007), CHRR Doc. 07-632, 2007 HRT0 38 at 57 (Human Rights Tribunal of Ontario), and *Reed v. Cattolica Investments Ltd.* (1996), 30 C.H.R.R. D/331 (Ont. Bd. Inq.).

⁴⁴ *Peterson v. Anderson* (1992), 15 C.H.R.R. D/1 (Ont. Bd. of Inq.).

⁴⁵ In *Leong v. Cerezin* (1992), 19 C.H.R.R. D/381 (B.C.C.H.R.), a B.C. human rights tribunal found that the claimant was discriminated against by the respondent when he was refused occupancy of a suite because, according to the building manager, the owner preferred female tenants. Ultimately, the apartment was rented to a female for the same occupancy date the claimant had requested and for a lower rent.

married partner. The disadvantages inflicted on the unmarried partner have ranged from social ostracism through denial of status and benefits.⁴⁶

A number of cases have determined that denying someone housing because they are unmarried or do not conform to traditional family models is a violation of their human rights.⁴⁷

Single people may experience discrimination when they inquire about or apply for rental housing. Some landlords prefer to rent to married couples, rather than single people or common-law couples.⁴⁸ A parent who is unmarried or divorced may also experience difficulties when trying to view or apply for rental housing. This experience may be made worse if the lone parent is female, young, racialized, Aboriginal, gay or lesbian, and/or receives social assistance.⁴⁹

When considering prospective tenants, housing providers may not screen out people who are not married, or ask about marital status on a rental application. Also, housing providers are not allowed to treat unmarried tenants differently during their tenancies.

2.5 Family status

Section 10(1) of the *Code* defines “family status” as the status of being in a parent and child relationship. There is a lengthy history of families with children being turned away from housing because of negative attitudes and perceptions. These negative perceptions are compounded for young families, lone-parent

⁴⁶ *Miron v. Trudel*, [1995] 2 S.C.R. 418 at para. 152.

⁴⁷ See *Swaenepoel v. Henry* (1985), 6 C.H.R.R. D/3045 (Man. Bd. Adj.) in which a human rights tribunal found that the claimants, a group of three single women, were discriminated against by the respondents because of the respondents’ assumptions about the characteristics of single people of the same sex, residing together as tenants, who did not conform to the nuclear family model; in *Gurman v. Greenleaf Meadows Investment Ltd* (1982), C.H.R.R. D/808 (Man. Bd. Adj.), a tribunal found that the respondent had discriminated against the claimants, two sisters and a brother, because they were a group of single adults of mixed sexes; in *Wry v. Cavan Realty (C.R.) Inc.* (1989), 10 C.H.R.R. D/5951 (B.C.C.H.R.), the British Columbia tribunal found that the claimant (a single man) was discriminated against because the respondent only wished to rent to families and married couples. The tribunal found that there was discrimination based on sex and marital status.

⁴⁸ In *Matyson v. Provost* (1987), 9 C.H.R.R. D/4623 (Sask. Bd. Inq.), the respondents would not rent to common-law couples because it offended their religious beliefs. A Saskatchewan human rights tribunal found that while the respondent’s freedom of religion was protected under the *Charter of Rights and Freedoms* and the Saskatchewan *Human Rights Code*, the respondents had a responsibility to provide housing accommodations in a non-discriminatory way once they made it available to the public. See also *Vander Schaaf v. M & R Property Management Ltd.* (2000), 38 C.H.R.R. D/251 (Ont. Bd. Inq) in which the claimant alleged that the superintendent refused her rental application because of a preference for married couples. There was evidence to show that the claimant was treated differently than spousal co-tenants would have been. An Ontario human rights tribunal found that the respondents had directly discriminated against the claimant.

⁴⁹ See *Raweater v. MacDonald*, (2004), 51 C.H.R.R. D/459, 2005 BCHRT 63.

families, families from racialized and Aboriginal communities, and people who receive social assistance.

The continued prevalence of “adult only” housing despite the clear prohibition in the *Code* is a strong example of this. Landlords may also use a number of euphemisms to discourage or deny applications from families with children. Statements that a building is a “quiet building,” an “adult lifestyle” building, “not soundproof,” or “geared to young professionals” may, when coupled to a refusal to rent to a family with children, indicate that discriminatory attitudes related to family status played a role in the refusal.

Often, a person will experience discrimination based on family status along with one or more *Code*-protected ground(s). Since women continue to be the primary caregivers of most families in Ontario⁵⁰, discrimination based on family status will very often include a gender component. Also, families with young children may be marginalized in the rental housing market, particularly where family status intersects with marital status, receipt of public assistance, or the race-related *Code* grounds. Same-sex couples and gay or lesbian lone parents raising children may also be subjected to negative attitudes and stereotypes because they do not conform to typical family models.

Some landlords prefer not to rent to families with children because they believe that children are noisy, disruptive, and will damage the property. As well, there are specific negative stereotypes about teenage children, especially if they are male or from Aboriginal or racialized communities. Female-headed lone-parent families face a range of negative attitudes, particularly if they are Aboriginal, racialized, young, or receive social assistance, including stereotypes that they are less responsible, less reliable, and more likely to default on their rent.⁵¹ Foster families also face extra difficulties in accessing housing because of negative attitudes towards foster children and foster families.

Families may be discriminated against during their tenancies. For example, tenants may be treated differently or subjected to negative comments due to the form or composition of their families.

Families may also be affected negatively by occupancy policies. For example, Tribunals have found that the stipulation by landlords of a minimum number of bedrooms based on the number and gender of the children may have the result of impeding the access of lone-parent families to housing.⁵² See the section

⁵⁰ See N. Zukewich, “Unpaid Informal Caregiving” (Autumn 2003) 70 Canadian Social Trends 14, online: www.dsp-psd.pwgsc.gc.ca/Collection-R/Statcan/11-008-XIE/0020311-008-XIE.pdf.

⁵¹ See, for example, *Flamand v. DGN Investments* (2005), *supra*, note 35, which involved a landlord who denied housing and made racial slurs to an Aboriginal woman who was a mother of one child.

⁵² *Fakhoury v. Las Brisas Ltd.* (1987), 8 C.H.R.R. D/4028 (Ont. Bd. of Inq.). In this case, there was a policy whereby a four-person family, composed of one parent and three children, were required to rent at least a three-bedroom unit. The tribunal held that there was no reasonable

of this *Policy* entitled “Number of Occupants per Room or Bedroom” under “Occupancy Policies” for more information. A tribunal has also stated that restricting apartment buildings to “families,” where that designation excludes lone-parent families or common-law couples, is discriminatory.⁵³

Some landlords have policies prohibiting tenants from transferring between rental units in the same building. Such policies may have a negative impact on families with children, because their rental housing needs change as their families grow, forcing them to leave their building to accommodate their need for additional space. At least one tribunal has found that “no transfer policies” have a negative impact on families with children, and violate the *Code*.⁵⁴

The case law has steadily expanded the scope of the family status protection to include the denial of housing to pregnant women, lone-parent families, and parents who are not legally married.⁵⁵

2.6 Sexual orientation

People may be subjected to discrimination in rental housing based on their sexual orientation in several different ways. For example, they may be denied the opportunity to view available units because of negative attitudes about their sexual orientation. They may be asked invasive questions about the nature of their relationships or subjected to inappropriate comments or treatment because of their sexual orientation. They may not receive equal access to housing-related services during their tenancies, be subjected to harassment, or face eviction due to homophobic attitudes.⁵⁶

The experience of same-sex couples (whether married or living together outside of marriage) or lone gay, lesbian and bisexual people who are parents is also unique. These parents may find themselves facing negative stereotypes, and may experience discriminatory treatment because they do not conform to the

justification for this unequal treatment. For related cases, see *Desroches v. Québec (Comm. des droits de la personne)* (1997), 30 C.H.R.R. D/345 (C.A. Qué.), and *Cunanan v. Boolean Developments Ltd.* (2003), 47 C.H.R.R. D/236, 2003 HRTO 17.

⁵³ *Booker v. Floriri Village Investments Inc.*, (1989), 11 CHRR D/44 (Ont. Bd. Inq.).

⁵⁴ *Ward v. Godina* (1994), CHRR Doc. 94-130 (Ont. Bd. Inq.).

⁵⁵ For example, in *Thurston v. Lu* (1993), 23 C.H.R.R. D/253 (Ont. Bd. Inq.), a tribunal held that denying a woman the right to apply for the apartment and rejecting her outright because she had a child resulted in *prima facie* discrimination. In *Cunanan v. Boolean Developments Ltd.* (2003), *supra*, note 52, a tribunal found a breach of the *Code* where the landlord refused to rent to a claimant because her family, that included three teenage children, was not the “ideal” size according to “Canadian” standards and was not suitable. In *Peterson v. Anderson* (1991), *supra*, note 44, a tribunal held that the eviction of a pregnant tenant was discrimination on the ground of family status, as well as sex. The tribunal found evidence of stereotypes and disapproval of single parenthood and unmarried conjugal relationships, even though there was no general restriction on children in the building.

⁵⁶ See *Wasylnka v. Bilich* (2009), 2009 HRTO 265.

typical “nuclear family” norm. In some cases, they and/or their children may be subjected to harassment because of their living arrangements.

2.7 Age

The *Code* prohibits discrimination in housing accommodation based on age only for people aged 18 or older.⁵⁷ In other words, with the exception of people who are 16 or 17 years old, who have withdrawn from parental control, housing providers are entitled, under the *Code*, to not rent to minors. It should be noted, however, that a recent tribunal decision has indicated that the definition of age in the *Code* can be an unjustifiable abridgement of the equality rights of children under the *Charter of Rights and Freedoms*.⁵⁸

Discrimination in rental housing based on age can take place in several different ways. For example, young people are often subjected to discriminatory perceptions about age.⁵⁹ They may be stereotyped as being irresponsible, having too many parties, not paying the rent or destroying the property, and as a result, may have a hard time finding rental housing. Young people may be told that they have to be 18 years old to enter into tenancy agreements.⁶⁰ They may also be subjected to rental conditions that are not required of others – such as being asked to provide a guarantor or direct payments of rent. Due to their often low income, rent-to-income ratios may have a negative impact on this group.⁶¹ Negative attitudes about young people, in particular that groups of young people living together create noise and may reduce property values, have contributed to municipal licensing by-laws that restrict student housing.

⁵⁷ Based on the definition of “age” in section 10 of the Ontario *Human Rights Code*, R.S.O. 1990, c.H.19.

⁵⁸ *Arzem v. Ontario (Ministry of Community and Social Services (No. 6) (2006)*, 56 C.H.R.R. D/426, 2006 HRTO 17, in the context of claims of discrimination in the provision of autism services based on age and disability.

⁵⁹ See *Bushek v. Registered Owners of Lot SL 1, Plan LMS13, Dist. Lot 384A, New Westminster Land Dist.* (1997), CHRR Doc. 97-224 at para. 48 (B.C.C.H.R.); *Watkins v. Cypihot* (2000), CHRR Doc. 00-036, 2000 BCHRT 13; and *Cunanan v. Boolean Developments Limited*, (2003), *supra*, note 52.

⁶⁰ As mentioned previously, section 4(1) of the *Code* provides that 16- or 17-year-olds who have withdrawn from parental control have the right to equal treatment with respect to occupancy of, and contracting for, accommodation. Such contracts are enforceable as if the person was 18 years old: see section 4(2) of the *Code*, *supra*, note 57.

⁶¹ See *Sinclair v. Morris A. Hunter Investments Ltd.* (2001), 41 C.H.R.R. D/98 (Ont. Bd. Inq.), a case where an Ontario human rights tribunal found that the claimants were discriminated against when they were refused rental of an apartment because they could not meet a rent-to-income ratio of 33 percent. The tribunal accepted expert evidence that rent-to-income ratios discriminate against rental applicants at least up until their mid-twenties. The tribunal also found that rental policies requiring applicants to have permanent jobs and a minimum tenure with an employer discriminate on the basis of age since employment for younger people is more unstable and of a shorter duration than that of older adults. For a related case, see *Dominion Management v. Vellenosi* (1989), 10 C.H.R.R. D/6413 (Ont. Bd. Inq.) in which an Ontario human rights tribunal found that the claimant, a 37 year old woman, had been discriminated against based on age because the owners preferred to rent to older, wealthy couples. See also *Garbett v. Fisher* (1996), 25 C.H.R.R. D/379 (Ont. Bd. Inq.).

Older people also face unique challenges in the rental housing market. The main barrier to housing experienced by older people appears to be a lack of housing to meet their needs both in terms of affordability and accessibility. Housing providers may be reluctant to rent to older people due to a belief that it will be costly to provide necessary age-related accommodations. They may turn away older tenants out of a desire to attract more youthful residents. Or, in an effort to generate greater rental income, some landlords may try to evict older people paying lower rents due to longer tenure in their rental units. Older people, like young people, often have low incomes and will, therefore, also be affected negatively by rent-to-income ratios. In many cases, older people are unemployed, employed part-time, or retired. Further, a large number of people in this group will depend on social assistance for the majority of their household income.

2.8 Disability

Discrimination based on disability in rental housing may occur in various ways.⁶² Inaccessible buildings and non-inclusive housing design are among the obstacles often encountered by people with disabilities. Housing providers have a duty to accommodate the needs of tenants with disabilities to the point of undue hardship.⁶³ However, some housing providers will deny housing to a person with a physical disability due to an unwillingness to provide required accommodations.

People with disabilities, especially specific types of disabilities, may be subjected to negative attitudes and stereotypes. For example, people living with HIV/AIDS have reported having difficulty finding rental housing, and/or experiencing stigma during a tenancy. Other people with disabilities may also experience differential treatment due to negative attitudes. For example, in one case, an Ontario human rights tribunal found that the respondents willfully and recklessly discriminated against the claimant, a blind woman, when they cancelled an apartment viewing without notifying her, later refused to let her enter the unit, and generally treated her rudely. The tribunal held that a landlord and/or superintendent contravenes the *Code* when they refuse to show an apartment to a prospective tenant with a visual handicap and fail to provide a reasonable explanation for this.⁶⁴

⁶² The definition of “disability” in section 10 of the *Code* is broad and includes physical disability, mental disability, learning disability, mental disorder or any injury or disability where benefits are claimed under the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c.16. The *Code* also provides protection against discrimination to people who have had disabilities and who are perceived to have or to have had disabilities.

⁶³ Accommodations may include physical modifications such as installing ramps and elevators, visual fire alarms and doorbells for the hearing impaired, different door handles, lower counters, etc. It can also require other forms of accommodation such as waiving or changing a rule, for example, allowing guide dogs in a building with a “no pets” policy. See *Di Marco v. Fabrice* (2003), CHRR Doc. 03-050, 2003 HRTO 4.

⁶⁴ *Yale v. Metropoulos* (1992), 20 C.H.R.R. D/45 (Ont. Bd. Inq.).

People with mental health issues face particular challenges in the rental housing market due to negative attitudes and stereotypes.⁶⁵ Some landlords may believe that a tenant with a mental disability will be an unpredictable, disruptive tenant, a threat to other neighbours, or will generally compromise the desirability of the rental establishment. There may be limited understanding of how to accommodate the tenant's needs, particularly if the person engages in disruptive behaviour due to the disability.

People with past or present psychiatric illnesses continue to experience extreme marginalization and discrimination in rental housing. The formidable stigma around mental illness has also influenced the phenomenon of “Not in My Back Yard” or NIMBY opposition to affordable and supportive housing options. NIMBY opposition has resulted in municipal zoning by-laws that bar people with mental disabilities (and others identified by *Code* grounds) from living in certain neighbourhoods. For a more detailed discussion on the discriminatory effects of NIMBY opposition, see the section of this *Policy* entitled, “Discriminatory neighbourhood opposition, or ‘NIMBYism.’”

2.9 Receipt of public assistance

Many housing providers continue to be unaware that the *Code* protects tenants against discrimination based on receipt of public assistance. “Public assistance” – more commonly referred to as social assistance – includes Ontario Works, OSAP, ODSP, Old Age Security, Employment Insurance, *etc.* Rental advertisements for “professionals” or “working people only” are common and indicate a pervasive mentality to exclude low-income tenants.

People who receive social assistance often bear the brunt of negative attitudes and stereotypes. An expert witness in one case testified that the most prevalent stereotype about people in receipt of social assistance is a lack of work ethic. She also stated that there is a prevalent belief that people who receive social assistance are more associated with criminal behaviour. She stated that often social assistance recipients are portrayed as “fraudsters” who are “lazy, parasitic and irresponsible,” and as people who have “personal failings, and lack adequate virtue.”⁶⁶

Several human rights cases in Canada have involved people being refused rental housing once it is discovered that they receive social assistance.⁶⁷ In one case, a landlord refused to rent to a woman because she was poor and her source of income was social assistance, without considering whether or not she was a

⁶⁵ See *Weiher v. Polhill* (2003), 47 C.H.R.R. D/104, 2003 HRTO 13.

⁶⁶ *Iness v. Caroline Co-operative Homes Inc. (No. 5)* (2006), CHRR Doc. 06-450, 2006 HRTO 19, at para. 43.

⁶⁷ See *Willis v. David Anthony Philips Properties* (1987), 8 C.H.R.R. D/3847 (Ont. Bd. Inq.); *Kostanowicz v. Zarubin* (1994), 28 C.H.R.R. D/55 (Ont. Bd. Inq.); and *Québec (Comm. Des droits de la personne) v. Gauthier* (1993), 19 C.H.R.R. D/312 (T.D.P.Q.) [English Summary].

reliable tenant. The landlord stated that poor people cannot pay their rent,⁶⁸ despite social science evidence to the contrary.⁶⁹ Other cases have dealt with landlords who have policies of not renting to people who receive social assistance regardless of their ability to pay the rent.⁷⁰

In addition to experiencing outright denials of housing opportunities⁷¹, people depending on social assistance are often subjected to rental requirements not imposed on others and differential treatment during their tenancies. For example, they may be asked to arrange for direct payment of government cheques⁷², they may be charged unreasonably large and illegal rent deposits, and/or they may be subjected to intrusive questioning that violates their privacy and compromises their dignity. In a 1996 case, requests for “first and last month’s rent” were found to have a discriminatory impact on some people who relied on public assistance.⁷³ Minimum income criteria may similarly have an adverse impact on people in receipt of public assistance.⁷⁴

⁶⁸ *Québec (Comm. des droits de la personne) c. Whittom* (1993), 20 C.H.R.R. D/349 (Trib. Qué.), upheld on appeal, *Whittom c. Québec (Comm. des droits de la personne)* (1997), 29 C.H.R.R. D/1 (C.A. Qué.).

⁶⁹ See, for example, Linda Lapointe, *Analysis of Evictions in the City of Toronto: Overall Rental Housing Market*, (March 2004) that establishes that the main reasons for rent arrears are the following: job-related reasons (39%), medical reasons (17%), other financial reasons (12%), family issues (7%), landlord/tenant conflict (13%), other reasons (12%).

⁷⁰ *Québec (Comm. Des droits de la personne) v. Gauthier* (1993), *supra*, note 67.

⁷¹ See, for example, *Willis v. David Anthony Philips Properties* (1987), *supra*, note 67; *Kostanowicz v. Zarubin* (1994), *supra*, note 67; *Whittom c. Québec (Comm. des droits de la personne)* (1997), *supra*, note 68; *Québec (Comm. Des droits de la personne) v. Gauthier* (1993), *supra*, note 67.

⁷² See *McEwen v. Warden Building Management Ltd.* (1993), 26 C.H.R.R. D/129 (Ont. Bd. Inq.). Note that direct payment of government cheques may not be discriminatory in the context of rent-geared-to-income housing arrangements, or other special programs.

⁷³ See *Garbett v. Fisher* (1996), *supra*, note 61. Note that Regulation 290/98 under the *Code*, which was enacted in 1998, effectively permits landlords to require security deposits. Please see the section of this Policy entitled “Security Deposits and Extra Rent Requirements” for more detailed information.

⁷⁴ See *Kearney v. Bramalea Ltd. (No. 2)*, (1998), 34 C.H.R.R. D/1 (Ont. Bd. Inq.); aff’d *Shelter Corp. v. Ontario (Human Rights Comm.)* (2001), 39 C.H.R.R. D/111 (Ont. Sup. Ct.). The OHRC has expressed its concern about the inadequate level of public assistance. In particular, the OHRC has highlighted the “shelter gap” created when the shelter allowance portion of public assistance is dramatically lower than the average rent in Ontario (particularly in cities), and the tenuous situation this creates for people and families. For more information, see the OHRC’s housing background paper, *supra*, note 12 and consultation report, *supra*, note 14.

IV. Social and economic status

Groups that have experienced historical disadvantage and who are identified by *Code* grounds are more likely to experience low social and economic status.⁷⁵

Poverty is linked closely with inequality, particularly for women (especially lone mothers and elderly women), Aboriginal people, racialized groups and people with disabilities. Therefore, policies and practices that disadvantage people who have low incomes are likely to disproportionately disadvantage members of *Code*-identified groups.

A person's social and economic status is highly relevant to their housing situation. More often than not, it will dictate the type of housing available and the likelihood that they will get the housing they are seeking. High market rents, insufficient social housing supply, low minimum wage and social assistance rates, and income-related rental requirements all make it very hard for a person who has low social and economic status to find and keep adequate housing.

Tenants with low social and economic status are also more vulnerable to differential treatment by housing providers. Some housing providers have negative attitudes towards people who are poor. They may screen out prospective tenants based on stereotypes about poverty and poor people, they may impose illegal rental criteria (such as security deposits), they may provide substandard housing-related services, they may engage in harassing behaviour, and/or they may be more quick to try to evict.

Poverty, if left unaddressed, and if not understood as part of larger patterns of systemic discrimination, can undermine the cohesion and prosperity of our communities. One of the most extreme outcomes of low social and economic status is homelessness.⁷⁶ Discrimination puts many groups at higher risk of homelessness. And, once a person or a family becomes homeless, it is very hard to re-enter the "mainstream" of society, and the potential for unequal treatment and further discrimination increases steadily.⁷⁷ Inadequate housing is also cited

⁷⁵ The connection between membership in a group identified under the *Code* and the likelihood of having low income has been recognized by the Human Rights Tribunal of Ontario in several decisions, as well as by the Courts: see, for example, *Kearney v. Bramalea Ltd. (No. 2)* (1998), *ibid.*

⁷⁶ The homelessness crisis in Ontario's cities has been well documented. In addition to extensive work conducted by the Toronto Disaster Relief Committee and the City of Toronto's annual report cards on homelessness, the extensive Golden Report on Homelessness was released in January 1999.

⁷⁷ Homeless people include people living on the streets, "hidden" homeless people who use shelters, and people at imminent risk of becoming homeless. Homeless people often find themselves at the outermost margins of society and are highly vulnerable to ill health, spread of disease, harassment, abuse, malnutrition, dehydration, sleep deprivation and life threatening weather. Homelessness may, in turn, lead to the involuntary relinquishment of children to children's aid societies, and the destruction of families.

often as a significant factor in the relinquishment or apprehension of children into the care of children's aid societies. Once children are separated from their parents, it may be very challenging for parents to regain custody.⁷⁸

Social and economic rights and homelessness in Canada and Ontario have been identified as a priority by international human rights bodies. The *Universal Declaration of Human Rights*⁷⁹, adopted by the United Nations General Assembly in December 1948, proclaimed the inviolability of social and economic rights. Article 2 of the *Declaration* states that everyone is entitled to these rights without distinction of any kind based on grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The moral statements expressed in the *Declaration* were given legal force through two covenants: the *International Covenant on Civil and Political Rights*⁸⁰ and the *International Covenant on Economic, Social and Cultural Rights*. The *ICESCR* is one of the most influential and comprehensive international documents in the area of social and economic rights, and directly addresses the right to housing.⁸¹ Article 11 of the *ICESCR* states:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and **housing**, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent. [emphasis added]

General Comment 4: The Right to Adequate Housing by the Committee on Economic, Social and Cultural Rights⁸² clarifies that the right is to *adequate* housing, including considerations of security of tenure, accessibility, habitability, and affordability, among others. Financial costs associated with housing should not be at a level that compromises or threatens attaining and satisfying other basic needs.⁸³

⁷⁸ For more information, see pgs. 67-8 of the OHRC's housing consultation report, *supra*, note 14.

⁷⁹ *Universal Declaration of Human Rights*, *supra*, note 3.

⁸⁰ *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47 (entered into force 23 March 1976, accession by Canada 19 May 1976).

⁸¹ Ontario Ministry of the Attorney General, Constitutional Law and Policy Division, *The Protection of Social and Economic Rights: A Comparative Study*, Staff Paper (19 September 1991) at 34.

⁸² Committee on Economic Social and Cultural Rights, *General Comment 4: The Right to Adequate Housing*, 13 December 1991, Article 11(1).

⁸³ In addition, there are a series of international conventions, declarations and agreements that address economic, social and cultural rights. In 1995, the United Nations estimated that there were no fewer than 81 formal agreements that address such issues as poverty eradication, employment generation and social integration; J.W. Foster, "Meeting the Challenges: Renewing the Progress of Economic and Social Rights" (1998) 47 U.N.B.L.J. 197 at 197. These instruments

Canada became a party to the *ICESCR* in 1976, and by doing so agreed to take appropriate steps towards realizing the right to adequate housing. Under the *ICESCR*, governments must periodically report on progress being made on implementing and realizing rights set out in the Covenant.

Article 28 states that the Covenant's provisions "shall extend to all parts of federal States without any limitations or exceptions." For this reason, the *ICESCR* is binding on the federal government and each of the provinces and territories, and rights that are within provincial competence are the obligation of the provincial and territorial governments.⁸⁴

Article 2 describes the nature of the legal obligations under the *ICESCR* and the way that States Parties should approach implementing the substantive rights. States Parties must take steps to the maximum of their available resources with a view to achieving progressively the full realization of *ICESCR* rights by all appropriate means. *General Comment No. 9: The Domestic Application of the Covenant* by the Committee on Economic, Social and Cultural Rights states that legislative measures alone are not enough: administrative, judicial, policy, economic, social and educational measures will be required by governments to ensure *ICESCR* rights.⁸⁵

It is clear that for many Canadians, the realization of these international and domestic rights has been sporadic at best. One's housing situation is generally a good indicator of one's overall social and economic condition. Many continue to struggle in the rental housing market, and may find themselves in housing that is neither affordable nor adequate, or, in extreme cases, may find themselves homeless.

have further refined international legal norms relating to a wide range of social and economic issues. Protection of economic, social and cultural rights has been deemed necessary as the right to live a dignified life can never be attained unless all basic necessities of life – work, food, housing, health care, education and culture – are adequately and equitably available to everyone.

⁸⁴ Before ratification of both the *ICESCR* and the *ICCPR*, there was extensive consultation between the federal government and the provinces. After a 1975 Federal-Provincial Ministerial Conference on Human Rights, all the provinces gave their consent to Canada's ratification of both covenants.

⁸⁵ See *General Comment No. 9: The Domestic Application of the Covenant*, available at: [www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/4ceb75c5492497d9802566d500516036?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/4ceb75c5492497d9802566d500516036?OpenDocument) (date accessed: May 13, 2009). As the complaint procedure (Optional Protocol) under the *ICESCR* has not yet entered into force, the primary mechanism for enforcing the *ICESCR* is the state reporting and review process. Pursuant to Articles 16 and 17, States parties undertake to submit periodic reports to the *ICESCR* Committee on the programs and laws they have adopted and the progress made in protecting Covenant rights. The U.N. has proclaimed guidelines for the preparation of reports.

On several occasions, the United Nations has expressed significant concern about Canada's record in implementing social and economic rights.⁸⁶ For example, the *Concluding Observations* issued by the Committee on Economic, Social and Cultural Rights in 1998 expressed serious concern about the state of economic and social rights in a country as wealthy as Canada.⁸⁷

In May 2006, the Committee on Economic, Social and Cultural Rights issued its review of Canada's compliance with the Covenant. The Committee was critical of the fact that 11.2% of Canada's population still lived in poverty in 2004, particularly in light of Canada's economic wealth and resources. The Committee noted with concern that poverty rates remain very high among disadvantaged and marginalized people and groups such as Aboriginal people, African Canadians, immigrants, people with disabilities and youth.⁸⁸ The Committee was also concerned about the disproportionate number of women, especially lone mothers, living in poverty and the effect that one's social and economic status has on one's ability to access adequate housing. Some reports have directly attributed blame to cuts in social funding.⁸⁹

The Committee also commented on the "insufficiency of minimum wage and social assistance to ensure the realization of the right to an adequate standard of living."⁹⁰ The Committee recommended that "the State party assess the extent to which poverty is a discrimination issue in Canada, and ensure that measures and programs do not have a negative impact on the enjoyment of economic, social and cultural rights, especially for disadvantaged and marginalized individuals and groups."⁹¹

⁸⁶ See Canada United Nations Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant (Concluding Observations – Canada)*, 10 December 1998, E/C.12/1/Add.31 and United Nations Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant (Concluding Observations – Canada)*, 19 May 2006, E/C.12/CAN/CO/4, E/C.12/CAN/CO/5.

⁸⁷ The more recent 2006 *Concluding Observations* reiterated that most of the 1993 and 1998 recommendations had not been implemented, *supra*, note 86.

⁸⁸ The Committee identified a range of concerns, such as Canada's response to homelessness, a shortage of affordable housing, the insufficiency of minimum wage and social assistance rates, increasing poverty rates among Code protected groups, disparities between Aboriginal and African-Canadian people and the rest of the population with respect to realization of ICESCR rights, cuts to social programs, and the discriminatory impact of such cutbacks on certain disadvantaged groups and the significant barriers to enforcing ICESCR rights under domestic law. For more information, see the 2006 *Concluding Observations*, *supra*, note 86.

⁸⁹ See for example, the United Nations Committee on Economic, Social and Cultural Rights: *Concluding Observations on Report of Canada Concerning the Rights Covered by Articles 10 to 15 of the International Covenant on Economics, Social and Cultural Rights*, UN doc. E/C.12/1993/19; 20 CHRR C/1. See also recent media coverage such as "Canada's Poor Face 'Emergency': UN," *The Toronto Star* (May 23, 2006), which reported that the United Nations Committee on Economic, Social and Cultural Rights again criticized Canada in its 2006 Annual Report for its inaccessible employment insurance program, its meagre minimum wages, and the fact that it has let homelessness and inadequate housing amount to a "national emergency."

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

Most recently, Miloon Kothari, the United Nations Special Rapporteur on adequate housing, noted in his March 2008 statement:

As a very wealthy country, with significant surplus in the federal budget, immediate attention is required for the most vulnerable part of the population living in inadequate housing and living conditions. There is no justification for not massively engaging in the improvement of the situation of all those that face inadequate housing and living conditions throughout Canada.⁹²

Canada has also been subjected to criticism in the international context for the failure of its courts to provide remedies for violations of social and economic rights. Judicial and legislative reluctance to address social and economic issues as rights has real consequences for vulnerable groups, and has contributed to an increased focus on the role of human rights bodies in protecting these rights.⁹³

1. Addressing issues of poverty in housing

It is clear that Canada's promise to give effect to social and economic rights, including the right to adequate housing, will not be sufficiently realized unless governments, courts, tribunals, administrative bodies, housing providers, and other responsible actors take appropriate steps to ensure their fulfillment.

By endorsing the *ICESCR*, Canada committed to taking the necessary steps to make sure that all Canadians have access to adequate and affordable housing options. The extent of homelessness in cities across the country is just one indicator that many Canadians continue to face grave challenges finding appropriate housing. The OHRC has recommended that the federal, provincial and territorial governments of Canada coordinate their efforts to develop a national housing strategy to make sure that all Canadians have access to housing of an appropriate standard.⁹⁴

Courts, tribunals and administrative bodies have a significant role to play in helping to fulfill Canada's international commitment to provide adequate housing. Decision-makers who interpret housing-related legislation should do so in accordance with the right to adequate housing set out in the *ICESCR*. The Supreme Court of Canada has stated that Canadian law should provide at least as much protection as international human rights law, and, international law,

⁹² Kothari, Miloon, "Statement of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context," Report presented at the 7th session of the Human Rights Council (12 March 2008) at 6.

⁹³ For example, the *ICESCR* Committee has emphasized the role of human rights institutions and human rights legislation in a country's efforts to fulfill its commitments under international treaties to achieve the realization of social and economic rights.

⁹⁴ See Recommendations 1-4 of the OHRC's housing consultation report, *supra*, note 14.

according to the Court, helps give meaning and content to Canadian law. As L’Heureux-Dubé, J. stated in *Baker v. Canada*, one of the Court’s leading cases on the relationship of international law to Canadian law:

[T]he values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review... [T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred.⁹⁵

Thus, the Supreme Court has affirmed that decision-makers should, as much as possible, and particularly in the absence of a contrary interpretation, be guided by Canada’s international obligations and the directions of international instruments, norms, laws, and interpretive bodies. Decision-makers that deal with housing issues should view themselves as local monitors of Canada’s international commitments and make every effort to use the lens of international human rights when deciding housing matters. In light of the fundamental importance of housing to an individual and to society at large, decision-makers should consider a tenant’s social and economic status when making housing decisions.⁹⁶

Human rights legislation in Canada includes a range of protections in specified areas, including housing, to make sure that discrimination does not prevent people from participating equally in their communities. Since this legislation has a quasi-constitutional status, international law has a special relationship to human rights codes. Human rights decision-makers should, therefore, look to international law to expand current understandings of human rights legislation to include economic, social and cultural rights within their mandates. As the *Universal Declaration* reminds us, economic, social and cultural rights go to the core of dignity and equality. In this regard, human rights decision-makers should use the *ICESCR* as an interpretive tool in how they enforce, promote and give full attention to these rights when fulfilling all aspects of their mandates.⁹⁷

The Ontario *Human Rights Code* emphasizes the importance of creating a climate of understanding and mutual respect for the dignity and worth of each person, so that each person can contribute fully to the development and well-being of the community. This sentiment is consistent with Canada’s international

⁹⁵ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 70-71 citing R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 330.

⁹⁶ The *Concluding Observations* of the Committee on Economic, Social and Cultural Rights, *supra*, note 86 at para. 29 stated: “The Committee notes with particular concern that many evictions occur on account of minimal arrears of rent, without due consideration of the State party’s obligations under the Covenant.”

⁹⁷ The text of the resolutions can be found on the OHRC website: www.ohrc.on.ca

human rights commitments. The explicit reference in the *Code's* Preamble to the *Universal Declaration of Human Rights* reinforces the notion that the *Code* should be interpreted in a way that is consistent with international human rights principles. This means that the *Code's* protections against discrimination in housing should be interpreted in light of Canada's commitment under the *ICESCR* to protect and promote social and economic rights, including the right to adequate housing.

The *Code* provides protection against discrimination in housing based on specific grounds, including "receipt of public assistance." The inclusion of "receipt of public assistance" allows some individuals with low social and economic status to file human rights claims where they have been subjected to differential treatment in housing. However, many people with low social and economic status will not be in receipt of public assistance (e.g. people earning low wages, homeless people, etc.), but will still experience differential treatment in housing. In many cases, given the strong link between low social and economic status and membership in a *Code*-protected group, these people will be identified by one or more *Code* grounds, and may experience discrimination based on an intersection of low social and economic status with other grounds.

Example: A housing provider denies a lone working mother with two children a one-bedroom apartment, even though she cannot afford a larger apartment. Although the grounds for the claim would be marital status and family status (receipt of public assistance is not applicable as the woman is working), it is the woman's social and economic status that forces her to rent a one-bedroom apartment.

In such cases, decision-makers, as well as housing providers, should consider the impact that low social and economic status has on the overall discrimination experienced by the person.

An example of successfully protecting social and economic rights in the context of housing is the decision of an Ontario human rights tribunal in *Kearney v. Bramalea Ltd. (No. 2)*.⁹⁸ The case involved the use by several landlords of minimum income criteria or rent-to-income ratios when assessing applications for tenancy. Statistical evidence showed that the landlords' use of such criteria had a disparate impact on individuals based on their sex, race, marital status, family status, citizenship, place of origin, age and the receipt of public assistance. The landlords could not establish a defence as they could not show that the use of the criteria was reasonable and *bona fide*, or that stopping the use of the criteria would cause undue hardship.

The approach used in *Kearney* recognized the intersection between social and economic status and grounds that are protected in the *Code*. The case sets a

⁹⁸ *Kearney v. Bramalea Ltd. (No. 2)*, (1998), *supra*, note 74.

very important precedent for adjudicating social and economic rights before the Human Rights Tribunal of Ontario where evidence exists that discrimination based on social and economic status disproportionately affects groups that have been traditionally protected under human rights legislation.⁹⁹ The case has already been cited in several other decisions involving denial of rental accommodation¹⁰⁰ and has been referred to extensively in papers and articles as an example of a crucial victory for people living in poverty.¹⁰¹

The Government of Ontario has acknowledged the connection between poverty and human rights. Section 2(2)3 of the *Poverty Reduction Act, 2009*¹⁰² recognizes, “That not all groups of people share the same level of risk of poverty. The poverty reduction strategy must recognize the heightened risk among groups such as immigrants, women, single mothers, people with disabilities, aboriginal peoples and racialized groups.” Section 2(3)3 of the *Act* also recognizes that “housing” is one of the key determinants of poverty and accordingly requires annual reporting on indicators to measure its success.

Because of the close connection between low social and economic status and membership in a *Code*-protected group, measures that subject people who have low social and economic status to differential treatment will frequently raise human rights concerns. Government, housing planners, policy-makers and housing providers should take make sure that their policies and practices do not have an adverse impact on people identified by *Code* grounds.

Example: A housing provider directs certain applicant groups including students, new immigrants and lone mothers into its older, more run-down, yet more expensive buildings. The housing provider is less likely to respond to repair requests from people living in these buildings and more

⁹⁹ It is not clear what type of evidence is required to make the connection to a prohibited ground of discrimination. However, in both *Kearney, ibid.* and *Dartmouth/Halifax County Regional Housing Authority v. Sparks*, (1993) 101 D.L.R. (4th) 224 (N.S.C.A.), statistical evidence was presented and some cases have failed in the absence of empirical evidence (for example, *Vander Schaaf v. M & R Property Management Ltd.* (2000), *supra*, note 48, and *Symes v. Canada*, [1993] 4 S.C.R. 695).

¹⁰⁰ See, for example, *Vander Schaaf, ibid.* and *Birchall v. Guardian Properties Ltd.* (2000), 38 C.H.R.R. D/83 (B.C.H.R.T.).

¹⁰¹ See, for example, M. Jackman and B. Porter, “Women’s Substantive Equality and the Protection of Social and Economic Rights under the *Canadian Human Rights Act*” (Ottawa: Status of Women Canada, October 1999), available online at www.equalityrights.org/cera/docs/MJ&BP.htm. After the case was heard by the tribunal and before the decision was rendered, the Ontario government passed legislation amending the *Code* to expressly permit the use of income information, credit checks, credit references, rental history, guarantees or other similar business practices in selecting tenants. (See *Tenant Protection Act*, S.O. 1997, c. 24 amending sections 21 and 48 of the *Code*.) O. Reg 290/98 under the *Code*, enacted on May 13, 1998, permits landlords to request and consider income information from a prospective tenant if credit references, credit checks and rental history information are also requested and considered in the screening process.

¹⁰² *Poverty Reduction Act, 2009*, S.O. 2009, c.10: www.ontla.on.ca/web/bills/status_of_legislation.do?locale=en#152

likely to seek eviction against these groups. However, if a new immigrant or lone mother applicant is in a professional occupation such as a doctor or lawyer, they are offered a much better unit in the housing provider's newer, less expensive buildings. This form of streaming amounts to discrimination against certain groups because of their low social and economic status, and raises serious human rights concerns.

The creation of special programs, as authorized by section 14 of the *Code*, can be an effective way for governments and housing providers to help address pre-existing hardship and economic disadvantage in the housing context. See the section of this *Policy* entitled "Special Programs and Special Interest Organizations" for a more detailed discussion.

Example: A co-op provider appropriately applies an income needs test to applicants wishing to rent a fixed proportion of units subsidized to average market rent for that city. The subsidy scheme is designed to make sure that applicants are offered units adequate to their family size and of the same quality as other units in the building.

Under its new and enhanced mandate, the OHRC has broad powers to protect the public interest and to address incidents of tension and conflict in Ontario's communities. It is the OHRC's role to focus its efforts on addressing systemic discrimination and promoting a culture of human rights in the province. To this end, the OHRC will consider, where appropriate, the role that poverty plays in preventing individuals from accessing adequate housing.

V. Identifying discrimination in rental housing

1. Defining discrimination

The *Code* provides that every person has the right to be treated equally in the area of housing without discrimination because of any of the grounds set out in the *Code*. The purpose of anti-discrimination laws is to prevent the violation of human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice.

There are several ways of defining and identifying discrimination. Discrimination includes any distinction, including any exclusion, restriction or preference based on a prohibited *Code* ground, that impairs the recognition of human rights and fundamental freedoms.¹⁰³

¹⁰³ In keeping with the decision of the Supreme Court of Canada in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 174, discrimination in housing based on a protected *Code* ground may be described as any distinction, conduct or action, whether intentional or not, but based on a *Code* ground, that has the effect of either imposing burdens on an individual or group that are not imposed upon others, or withholding or limiting access to opportunity, benefits,

The most important issue to determine is whether a prohibited *Code* ground was a *factor* in the discrimination. Even if a *Code* ground is only one of the factors in a decision to restrict a person's equal access to housing, this may be a violation of the *Code*.¹⁰⁴

The right to equal treatment in rental housing offers protection in a broad range of situations. The right to be free from discrimination in housing includes not only the right to enter into an agreement and occupy a residential dwelling, but also the right to be free from discrimination in all matters relating to the accommodation.

2. Forms of discrimination in rental housing

2.1 Negative attitudes, stereotypes and bias

Discrimination can take many forms. In some cases, discrimination may be direct and intentional, where an individual or organization deliberately treats an individual unequally or differently because of a *Code*-protected ground. This type of deliberate discrimination generally arises from negative attitudes and biases about people identified by *Code* grounds.

Example: A landlord decides that she does not wish to rent apartments to families with young children, and designates her building as “adults-only.”

Example: Two women of Aboriginal ancestry were seeking to rent a house. Upon learning that they were Aboriginal, the owner's wife stated she didn't rent to “Indians” and made further disparaging comments. She then asked what the women did and when one of the women said she received social assistance responded, “That's just as bad.”¹⁰⁵

It is a principle of human rights that people should be judged on their individual attributes, skills, and capacities, rather than on stereotypes and assumptions based on the groups to which they belong. Negative attitudes and stereotypes may lead to harassment and discrimination, and affect a person's access to housing. Individual assessment combats the effects of negative attitudes and stereotypes based on *Code* grounds.

and advantages available to other members of society. Recent case law has confirmed the applicability of the *Andrews* analysis to determining discrimination under section 15 of the *Canadian Charter of Rights and Freedoms*: *R. v. Kapp*, [2008] 2 S.C.R. 483 and *Ontario Disability Support Program v. Tranchemontagne, et al.*, 2009 CanLII 18295.

¹⁰⁴ *Riggio v. Sheppard Coiffures Ltd.* (1988), 9 C.H.R.R. D/4520 (Ont. Bd. Inq.); *Stefanyshyn v. 4 Seasons Management Ltd. (4 Seasons Racquet Club)* (1986), 8 C.H.R.R. D/3934 (B.C.C.H.R.).

¹⁰⁵ *DesRosiers v. Kaur* (2000), 37 C.H.R.R. D/204 (B.C.H.R.T.).

2.2 Subtle discrimination

In some instances, discrimination takes on more subtle or covert forms. Intent or motive to discriminate is not a necessary element for a finding of discrimination – it is sufficient if the conduct has a discriminatory effect. Also, as previously mentioned, discrimination based on a *Code* ground need only be one of several reasons for the decision or treatment.¹⁰⁶

Subtle forms of discrimination can usually only be detected upon examining all of the circumstances. Individual acts themselves may be ambiguous or explained away, but when viewed as part of a larger picture, may lead to an inference that discrimination based on a *Code* ground was a factor in the treatment a person received.

Example: A Black man responded to an ad for an apartment and was invited to view it. After the viewing he was told that another person was coming to view the suite and that he would be advised if it would be available. On phoning the landlord he was told that the suite had been rented. However, when his girlfriend's sister phoned back, she was told the suite was still available. The tribunal rejected the landlord's evidence that the man's demeanor made her uncomfortable and the evidence of another tenant, a woman of Chinese origin, that the landlord could not have practiced racial discrimination toward the Black man as she had rented a suite to her.¹⁰⁷

It can be difficult to determine whether subtle discrimination is a factor in such situations. They may therefore require further probing and analysis that examines the context, including the presence of comparative evidence contrasting how others were treated, or evidence that a pattern of behaviour exists. A departure from usual practices with tenants, such as a demand for a security deposit or a guarantor, may establish a claim of discrimination.¹⁰⁸ Rental criteria that are applied to some tenants but not others may be evidence of discrimination if it can be shown that people and groups identified by the *Code* are being singled out for differential treatment.

Example: A housing provider asks a tenant with a mental illness to provide verbal or written assurances that he will take psychiatric medications and seek medical treatment as a condition of getting rental housing.

¹⁰⁶ *Gray v. A&W Food Service of Canada Ltd.* (1994), CHRR Doc 94-146 (Ont. Bd. Inq.); *Dominion Management v. Velenosi*, [1977] O.J. No. 1277 at para. 1 (Ont. C.A.); *Smith v. Mardana Ltd. (No. 1)* (2005), 52 C.H.R.R. D/89 at para. 22 (Ont. Div. Ct.).

¹⁰⁷ *Wattley v. Quail* (1988), 9 C.H.R.R. D/5386 (B.C.C.H.R.).

¹⁰⁸ See *Styres v. Paiken* (1982), 3 C.H.R.R. D926 (Ont. Bd. Inq.)

It is the OHRC's position that housing providers are not allowed to ask tenants to sign additional contracts outside of their lease, simply because they are a member of a group identified by the *Code*.

It is not necessary for language or comments related to a protected *Code* ground to be present in the interactions between the parties to show that discrimination has occurred. However, where such comments are made, they can be further evidence that a protected *Code* ground has been a factor in a person's treatment.

Auditing studies conducted in the rental housing context have revealed the extent of subtle discrimination on several different grounds. For example, the U.S. Department of Housing and Urban Development has backed several broad housing audits that produced significant evidence of discrimination toward and differential treatment of racialized people across major U.S. cities.¹⁰⁹ Comparable audits conducted in Canadian cities, although on a smaller scale, have revealed similar trends. These audits indicate that people from Black and Aboriginal communities, in particular, face discriminatory treatment when seeking to rent housing.¹¹⁰ Other similar audits have shown discriminatory practices in renting to people who disclosed they were gay or lesbian or had mental health issues.¹¹¹

In July 2009, the Centre for Equality Rights in Accommodation (CERA) released a report entitled "Sorry It's Rented: Measuring Discrimination in Toronto's Rental Housing Market." The report estimates that 1 in 4 households receiving social assistance, South Asian households, and Black lone parents experience moderate to severe discrimination when they inquire about an available apartment. Discrimination increases to a rate of 1 in 3 for housing seekers who have a mental illness. Lone parents also experience significant discrimination when attempting to access housing opportunities.¹¹²

2.3 Harassment

Section 2(2) of the *Code* provides that every person who occupies accommodation has a right to freedom from harassment by a landlord or agent of the landlord or by an occupant of the same building because of a *Code*-protected ground.

Harassment is defined in section 10(1) of the *Code* as "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to

¹⁰⁹ See www.hud.gov/news/release.cfm?content=pr03-060.cfm; and K.L. Dion, "Perceptions of Housing Discrimination in Toronto: The Housing New Canadians Project" (2001) 57 *Journal of Social Issues* 523 at 527.

¹¹⁰ See, for example, Dion, *ibid*, at 528.

¹¹¹ S. Page, "Accepting the Gay Person: Rental Accommodation in the Community" (1998) 36(2) *Journal of Homosexuality* 31.

¹¹² See "Sorry It's Rented: Measuring Discrimination in Toronto's Rental Housing Market," available at www.equalityrights.org/cera/docs/CERAFinalReport.pdf.

be unwelcome.” The reference to comment or conduct “that is known or ought reasonably to be known to be unwelcome” establishes both a subjective and an objective test for harassment.

The subjective part of the test considers the harasser’s own knowledge of how their behaviour is being received. This knowledge may arise in different ways. In some cases, it should be obvious that the conduct or comments will be offensive or unwelcome. Some conduct or comments relating to *Code*-protected grounds may not, on their face, be offensive. However, they may still be “unwelcome” from the perspective of a particular person. If similar behaviour is repeated despite indications from the person that it is unwelcome, there may be a violation of the *Code*.

Example: An Ontario human rights tribunal found that a landlord engaged in a vexatious course of conduct to control the life of a woman with cerebral palsy, as both a tenant and as a person. Among other things, the landlord entered the woman’s apartment when she was not there, turned off the hallway light when she was partly down the stairs, and banged repeatedly on her ceiling. The landlord was also found to have made verbal slurs regarding the woman’s disability.¹¹³

Example: A racialized man was harassed by his landlords when they uttered several abusive racial slurs, routinely violated his privacy, and accused him of being a pedophile.¹¹⁴

The objective component of the test considers, from the point of view of a “reasonable” third party, how such behaviour would generally be received. The determination of the point of view of a “reasonable” third party must take into account the perspective of the person who is harassed.¹¹⁵

It is important to note that there is no requirement that a person must object to the harassment at the time for a violation of the *Code* to exist, or for a person to claim their rights under the *Code*. A person who is the target of harassment may be in a vulnerable situation, and afraid of the consequences of speaking out. Housing providers have an obligation to maintain an environment that is free of discrimination and harassment, whether or not anyone objects. Each situation must be assessed on its own merits.

Example: When a couple with a small child moves into a new apartment, one of their neighbours comments to them that she has raised her kids and now “has a right to peace and quiet.” This neighbour repeatedly tells them that “children shouldn’t be in apartments – they need yards to play in.” No matter how hard they try to keep their child quiet, this neighbour

¹¹³ *Aquilina v. Pokoj* (1991), 14 C.H.R.R. D/230 (Ont. Bd. Inq.).

¹¹⁴ *King v. Bura* (2004), 50 C.H.R.R. D/213, 2004 HRTO 9.

¹¹⁵ *Dhanjal v. Air Canada* (1996), 28 C.H.R.R. D/367 at para. 210 (C.H.R.T.).

constantly complains to their landlord about them. The landlord provides the neighbour with information about rights and responsibilities under the *Code*, and offers either to provide some further soundproofing or to relocate the complaining neighbour to the first available vacant apartment. Harassment may take on different forms depending on whether the affected person is identified by more than one *Code* ground at the same time.

Example: A housing provider makes several comments to a woman who is a lesbian with a small child about the child's lack of "proper role models" and a "real family." The woman may claim harassment based on both sexual orientation and family status.

While "sexual orientation" is not specifically listed as a ground in section 2(2) of the *Code*, it is the OHRC's policy position that sexual orientation is included in the protection against harassment. This approach is consistent with human rights jurisprudence.¹¹⁶

2.3.1 Sexual harassment

Section 7(1) of the *Code* states that every person who occupies housing has a right to freedom from sexual harassment by their landlord, an agent of their landlord, or an occupant of the same building.

Sexual harassment includes unwelcome sexual contact and remarks, leering, inappropriate staring, unwelcome demands for dates, requests for sexual favours and displays of sexually offensive pictures or graffiti. A person has the right to be free from unwelcome advances or requests for sexual favours made by a landlord, superintendent, an employee of the facility, another person in a position of power, or another tenant.

The following is not an exhaustive list but should help to identify what may constitute sexual harassment or inappropriate gender-related comments and conduct:

- gender-related comments about a person's physical characteristics or mannerisms
- unwelcome physical contact
- suggestive or offensive remarks or innuendoes about members of a specific gender
- propositions of physical intimacy
- gender-related verbal abuse, threats, or taunting
- leering or inappropriate staring
- bragging about sexual prowess
- demands for dates or sexual favours
- offensive jokes or comments of a sexual nature

¹¹⁶ See, for example, *Crozier v. Asselstine* (1994), 22 C.H.R.R. D/244 (Ont. Bd. Inq.).

- display of sexually offensive pictures, graffiti, or other materials
- questions or discussions about sexual activities
- paternalism based on gender which a person feels undermines their self-respect or position of responsibility
- rough and vulgar humour or language related to gender
- threats to report a woman to government authorities (e.g. Children's Aid Society, immigration officials) if she refuses to comply with sexual advances.

The comments or conduct do not have to be sexual in nature. Someone may tease or bother a woman because of gender-based ideas about how men or women “should” look, dress or behave.

Example: A landlord repeatedly makes comments to a female tenant about her choices of clothing. He tells her that she should wear skirts more often because they make her look “feminine” and that she looks “prettier” when she wears her hair down.

Sexual harassment may be subtle or ambiguous in nature. Depending on the context, sexual harassment may include unwanted prying into a woman's personal life.

Example: A single woman living in a co-op is asked intrusive questions by other co-op members about her single status such as: “Are you seeing anyone?” and “When are you going to settle down and have kids?” When she expresses her discomfort with these questions, she's told to “lighten up.”

It may also include uninvited visits to a woman's unit (either when she is home, or when she is not home), refusals to make necessary repairs and/or conduct maintenance, threats to cut services, and threats of eviction.

Transgender people are protected in housing accommodation from degrading comments, insults or unfair treatment because of gender identity.

While some men do experience sexual harassment in rental housing, it is women who are most often affected. The typical power imbalance that exists between landlords and tenants is often heightened by gender inequalities. In a recent case, the Human Rights Tribunal of Ontario commented on this power imbalance:

A superintendent is in a position of power over tenants. They can make the living situation of a tenant uncomfortable or unbearable. An abuse of this power can have a significant effect on a tenant's enjoyment of her living space. When the superintendent is an older male inappropriately

exerting power over a younger female in the form of sexual harassment, this undermines her expectation of peaceful occupation of her home.¹¹⁷

Feedback provided to the OHRC in its housing consultation indicates that women who depend on rent supplement programs and who live in private housing units are especially vulnerable to threats and sexual harassment from their neighbours or landlords. Some landlords may sexually harass low-income female tenants by seeking sexual favours in lieu of rent if they have fallen into arrears, to prevent eviction or if they need maintenance services.

Often, sexual harassment will take place based on more than one *Code* ground. Racial stereotypes about the sexuality of women, for example, have played a part in a number of sexual harassment claims. Women may be targeted because of a belief that based on racialized characteristics, they are more sexually available, more likely to be submissive to male authority, more vulnerable, *etc.* Young women, women with disabilities, lone mothers and lesbians may also be targets for sexual harassment.

Example: A property manager and property management company were found liable for the sexual harassment of a young female tenant due to the manager's inappropriate behaviour toward her. In addition to making unwanted comments of a sexual nature, he attempted to impose a friendly relationship on her, and his "open door" policy included leaving his door open into a common hallway while he was having sex.¹¹⁸

2.4 Poisoned environment

The *Code* definition of harassment refers to more than one incident of comment or conduct. However, even a single statement or incident, if sufficiently serious or substantial, can have an impact by creating a poisoned environment.¹¹⁹ Context is critical in determining whether a single incident may be considered harassment.

Example: A landlord's comment that his tenant should "get out of my home and get out of my country" was sufficient to create a poisoned environment and therefore constituted harassment because it was

¹¹⁷ See *Kertesz v. Bellair Property Management* (2007), *supra*, note 43 at 57. See also *Reed v. Cattolica Investments Ltd.* (1996), *supra*, note 43.

¹¹⁸ *Kertesz, ibid.*

¹¹⁹ See *Peroz v. Yaremko* (2008), *supra*, note 40; *Kahsai v. Saskatoon Regional Health Authority* (No. 2) (2005), 55 C.H.R.R. D/192; *Dhanjal and Canadian Human Rights Commission v. Air Canada*, *supra*, note 115; *Canada (Human Rights Commission) v. Canada (Armed Forces) and Franke* (1999), 34 C.H.R.R. D/140 (F.C.T.D.), *Kafé et Commission des droits de la personne du Québec c. Commission scolaire Deux-Montagnes*, (1993), 19 C.H.R.R. D/1 (T.D.P.Q.); *Starr v. Karcher Holdings Ltd.* (2007), *supra*, note 34.

accompanied by the use of considerable profanity and physical aggression.¹²⁰

A poisoned environment is based on the nature of the comments or conduct and the impact of these on the person, rather than on the number of times the behaviour occurs.

In the employment context, tribunals have held that the atmosphere of a workplace is a condition of employment just as much as hours of work or rate of pay. A “term or condition of employment” includes the emotional and psychological circumstances of the workplace.¹²¹ It is the OHRC’s position that this principle applies equally to rental housing. The atmosphere of rental accommodation is a condition of tenancy, and as such will include the emotional and psychological circumstances of the rental accommodation.

Example: A poisoned environment was found to exist where a landlord provided substandard maintenance to a tenant of Cambodian ancestry, and other tenants of Asian ancestry. The landlord had also made derogatory comments about Asians in a newspaper article.¹²²

A consequence of creating a poisoned environment in rental housing is that certain people are subjected to terms and conditions of tenancy that are quite different from those experienced by people who are not subjected to those comments or conduct. Such instances give rise to a denial of equality under the *Code*.

Housing providers, including management personnel, or housing co-operative Board members, who know or ought to know of the existence of a poisoned atmosphere but permit it to continue discriminate against affected employees even if they themselves are not involved in creating that atmosphere.¹²³ Inappropriate comments or conduct not only poison the environment for racialized people, but also affect everyone’s environment and are disruptive. Every housing provider is responsible for ensuring that its environment is free from this sort of behaviour, even if no one objects.

¹²⁰ See *Peroz v. Yaremko* (2008), *supra*, note 40.

¹²¹ *Dhillon v. F.W. Woolworth Co.* (1982), 3 C.H.R.R. D/743 at para. 6691 (Ont. Bd. Inq.); *Naraine v. Ford Motor Co. of Canada (No. 4)* (1996), 27 C.H.R.R. D/230 at para. 50 (Ont. Bd. Inq.)

¹²² *Ontario (Human Rights Comm.) v. Elieff* (1996), *supra*, note 38.

¹²³ These principles are derived from a line of employment cases. See in particular: *Ghosh v. Domglas Inc. (No.2)* (1992), 17 C.H.R.R. D/216 at para. 76 (Ont. Bd. Inq.) and *Naraine v. Ford Motor Co. of Canada (No. 4)* (1996), *supra*, note 121, at para. 54, *aff’d* (1999), 34 C.H.R.R. D/405 (Ont. Ct. (Gen. Div.)), Board of Inquiry’s order upheld except with respect to the issue of reinstatement (2001), 41 C.H.R.R. D/349 (Ont. C.A.), leave to appeal denied [2002] S.C.C.A. No. 69.

A poisoned environment can be created by the comments or actions of any person, regardless of their position of authority or status in a given environment. Therefore, a housing provider, a co-tenant, a member of the Board of Directors, a service person, *etc.* can all engage in conduct that poisons the environment of a person identified by *Code* grounds.

Behaviour need not be directed at any one person to create a poisoned environment. A person can experience a poisoned environment even if they are not a member of the group that is the target.

Example: A Hindu man lives in a social housing complex where slurs and stereotypical language about Muslims are commonly used by other tenants in common recreation areas. Although none of these remarks are directed specifically at him, but rather at his Muslim co-tenants, he is also being subjected to a poisoned environment and could file a human rights claim on this basis.

Other examples of situations that could be viewed as a violation of the *Code* by creating a poisoned environment include the following:

- a landlord saying to a tenant “I don’t know why you people don’t go back to where you came from because you don’t belong here”
- comments, signs, caricatures or cartoons displayed in a common area that show people identified by *Code* grounds in a demeaning manner
- discriminatory graffiti that is tolerated by a housing provider who does not act promptly to have the graffiti removed
- discriminatory remarks, jokes or innuendo about a tenant. Also, discriminatory remarks, jokes or innuendo made about other people or groups identified by *Code* grounds may create an apprehension that similar views are held about the tenant.

2.5 Systemic discrimination

Discrimination in rental housing may often take on systemic or institutional forms. Systemic or institutional discrimination consists of patterns of behaviour, policies or practices that are part of the social or administrative structures of an organization, and that create or perpetuate a position of relative disadvantage for people identified by *Code* grounds. These may appear neutral on the surface, but nevertheless have an exclusionary impact based on *Code* protected grounds. Systemic or institutional discrimination is a major barrier for people identified by *Code* grounds.

Systemic or institutional discrimination may be experienced differently when more than one *Code* ground is at play and when these grounds intersect.

Example: A building manager requires prospective tenants to provide an employment history before entering into a rental agreement. This condition could impose three layers of disadvantage on a young mother who recently emigrated from Africa, on the bases of her age, family status and her status as a new Canadian.

Systemic discrimination may have its roots in broader societal structures and social attitudes. Individual housing providers may hold assumptions about people who receive social assistance, gay and lesbian couples, people with mental disabilities, people of specific racialized groups, and/or “ideal” family forms, for example. These assumptions may, consciously or subconsciously, influence the policies and practices implemented by housing providers. For example, since people identified by *Code* grounds are disproportionately more likely to have low social and economic status, the practice of requesting unaffordable (and illegal) rental deposits may be a tactic to deter tenants that a landlord does not want to rent to.

Housing providers may engage in systemic discrimination if they systematically fail to maintain buildings inhabited primarily by people identified by *Code* grounds. This phenomenon has been seen particularly in low-income housing complexes. People who live in these dwellings may be especially vulnerable to sub-standard housing conditions due to their lack of social and economic power and their unwillingness to complain for fear of reprisal.

It is also contrary to the *Code* for housing providers to “stream” people identified by *Code* grounds into less desirable housing units.

Example: A building manager of a four-building rental housing operation routinely directs prospective tenants who have low social and economic status into one particular building. This building is less well-maintained and more expensive than the other three buildings.

The interaction between these societal realities and institutional policies and practices is complex. Inadequate levels of social assistance and minimum wage rates, for example, place many people and families at significant disadvantage in securing housing. The shortage of adequate and affordable housing options further compounds the situation. Add to this, minimum income requirements imposed by some landlords and the chronological allocation of subsidized housing based on waiting lists which may create additional barriers for people identified by *Code* grounds. Not taking this broader context into account may perpetuate the disadvantage of people identified by *Code* grounds.

In some situations, the existence of historical disadvantage is also a factor that gives rise, or contributes to, systemic discrimination. It is, therefore, necessary to consider a person’s or group’s already disadvantaged position in Canadian

society as part of any analysis of whether systemic or institutional discrimination is taking place.

Housing providers must take into account the broader societal context when determining whether their programs, policies and structures may be having a disproportionate impact on people identified by *Code* grounds. Systemic discrimination may arise when housing providers, particularly larger housing providers, fail to take into account the reality of people identified by the *Code* when designing their policies, programs and structures. Where housing providers fail to design in a way that includes people identified by *Code* grounds, these people may find themselves disadvantaged and excluded.

Example: In designing a new rental housing complex, a property management company hires a design expert to ensure that the physical structure is built according to the principles of inclusive design. This step ensures that the rental units are equally accessible to people with physical disabilities, families with small children and older people.¹²⁴

As is discussed at greater length in the OHRC's *Policy and Guidelines on Racism and Racial Discrimination*,¹²⁵ the OHRC uses the following three considerations in identifying and addressing systemic discrimination:

1. Organizational culture

Organizational culture can be described as shared patterns of informal social behaviour, that are the evidence of deeply held and possibly unconscious values, assumptions and behavioural norms.

2. Numerical data

Numerical data that shows that members of certain groups are disproportionately represented may be an indicator of systemic or institutional discrimination. For example, the under-representation of racialized people and families in a large rental housing complex may indicate inequitable rental practices. By itself, numerical data is usually not proof of systemic discrimination; however, it may form strong circumstantial evidence that inequitable practices exist, particularly if representation of certain groups is disproportional to demographic data controlling for social and economic status.

3. Policies, practices and decision-making processes

Policies, practices and decision-making processes that do not take into account the realities of people identified by *Code* grounds may lead to exclusion and result in systemic discrimination.

¹²⁴ For more detailed information on inclusive design practices, see the section of this *Policy* entitled "Inclusive design" under "Duty to accommodate."

¹²⁵ See Ontario Human Rights Commission, *Policy and Guidelines on Racism and Racial Discrimination*, *supra*, note 30.

Specific policies and practices that may create systemic barriers for people identified by *Code* grounds are outlined in the section on “Discrimination trends in rental housing.”

2.6 Discrimination by association

The *Code* provides protection to people who experience discrimination or harassment because of their association, relationship or dealings with a person identified by a ground of the *Code*.¹²⁶ A person has this protection whether or not they are identified by a *Code* ground themselves.

Therefore, a person who is denied housing, treated differently during a tenancy (including being subjected to negative comments), or evicted because of their relationship with a person who is identified by a ground of the *Code* can file a claim of discrimination based on association.

Example: A housing provider was found to have discriminated against a woman by making it a condition of occupancy that she not associate with “coloured” people. The woman, who was White with two racialized children, was deeply offended, and even though she did not disclose to the housing provider that she could not rent the apartment because of her family, the Tribunal found that discrimination had occurred and awarded compensation.¹²⁷

It would likewise be discriminatory for a housing provider to deny an apartment to someone because of their relationship with someone who has young children, a disability, is gay or lesbian, *etc.*

Discrimination because of association in the housing context can also arise where landlords prevent tenants from subletting to people identified by a ground of the *Code*.

Example: A landlord was found to have discriminated against a tenant when he prevented him from subletting his apartment to a couple with Aboriginal ancestry.¹²⁸ In another case, a landlord was found liable for

¹²⁶ Section 12 of the *Code* states:

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.

¹²⁷ *Hill v. Misener* (No. 1) (1997), 28 C.H.R.R. D/355 (N.S. Bd. Inq.). For a related case, see *John v. Johnstone*, (September 16, 1977), No. 82, Eberts (Ont. Bd. Inq.) in which a housing provider was found to have breached the *Code* when he evicted his tenant, a White woman, after she had a Black friend over for dinner.

¹²⁸ *Québec (Comm. des droits de la personne) v. Thibodeau* (1993), 19 C.H.R.R. D/225 (Que. H.R.T.).

discrimination when he refused to allow assignment of a lease to people of “East Indian” or Pakistani origin.¹²⁹

2.7 Discriminatory neighbourhood opposition, or “NIMBYism”

The right to be free from discrimination in housing under the *Code* could extend to the development of affordable housing projects for people and groups identified by the *Code*. Discriminatory neighbourhood opposition, also known as “Not in My Backyard” attitudes, or “NIMBYism,” refers to opposition to housing projects that are based on stereotypes or prejudice towards the people who will live in them. It can refer to discriminatory attitudes as well as actions, laws or policies that have the effect of creating barriers for people, such as people with low income and disabilities, who seek to move into affordable housing or supportive housing in a neighbourhood.

NIMBYism does not refer to legitimate public consultations or concerns around land use and planning and security, but to the response to affordable and supportive housing because of negative attitudes towards the people who will live there. NIMBY responses are often unfounded concerns that such housing will bring down property values, create safety risks, or otherwise ruin the neighbourhood.¹³⁰ It may cause housing providers to feel that they need to make design compromises, even when these compromises undermine the dignity and well-being of their residents. The result of NIMBYism is that affordable and supportive housing development is unnecessarily delayed, halted or restricted.

People typically affected by NIMBYism are people who need to rely on affordable housing, such as rooming houses (lodging houses), group homes, social housing and supportive housing, boarding houses, institutional care homes, and shelters. These types of housing often serve people identified by *Code* grounds, including people receiving social assistance, racialized people, Aboriginal people, immigrants and refugees, students (who are often young people), older people, single people, people with disabilities, including mental health issues, and families with young children.

It is the OHRC’s position that people or groups identified under the *Code* should not have to ask permission from prospective neighbours before moving into a neighbourhood.¹³¹ Concerns about affordable housing projects should be anchored legitimately in planning issues, rather than stereotypical assumptions about the people for whom the housing is being built. For example, efforts to keep out people with disabilities, including mental illnesses, are no less offensive

¹²⁹ Tabar, *Lee and Lee v. Scott and West End Construction Ltd.* (1984), 6 C.H.R.R. D/2471 (Ont. Bd. Inq.).

¹³⁰ S. Chisholm, *Affordable Housing in Canada’s Urban Communities: A Literature Review* prepared for Canada Mortgage and Housing Consultation (July 2003) at 23, online: www.chra-achru.ca/english/View.asp?x=511 (date accessed October 26, 2006).

¹³¹ Chief Commissioner Barbara Hall, “Re: Residents angry over housing project,” (November 14, 2007): www.ohrc.on.ca/en/resources/news/nimby/view

than preventing racialized people from moving into a neighbourhood. To the greatest extent possible, people should be able to live in the community of their choice.

NIMBY opposition to affordable housing projects can violate the *Code* when it results in changes to existing planning processes, barriers to access to housing or exposes proposed residents to discriminatory comment or conduct. Also, when planning policies or practices are directed towards, or disproportionately affect, *Code*-protected populations, they may be seen to violate the *Code*.

Example: A university town indicates that it is responding to residents' complaints about student behaviour by instituting a by-law that limits the number of bedrooms for rent in a rental house to four, regardless of the number of legal bedrooms in the house. The by-law is only applied to the student area around the university, where the complaints have originated. Most rental housing in the area is occupied by students under the age of 22. The by-law could be seen to raise human rights concerns because it will result in restrictions for young people in being able to access housing in the area.

2.7.1 Zoning by-laws

Historically, zoning by-laws are often embedded in the urban plan of a municipality. Zoning by-laws that are not based in a legitimate urban planning rationale and have the effect of "people zoning," as opposed to zoning the use of the land, are deemed to be invalid¹³² and could be open to human rights challenges if they result in restrictions to people identified by *Code* grounds.

Zoning by-laws that define and restrict the location of dwellings based on the characteristics of their users, instead of the type of building structure, have been deemed to be discriminatory.

Example: The Manitoba Court of Appeal ruled that a city's zoning by-law violated s. 15(1) of the Canadian *Charter of Rights and Freedoms* by defining its group homes through reference to characteristics of the users (people who were "aged," "receiving supervision or treatment for alcohol or other drug addiction," "convalescent or disabled people," or "discharged from a penal institution"). As well, the court deemed that the people living in these homes were discriminated against because they and they alone had to apply to the various community and city committees for permission to form and live together as a group or "family." The court also indicated

¹³² The Ministry of Municipal Affairs and Housing indicates that a zoning by-law is invalid if its effect is to regulate the user, as opposed to the use of the land. Ministry of Municipal Affairs and Housing submission to Commission's Housing Consultation; *R.v.Bell* (S.C.C.), (1979), 98 D.L.R. (3rd) 255.

that the impugned provisions of the by-law were those that intended to regulate where these homes could be situated in the city.¹³³

Municipalities and decision-makers should be aware that zoning definitions that restrict the occupants of housing based on whether or not they are related (or defining the use of certain types of housing either explicitly or implicitly on definitions of “family”) can have the effect of discriminating against unrelated people from *Code*-protected groups who are likely to share accommodation.

2.7.2 Types of NIMBYism

Where the decisions are not grounded in legitimate urban planning rationale and are based on the residents of the affordable housing, the following can be seen as examples of types of NIMBYism that people protected under the *Code* and affordable housing providers may encounter:

- requiring housing providers to adopt restrictions or design compromises to affordable or supportive housing that are not applied to other housing in the area. For example:
 - requiring fences or walls around the property to separate it from other neighbourhood homes because of the intended residents
 - arbitrary caps on the numbers of residents allowed
 - adding visual buffering or removing balconies so tenants cannot look out on their neighbours
 - requiring residents to sign contracts with neighbours as a condition of occupying the building.
- requiring additional public meetings, amendments to the planning process, lengthy approval processes, or development moratoria because the intended residents of a proposed housing project are people from *Code*-identified groups
- zoning by-laws that restrict affordable housing development that serves people identified by *Code* grounds (such as lodging houses) in certain areas while allowing other establishments of a similar scale
- by-laws that define dwellings (e.g. group homes) based on the characteristics of their users¹³⁴
- zoning by-laws that have the effect of distinguishing between people who are related or unrelated in respect to the occupancy or use of a building or part of a building¹³⁵

¹³³ *Alcoholism Foundation of Manitoba v. Winnipeg (City of)*, (Man. C.A.), (1990), 69 D.L.R. (4th) 697.

¹³⁴ *Ibid.*

¹³⁵ *Planning Act*, R.S.O. 1990, c.P.13. s.35 (2). The authority to pass a by-law under section 34, subsection 38(1) or section 41 does not include the authority to pass a by-law that has the effect of distinguishing between persons who are related and persons who are unrelated in respect of the occupancy or use of a building or structure or a part of a building or structure, including the occupancy or use as a single housekeeping unit.

- minimum separation distances, caps on the number of residents allowed, or quotas on the number of housing projects allowed in an area, that are not justified in a rational planning basis, nor passed in good faith¹³⁶
- discriminatory comments or conduct towards the intended residents of a housing project at public planning meetings or in published or displayed notices, signs, flyers, pamphlets or posters.¹³⁷

City Councils, councillors, neighbourhood associations, developers, decision-makers such as the Ontario Municipal Board, and individuals all have a responsibility to refrain from discrimination against people identified by *Code* grounds based on NIMBYism, and to make sure policies and practices do not give rise to differential treatment. Even though these organizations and individuals may not provide housing directly, they still have an obligation not to contribute to indirect discrimination in the context of housing.

Example: A City councillor recognizes the potential for abusive language to occur at a community meeting about a proposed housing development for people with addictions. Because of this, she lays out ground rules at the beginning of the meeting stating that discriminatory language will not be tolerated and actively interrupts and objects to this type of language if it happens.

3. Special programs and special interest organizations

Section 14 of the *Code* permits the use of special programs in housing. This allows preferential treatment or programs aimed only at people identified by *Code* grounds, if the purpose of the program is to relieve hardship or economic disadvantage or to help disadvantaged people or groups achieve equal opportunity. Creating special programs is one step that governments can take to address the shortage of adequate and affordable housing.

Example: Based on research that indicates that Aboriginal people in Ontario are more likely to be in need of housing than the average household, a special program is created to provide social housing for Aboriginal people.

¹³⁶ The Ministry of Municipal Affairs and Housing indicates that separation distance requirements should be justified on a rational planning basis, passed in good faith, and in the public interest: Ministry of Municipal Affairs and Housing submission to Commission's Housing Consultation.

¹³⁷ Although the *Code* does not contain explicit provisions dealing with harassment or poisoned environment pertaining to community forums, municipalities and elected officials are expected to ensure that poisoned environments contrary to the *Code* are not created at their meetings.

Example: A housing co-op develops a policy that provides for a mix of market rent units and rent-geared-to-income units to help low wage earners or people who receive social assistance.

It is important that special programs be designed so that restrictions within the program are rationally connected to the objective of the program. A failure to do so, can lead to a successful challenge of the program and a finding that it is discriminatory.¹³⁸

Section 14 recognizes the importance of addressing pre-existing hardship and economic disadvantage so that disadvantaged people or groups may be better able to achieve equal opportunity.¹³⁹ It is the OHRC's position that organizations and institutions should try to undertake special programs where hardship or disadvantage exist. To give full meaning to the rights and responsibilities outlined in Part I of the *Code*, a special program may be an appropriate response on the part of a housing provider who is aware that discrimination is taking place against specific groups identified by *Code* grounds.

Example: A social housing provider sets up a housing program to help new immigrants, a community that has historically had difficulty finding housing, and that is often subjected to discrimination in the rental housing market.

There are circumstances where housing aimed at the needs of older Ontarians will promote the objectives of the *Code*. Section 15 of the *Code* permits preferential treatment for people aged 65 and older, and therefore permits housing that is limited to people over the age of 64.

Section 18 of the *Code* allows certain types of organizations, which may also provide housing as part of their services, to limit participation or membership based on *Code* grounds:

18. The rights under Part I to equal treatment with respect to services and facilities, with or without accommodation, are not infringed where membership or participation in a religious, philanthropic, educational, fraternal or social

¹³⁸ *Ontario (Human Rights Commission) and Roberts v. Ontario (Ministry of Health) (No. 1)* (1989), 10 C.H.R.R. D/6353 (Ont. Bd. Inq.), aff'd 14 C.H.R.R. D/1 (Ont. Div. Ct.), rev'd (1994), 21 C.H.R.R. D/259 (C.A.).

¹³⁹ For a discussion of the purposes of section 14 of the *Code* see *Ontario (Human Rights Commission) v. Ontario (Ministry of Health)* 21 C.H.R.R. D/259 (Ont. C.A.). The majority of the Court stated that s. 14(1) has two purposes. One is to protect affirmative action programs from being challenged as violating the formal equality provisions contained in Part I of the *Code*. The second purpose is to promote substantive or concrete equality. Affirmative action programs are aimed at achieving substantive equality by helping disadvantaged persons to compete equally with people who do not have the disadvantage. Section 14(1) is also an interpretive aid that clarifies the full meaning of equal rights by promoting substantive equality.

institution or organization that is primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination is restricted to persons who are similarly identified.

Example: A synagogue runs a seniors' residence that is meant to foster the religion and culture of its residents. Prayer services are provided and kosher food is served. It restricts membership to people of the Jewish faith who are over the age of 60.

An organization that wishes to rely on this defence must show it meets all of the requirements of this section.

4. Discrimination patterns in rental housing

4.1 Refusal to rent

While there are many housing providers who provide equal opportunities to all people applying to rent their premises, there are others who may deliberately refuse to rent to people identified by *Code* grounds. This type of direct and intentional discrimination generally arises from negative attitudes and biases.

Many housing providers, particularly smaller landlords who may be renting out portions of their own homes, are under the false impression that they may pick and choose tenants in whatever way they see fit. However, the *Code* applies to all rental housing arrangements in Ontario. Therefore, once a housing provider decides to offer a rental opportunity to the public, they must do so in a non-discriminatory way. A landlord or other housing provider who denies a rental opportunity to a person because of a personal characteristic that is identified by the *Code* is vulnerable to having a human rights claim filed against them.

A refusal to rent most commonly takes place in the form of discriminatory advertising and discriminatory tenant screening.

4.1.1 Discriminatory advertising

When listing rental opportunities, landlords may not exclude people identified by the *Code*. For example, phrases in rental advertisements such as “suits a working person” may indicate that people who receive social assistance or are unable to work due to a disability, or other *Code* ground, are not welcome or need not apply.

Other forms of inappropriate advertising include statements that a building is:

- “adults only”
- “adult lifestyle”
- “not suitable for children”
- “suitable for a single person or couple”

- “working people only”
- “professionals only.”

Discriminatory advertising that targets households with children may be more subtle. Where a landlord is attempting to discourage or deny applications from families with children, they may use specific euphemisms in their advertising.

Statements that a building is:

- a “quiet building”¹⁴⁰
- “not soundproof”
- “geared to young professionals”

may, however, when coupled with a refusal to rent to a family with children, indicate that discriminatory attitudes related to family status played a role in the refusal.¹⁴¹

Section 13 of the *Code* prohibits the publication or public display of any notice, sign, symbol, emblem or other representation that indicates the intent to discriminate. Signs that include phrases such as the ones set out above may be in breach of section 13 of the *Code*.

4.1.2 Discriminatory tenant screening

4.1.2.1 Application forms

Some housing providers, and agencies hired to find tenants, may engage in practices that are designed to screen out certain people identified by the *Code*. Information on rental application forms, for example, may identify prospective tenants based on *Code* grounds. Application forms that ask for a person’s source of income may reveal that the person is receiving social assistance, or that a person is unemployed due to the presence of a disability.

Example: In designing a universal application form for the use of housing providers, a federation for landlords does not include questions about

¹⁴⁰ See, for example, *Huot v. Chow* (1996), CHRR Doc 96-178 (B.C.C.H.R.).

¹⁴¹ The *Code* does permit age restrictions in housing under some circumstances.

- Section 15 of the *Code* permits preferential treatment of persons aged 65 and over, and therefore permits housing that is limited to persons over the age of 64.
- Section 14 of the *Code* permits special programs to alleviate hardship and disadvantage, such as specially designed barrier-free housing projects aimed at older persons with disabilities.
- Section 18 creates a defence for religious, philanthropic, educational, fraternal or social institutions or organizations that primarily serve the interests of older persons and that provide housing as part of their services.

However, there is no defence that permits “adult lifestyle” housing that results in the exclusion of children or people under a certain age. See *York Condominium Corp. No. 216 v. Dudnik* (No. 2) (1990), 12 C.H.R.R. D/325 at paras. 165-66, aff’d (1991), 14 C.H.R.R. D/406 at para. 23 (Ont. Div. Ct.).

“source of income,” or “place of employment” as these questions could reveal information related to protected *Code* grounds. By having access to such information, a landlord is vulnerable to allegations that subsequent decisions about who they chose to rent to were made based on inappropriate considerations.

A person’s name, while a necessary piece of information for housing providers, may also indicate their membership in a specific racialized group, or identify them as a practitioner of a particular creed. Housing providers are not permitted to discriminate against people on the basis of *Code*-identified characteristics that may be revealed by their names.

Example: In one case, a woman was mistakenly assumed to be French-Canadian based on her surname. When the landlord realized that she was not actually French-Canadian, but of Aboriginal ancestry, he refused to rent the apartment to her and commented that, “once you rent to a couple of Natives, fifteen Indians come behind.”¹⁴²

Application forms are often used to ask the ages of prospective tenants. The Human Rights Tribunal of Ontario has found this practice to be a *prima facie* act of discrimination based on family status.¹⁴³ Application forms may also be used to determine the number of children in a family. Where landlords ask such questions, the onus will shift to them to show that there was in fact no such discrimination. If landlords have a *bona fide* requirement for such information about tenants, they can request it after the housing application has been approved.

4.1.2.2 Telephone inquiries

Telephone inquiries may also provide information about a prospective tenant that a landlord may use for discriminatory purposes. When calling to ask about rental opportunities, a prospective tenant will be required to provide their name that, as indicated above, may reveal characteristics about their identity.

Telephone communications will also indicate things such as the presence of an accent. Socio-linguistic research shows that people are able to make fairly accurate racial attributions based on linguistic cues alone.¹⁴⁴ Therefore, landlords are able to screen out prospective tenants by simply saying, after hearing the tenant speak, that the apartment is “already rented.” This practice has been referred to as “linguistic profiling.”¹⁴⁵

¹⁴² *Flamand v. DGN Investments* (2005), *supra*, note 35 at para. 137.

¹⁴³ *St. Hill v. VRM Investments Ltd.* (2004), CHRR Doc. 04-023 at para. 32 (HRTO).

¹⁴⁴ See D.S. Massey & G. Lundy, “Use of Black English and Racial Discrimination in Urban Housing Markets” (March 2001) 36(4) *Urban Affairs Review* 452 at 466-7.

¹⁴⁵ “Linguistic profiling” has been defined as the “determin[ation of] characteristics such as social and economic status from the way a person uses language.” See www.wordspy.com/words/linguisticprofiling.asp (date accessed: January 3, 2007).

As well, in an age of sophisticated technology where most people have access to voice-mail messaging and/or call display features, landlords, if so inclined, are able to screen out prospective tenants, based on an accent or a name, for example, without ever needing to have any personal contact with them.

A community agency or other advocacy organization calling on behalf of a person looking for rental housing may actually “tip off” a prospective landlord to the fact that the person is identified by a *Code* ground and may, ironically, expose that person to discrimination.

Example: When a landlord sees “Aboriginal Legal Clinic” on his call display, or when the clinic name is left on his voice-mail, he may decide not to answer or return calls asking about rental opportunities if he has negative attitudes towards Aboriginal people.

Tenant screening of any kind that targets people based on *Code* grounds is contrary to human right principles and may result in a claim being filed with the Human Rights Tribunal of Ontario.

4.1.2.3 In-person meetings

After meeting with prospective landlords and agencies for the first time, people who are identified by *Code* grounds may find that the unit becomes mysteriously “unavailable.” In many cases, it may be difficult to prove that discrimination is at play in these situations.

As mentioned previously, auditing studies have been conducted that test for discrimination by comparing the experiences of people who are looking for rental housing and who are similarly situated except for one distinguishing personal characteristic (e.g. they are racialized, a lone parent, have a disability, are gay or lesbian, etc.). These studies have shown that racialized people, gays and lesbians, and people who have a mental disability are among the people identified by *Code* grounds who are highly vulnerable to being refused a rental opportunity outright.¹⁴⁶

Housing providers who routinely refuse to rent to people who are identified by specific *Code* grounds are usually motivated by negative attitudes, biases and/or stereotypes. Actions based on discriminatory stereotypes in the context of housing are a violation of the *Code*.¹⁴⁷ Larger housing providers should rely on objective and standardized criteria when selecting occupants to minimize the chances that discrimination will play a role in the selection process. Assessments based on whether a person would “fit” into the culture of a residence, for

¹⁴⁶ See D.S. Massey & G. Lundy, *supra*, note 144; K.L. Dion, *supra*, note 109; S. Page, *supra*, note 111; and CERA, “Sorry It’s Rented: Measuring Discrimination in Toronto’s Rental Housing Market,” *supra*, note 112.

¹⁴⁷ *Bekele v. Cierpich*, 2008 HRTO 7 (CanLii) (Ontario Human Rights Tribunal).

example, open the door for biases and stereotypes to influence decision-making, and may result in the exclusion of *Code*-protected people.¹⁴⁸

Example: When interviewing prospective members, the selection committee of a housing co-op restricts its assessment to non-discriminatory and transparent criteria that are applied equally to every applicant.

Where a housing provider receives multiple tenant applications, they should be prepared to show how they chose the successful applicant. For example, a landlord may decide to rent to someone because they were the first person to apply for the unit.

4.2 Rental criteria

When assessing prospective tenants, landlords commonly use a number of criteria that may create systemic barriers for people identified by the *Code*. The *Code*, in section 21(3), provides specific guidance to housing providers on using certain criteria in assessing and selecting tenants. Landlords are permitted to use income information, credit checks, credit references, rental history and guarantees in assessing and selecting tenants.

However, Regulation 290/98 under the *Code* restricts the way these business practices may be used, and specifically reaffirms that landlords may not use these assessment tools in an arbitrary way to screen out prospective tenants based on *Code* grounds. The criteria must be used in a *bona fide* and non-discriminatory way. Where income information, credit checks, credit references, rental history, or guarantees are being applied in a way that creates systemic barriers for people identified by a *Code* ground, the landlord will be required to show that this is a *bona fide* requirement – that is, that the criteria could not be applied in a way that was more accommodating without creating undue hardship for the landlord.

Applying rental criteria and practices in an arbitrary way (e.g. applying different rents to different tenants; asking for a security deposit from some tenants, but not others; asking only some people for “direct payment” of rent) may be evidence of discrimination where it can be shown that there is a pattern of *Code*-protected people being singled out for different treatment.

4.2.1 Income requirements

Section 21(3) and Regulation 290/98 permit landlords to seek and consider income information from prospective tenants. “Income information” encompasses “information about the amount, source, and steadiness of a potential tenant’s

¹⁴⁸ See *Bekele, ibid.*

income.”¹⁴⁹ Because of the prohibition in the *Code* against discrimination in housing based on receipt of public assistance,¹⁵⁰ it is the OHRC’s position that landlords may only verify the fact that the prospective tenant has a source of income, but they may not assess or judge the source type. In other words, landlords are not permitted to discriminate against a prospective tenant because they do not approve of the source of the person’s income (e.g. Ontario Works).

Income information may be sought and considered *only* if the landlord also seeks and considers information about the prospective tenant’s credit references and rental history. Only if the prospective tenant, when requested, provides no credit references or rental history information, can the landlord consider income information in isolation. Any assessment of all the available information must be *bona fide*, meaningful, and non-discriminatory.

It has been and still is a common practice for landlords to assess prospective tenants by applying income ratios (e.g., no more than 30% of a tenant’s income should be required to pay the rent). This practice was assessed in *Shelter Corp. v. Ontario*¹⁵¹ and found to have a systemic impact on a range of groups identified by *Code* grounds.¹⁵² An Ontario human rights tribunal found that these practices were not *bona fide* requirements because they had no value in predicting whether a tenant would default on the rent. The later addition of section 21(3) to the *Code* and the enactment of Regulation 290/98 do *not* permit landlords to apply income ratios, as has been clarified in a later decision of the tribunal.¹⁵³ This means that landlords must only assess whether an applicant has enough income to pay the rent. They must not assess whether the balance of an applicant’s remaining income is adequate for non-housing related expenses.

Example: A lone mother with one child applies for an apartment renting at \$800 per month. She proves her gross monthly income to be \$1,627, provides contact information for three previous landlords, and signs permission for an Equifax credit check. Her three previous landlords provide very positive references and her Equifax credit rating checks out solid. The landlord sees she has enough income to pay the rent, and offers her the apartment. She provides photocopies of her monthly social assistance cheque of \$904, Child Benefit cheque of \$323, and her part-time job paystub of \$400, totaling \$1,627 as her monthly income. The landlord hands over the keys to her new apartment, welcoming her and her daughter to the building.

¹⁴⁹ *Vander Schaaf v. M & R Property Management Ltd.* (2000), *supra*, note 48, at para. 105.

¹⁵⁰ “Public assistance” would include money from Ontario Works, Ontario Disability Support Program, Canada Pension Plan, Old Age Security, Child Benefit, Ontario Student Assistance Program, *etc.*

¹⁵¹ *Shelter Corp. v. Ontario* (1998), 34 C.H.R.R. D/1, *aff’d* (2001), 39 C.H.R.R. D/111 (Ont. Sup. Ct.).

¹⁵² *Ibid.* at para. 137.

¹⁵³ *Vander Schaaf v. M & R Property Management Ltd.*, *supra*, note 48, at para. 110.

Regulation 290/98 makes a specific exception for rent-geared-to-income housing. In assessing applicants for rent-geared-to-income (RGI) housing, landlords may request and consider income information on its own.

Section 4 of the Regulation specifically states that nothing in the regulation permits housing providers to discriminate against a prospective tenant based on any of the grounds set out in the *Code*.

4.2.2 Rental history

Regulation 290/98 permits landlords to request information on rental history, and to consider it, either alone or in combination with other factors, when assessing a potential tenant.

Prospective tenants may lack a rental history for reasons related to *Code* grounds. For example, recent immigrants and refugees may have no rental history in Canada. Women attempting to re-establish themselves after a marital breakdown may find themselves in a similar situation.

Landlords should not treat the lack of a rental history as equivalent to a negative rental history.¹⁵⁴ Where a prospective tenant lacks a rental history for reasons related to a *Code* ground, landlords should look at other available information on the prospective tenant to make a *bona fide* assessment.

Landlords should also refrain from refusing to rent to a tenant solely based on where they may have lived previously, and for how long they may have lived there. Some people identified by *Code* grounds may be more likely to have lived in rooming houses, for example, and/or to have lived at past residences for shorter periods of time.

4.2.3 Employment history

Some landlords require that potential tenants have “stable” long-term employment. This requirement can be a problem for people identified by several grounds of the *Code*. For example, requirements for employment histories are likely to have an adverse effect on women who have taken time out of the workforce to raise children, provide care-giving for others, or who are otherwise trying to establish and support themselves independently. Such requirements also affect new Canadians, people with disabilities who are unable to work, people who receive social assistance, including older people receiving benefits from CPP, seasonal workers, and young people starting out who will have shorter employment histories.

It should be noted that nothing in Regulation 290/98 permits housing providers to ask prospective tenants for information about employment history. Requirements

¹⁵⁴ *Ahmed v. 177061 Canada Ltd.* (2002), *supra*, note 37.

that applicants be employed on a permanent basis or satisfy a criterion of minimum tenure with an employer have been found to discriminate on *Code* grounds.¹⁵⁵

4.2.4 Credit history

Regulation 290/98 permits landlords to request credit references and to conduct credit checks (with permission from the prospective tenant), and to consider this information in selecting or refusing a tenant.

However, this requirement may have an adverse impact on people identified by *Code* grounds. For example, women returning to the workforce after lengthy periods of care-giving or after the breakdown of a marriage, young people, and newcomers, for example, may have little or no credit history. Human rights tribunals have found that the practice of refusing applicants with little or no credit history may have a disparate impact based on *Code* grounds. Landlords cannot equate the absence of a credit rating with a bad credit rating. Landlords should not reject tenancy applications based on a lack of credit history.¹⁵⁶

Even with a bad credit rating, there may be extenuating circumstances relating to *Code* grounds that should be examined before rejecting the person. The person should be able to explain their situation and potentially ask for accommodation (e.g. a landlord might be able to look at other forms of rental criteria).

In all cases, a credit history must only be considered as part of a *bona fide* attempt to validly assess potential tenants.

4.2.5 Social Insurance Number (S.I.N.) information

Some landlords require that applicants provide their Social Insurance Numbers (e.g. on rental application forms) usually to conduct a credit check. A person's Social Insurance Number may potentially reveal information about that person that is not relevant to securing a rental premise, for example, that the applicant is a refugee. Since the disclosure of such information may expose a person and their household to potential discrimination, it is the OHRC's position that housing providers should use means other than Social Insurance Numbers to conduct credit checks. Service Canada, a part of the federal government, specifically discourages private sector organizations, including landlords negotiating leases, from asking for a Social Insurance Number.¹⁵⁷

¹⁵⁵ *Sinclair v. Morris A. Hunter Investments Ltd.* (2001), *supra*, note 61, at paras. 36-37. This decision found discrimination based on age, as younger people are less likely to have permanent employment or lengthy job tenure. However, similar issues arise with respect to other grounds in the *Code*.

¹⁵⁶ *Ahmed v. 177061 Canada Ltd.*, *supra*, note 37, at para. 85.

¹⁵⁷ See Service Canada for more details: www.servicecanada.gc.ca/eng/sin/protect/provide.shtml.

4.2.6 Guarantors

Section 2(1) of Regulation 290/98 permits landlords to require guarantees for rent. While the use of co-signers may be appropriate where a tenant has poor references, a poor credit history, or a history of default, landlords are not allowed to require guarantors simply because the prospective tenant is a member of a *Code*-protected group, such as being a lone parent, a newcomer to Canada, a youth, a person with a past, present, or perceived mental illness, a person who receives social assistance, or a racialized person.¹⁵⁸

When landlords request a co-signer or guarantor, they cannot require that this person meet minimum rent-to-income ratios that they could not impose on the prospective tenant.

4.2.7 Security deposits and extra rent requirements

Regulation 290/98 under the *Code* permits landlords to “require a prospective tenant to pay a security deposit in accordance with [the *Residential Tenancies Act*].”¹⁵⁹ However, in some circumstances, this requirement may be seen to have an adverse impact on certain people receiving social assistance.¹⁶⁰

While the use of security deposits may be appropriate where a tenant has poor references or a history of default, it is not permissible to require security deposits simply because the prospective tenant is a member of a *Code*-protected group, such as being in receipt of social assistance, or a lone parent.

In some cases, housing providers may ask prospective tenants for cash sums (or “key money”) that are far larger than what is allowed by the *Residential Tenancies Act*. In addition to contravening the *Residential Tenancies Act*, landlords may also be violating the *Code* where it can be shown that they are using such practices to target groups identified by *Code* grounds, such as new Canadians, permanent residents, or Aboriginal people.

Some landlords may also attempt to charge more than the legal rent for a rental unit. In addition to violating the *Residential Tenancies Act*, housing providers may also be contravening the *Code* where it can be shown that they are using such practices to target *Code*-identified people.

¹⁵⁸ In *Styres v. Paiken* (1982), *supra*, note 108, an Ontario human rights tribunal found that a landlord contravened the *Code* by imposing different terms or conditions of occupancy on the claimant from those that were imposed on the other tenants because of race, colour or ancestry.

¹⁵⁹ Section 106(2) of the *Residential Tenancies Act*, *supra*, note 22 allows a landlord to require a tenant for a rent deposit that is not “more than the lesser amount of rent for one rent period and the amount of rent for one month.”

¹⁶⁰ *Garbett v. Fisher* (1996), *supra*, note 61.

4.2.8 Direct payment

Housing providers are not allowed to require that a tenant have their rent paid directly by a third party simply because the tenant is a member of a group identified by the *Code*. Some housing providers ask prospective tenants to arrange to have their rent paid directly, either from social services if they are receiving social assistance, or from another source of income, regardless of the tenant's demonstrated ability to pay their rent on time. An Ontario human rights tribunal found this practice, when applied to recipients of social assistance, to amount to a violation of the *Code*.¹⁶¹

At the same time, direct payment of rent may, in some cases, be shown to be a *bona fide* and reasonable requirement if it is tied to other non-discriminatory considerations such as: a situation where there is evidence of a tenant defaulting on their rent; direct payment has been ordered by a social assistance program following misuse of benefits; or direct payment is a condition for eligibility for rent-geared-to-income units. Even where direct payment may be shown to be a *bona fide* requirement, it is the OHRC's position that housing providers should adopt an individualized approach to implementing such an arrangement, and be mindful of a situation where a tenant's circumstances may require the landlord to be flexible.

Example: A lone parent who lives in a rent-geared-to-income unit with a direct payment arrangement has insufficient funds to pay her rent one month due to an unforeseen and irregular financial expense. She asks her landlord to allow her to pay him later in the month so that she has time to sort the matter out. Her landlord agrees because the tenant normally pays her rent on time, and it is not an undue hardship for him to do this.

4.2.9 Criminal or other police record checks

Nothing in section 21(3) of the *Code* or Regulation 290/98 permits or prohibits the use of criminal or other police record checks in the context of rental housing. Requiring a criminal or other police record check as a condition of tenancy may have an adverse impact on people identified by *Code* grounds.¹⁶² For example, a person with a mental health disability may have had non-criminal contact with the police under the provisions of the *Mental Health Act*¹⁶³ that would be exposed

¹⁶¹ *McEwen v. Warden Building Management Ltd.* (1993), *supra*, note 72.

¹⁶² For more detailed information, see the OHRC's publication, *Interim Guide: Police Record Checks for Vulnerable Sector Screening*, available at: www.ohrc.on.ca/en/resources/Guides/prc_interimguide/, and the OHRC's draft *Policy on Mental Health Discrimination and Police Record Checks*, available at: www.ohrc.on.ca/en/resources/Policies/mhdraft.

¹⁶³ Approximately 20% of Canadians will experience mental illness at some point in their lives. (Health Canada, *A Report on Mental Illness in Canada* [Ottawa: 2002], online: Canadian Mental Health Association Website: www.cmha.ca). For some, this may result in non-criminal contact with the police under the provisions of the *Mental Health Act*. The *Mental Health Act* authorizes the police to apprehend a person and take him or her to a hospital for examination in

through a police record check, thus violating that person's privacy and exposing them to potential discrimination.

There may be limited circumstances where it may be reasonable for a housing provider to conduct a criminal record check on a prospective tenant. For example, a lone mother with young children who rents out the basement of her house may be able to establish, due to safety concerns, that it is a *bona fide* requirement that a tenant in her home not have a criminal record. In such circumstances, the housing provider should obtain permission from the prospective tenant before conducting the record check.

4.3 Tenancy

Discrimination in rental housing accommodation is not just about denying access to housing opportunities. Tenants may experience unequal access to housing-related services or may otherwise face differential treatment throughout their tenancy. The right to be free from discrimination in housing includes all matters relating to the accommodation, including:

- the right not to be subjected to negative comments and/or treatment relating to a *Code* ground (e.g. unsolicited commentary about one's sexual orientation, marital status, *etc.*)
- equal treatment relating to the statutory obligations of a housing provider during occupancy (e.g. the right to sublet a unit, the right to receive prompt attention to needed repairs and/or maintenance, *etc.*) without discrimination based on a *Code* ground
- equal treatment with respect to the amenities associated with some types of rental housing (e.g. accessible recreational facilities, parking, common gardens, *etc.*)
- the right not to be affected negatively by a seemingly neutral rule (e.g. an inflexible "no pets" policy that would negatively affect a person with a disability who uses a service animal)
- the right to associate in one's living space with people who are identified by *Code* grounds (e.g. a gay friend, a racialized girlfriend, *etc.*) without discrimination.

The following sub-sections discuss some of the more common ways that discrimination may take place during a tenancy.

circumstances where the person appears to have a mental disorder that will likely result in serious bodily harm to self or to others, or serious physical impairment of the person, and the person engages in certain behaviour. In many cases, the person himself, or a family member, may have contacted the police for help. These contacts are recorded in police databases and may be kept there for years. In some cases they may never be removed. This record can then be a barrier when the person applies for housing.

4.3.1 Negative comments and treatment

A tenant has a right to be free from discriminatory comments and treatment throughout their tenancy. A housing provider has a corresponding duty not to subject tenants to negative *Code*-related comment and treatment, and to address immediately a situation where a tenant's neighbours, or others, are making negative comments, or otherwise engaging in conduct that negatively affects the tenant, and is linked to a *Code* ground.

As is discussed earlier in this *Policy*, some comments or conduct, even a single statement or incident, may be serious enough to create a poisoned environment. For a more detailed discussion, see the section of this *Policy* entitled "Poisoned environment" under "Forms of discrimination in rental housing."

Negative comments and/or conduct often arise out of the personal assumptions and prejudices of a housing provider about specific groups identified by *Code* grounds.

Example: A lone mother of Aboriginal ancestry is criticized by her landlord for the behaviour of her children and asked the whereabouts of their father. He states that her children would be "less disturbed" and "more controllable" if their father were present. He also periodically invades her privacy and made an offensive comment to her about her Aboriginal heritage. A British Columbia tribunal concluded that, in isolation, these comments might not have been sufficient to conclude that the claimant had been discriminated against on the grounds of marital status, family status and Aboriginal ancestry individually. However, when they were considered along with his other actions, the tribunal found that the landlord treated the claimant in a disdainful manner because of the combination of stereotypical views that he held about Aboriginal people and unmarried mothers.¹⁶⁴

Example: A landlord's behaviour toward an Afghan man and his family became negative and aggressive when they told him they were moving out because they bought a home in an affluent area. A tribunal found that the landlord's behaviour was motivated, in part, by his resentment about the man's improved economic status and his view that immigrants were not entitled to upward mobility.¹⁶⁵

Sometimes negative attitudes and stereotypes underlie a housing provider's unwanted interference in a tenant's affairs.

Example: A landlord repeatedly "checks up" on a woman who has recently spent time in a psychiatric hospital, despite the fact that she has told him that his behaviour is intrusive and unwelcome.

¹⁶⁴ *Raweater v. MacDonald*, (2004), *supra*, note 49.

¹⁶⁵ *Peroz v. Yaremko*, (2008), *supra*, note 40.

In all cases, the *Code* acts to protect tenants from being singled out, adversely affected, or otherwise subjected to negative comments and treatment based on *Code* grounds.

4.3.2 Provision of services

A violation of the *Code* may take place where it can be shown that a tenant is subjected to substandard accommodation-related services, or a denial of or delay in the provision of such services, and that the tenant's treatment is related to a *Code* ground.

Example: A young lone mother repeatedly asks her landlord to fix a leaky faucet and broken stove-top burner in her kitchen. He tells her he will get to it when he can. A couple of months go by without the landlord making the repairs. After talking to other tenants, the woman discovers that she and two other lone mothers have had their repair requests ignored, while others have had repair requests tended to promptly.

Example: An Aboriginal man hears his landlord making derogatory comments in the building's courtyard about renting to "drunken Indians." He approaches the landlord and asks that he not make these comments. The landlord "blows up," becomes aggressive, and says that he can say whatever he wants. The tenant tries to avoid him after this incident. However, when his mother falls ill, the man must return to his home province to care for her. Not knowing how long he will be away, he arranges to have a friend sublet his apartment. When he asks his landlord to approve the arrangement, the landlord refuses. Not being able to identify any other legitimate reason for the refusal, and knowing that other subletting arrangements have taken place in his building, the tenant wonders if he is being discriminated against.

4.3.3 Occupancy policies

A number of common rental policies and practices may create systemic barriers for people identified by the *Code*. Sometimes a rule or practice unintentionally singles out particular people and results in unequal treatment. This type of unintentional discrimination is called "constructive" or "adverse effect" discrimination and may create significant systemic barriers

A rule or practice can be justified if it is reasonable and genuine. However, it will only be allowed if a change or exception to the rule or practice would be too costly or would create a health or safety danger. If this cannot be shown, the rule or practice must be changed or an exception made so that there is no discrimination against a particular person or group of people.

Occupancy policies must be based on *bona fide* requirements. Some of the more common occupancy policies that may have an adverse impact on people and groups are discussed below.

4.3.3.1 Number of occupants per room or bedroom

Arbitrary rules on the number of occupants per room or bedroom may have an adverse impact on *Code*-protected groups, such as families with children, pregnant women, and/or “non-Western” or extended families. Landlords are not obliged to permit overcrowding of their units¹⁶⁶, but restrictions on the maximum number of occupants in rental accommodation must relate to legitimate health and safety requirements.

A human rights tribunal found a violation of the *Code* where a landlord denied a three bedroom apartment to a lone mother of three children because the “Canadian standard” was that such apartments should be rented to couples with two children.¹⁶⁷ In another case, a claimant was denied the opportunity to rent the apartment of her choice when the landlord discovered she was in the process of a divorce, and that her two daughters would be visiting her every Sunday. The landlord had a standing policy not to rent any of his four and a half room apartments to more than two occupants. The Quebec Court of Appeal found that this policy constituted “a very effective anti-child barrier,” since the policy had the effect of excluding all children who live with two parents, as well as all lone-parent families with more than one child. The opposite situation could also raise concerns. For example, a policy that a single person cannot rent an apartment with more than one bedroom may prevent a divorced parent from having their children visit and stay overnight.¹⁶⁸

Housing policies that set out a minimum number of bedrooms based upon the number and gender of the children may result in impeding the access of lone-parent families to housing.¹⁶⁹ Tribunals have also found against restricting apartment buildings to “families” where that designation excludes lone-parent families or common-law couples.¹⁷⁰

In a more recent case,¹⁷¹ a landlord had an informal policy of renting one-bedroom apartments only to couples or singles; two bedrooms to a couple with

¹⁶⁶ Municipal by-laws often set out space restrictions in rental units. For example, the City of Toronto’s *Municipal Code* states “the maximum number of persons living in a habitable room shall not exceed one person for each nine square metres of habitable room floor area.” See *City of Toronto Municipal Code*, Chapter 629-25(C).

¹⁶⁷ *Cunanan v. Boolean Developments Ltd.* (2003), *supra*, note 52.

¹⁶⁸ *Desroches v. Québec (Comm. des droits de la personne)* (1997), *supra*, note 52.

¹⁶⁹ *Fakhoury v. Las Brisas Ltd.*, *supra*, note 52. In this case, there was a policy whereby a four-person family, composed of one parent and three children, was required to rent at least a three-bedroom unit. The tribunal held that there was no reasonable justification for this unequal treatment.

¹⁷⁰ *Booker v. Floriri Village Investments Inc.*, *supra*, note 53.

¹⁷¹ *Cunanan v. Boolean Developments Limited*, *supra*, note 52. See also *Fakhoury v. Las Brisas Ltd.*, *supra*, note 52.

one child; and three bedrooms to couples with two children. Although he might rent a three bedroom apartment to a person or a couple with three children, he would only do so if the children were very young, and even so the family would have to move to a bigger unit fairly soon. The claimant in this case was a lone mother of three children, who was seeking (and was denied) a three-bedroom apartment. This policy was found to have a discriminatory effect based on family status. Concerns have also been raised about policies that restrict the sharing of rooms by opposite sex siblings, on the basis that such policies may reduce the ability of families with children to access affordable rental housing. These types of policies may have a significant impact on the social and economic rights of families, as they effectively deny access to the type of housing that is affordable for them.

4.3.3.2 “No pets” policies

The *Residential Tenancies Act* prevents landlords from implementing “no pets” policies.¹⁷² Such policies also raise human rights concerns. A rule that attempts to prohibit pets in rental housing would have an adverse effect on tenants who require “service animals” to help them in their mobility, or other disability-related needs, such as a blind person who uses a seeing eye dog.¹⁷³ A housing provider is required to accommodate the needs of a person with a disability who needs to use a service animal.¹⁷⁴

4.3.3.3 Guest policies

Some housing providers have “guest policies” aimed at regulating the temporary accommodation of guests in rent-geared-to-income units. It is acknowledged that, in some circumstances, landlords may need to determine whether someone is a guest versus an occupant. However, such policies must be reasonable and *bona fide* and landlords must be mindful of a tenant’s privacy and dignity. Such policies should not be used to target or penalize groups identified by *Code* grounds, such as lone mothers whose boyfriends or partners may spend the night, newcomers who have parents who visit for an extended period of time, a person with a disability who has regular overnight visitors for care, *etc.*

4.3.3.4 No transfer policies

Some landlords have policies prohibiting tenants from transferring between rental units in the same building. Such policies may have a negative impact on older people, for example, who, after becoming widowed, may wish to transfer to a smaller unit that they can better afford and maintain. Such policies may also have an adverse impact on families with children, because their rental housing needs change as their families grow, but they must leave their building to meet their need for additional space. In one case, an Ontario human rights tribunal found

¹⁷² Section 14 of the *Residential Tenancies Act*, 2006, *supra*, note 22.

¹⁷³ For a related case, see *Fitzhenry v. Schememauer*, (2008), C.H.R.R. Doc. 08-500 (Alta. H.R.P.).

¹⁷⁴ See *Di Marco v. Fabcic* (2003), *supra*, note 63.

that “no transfer policies” have an adverse impact on families with children, and violate the *Code*.¹⁷⁵

Where it would not amount to an undue hardship, housing providers should facilitate transfers between units when the need for the transfer relates to a *Code* ground.

4.3.3.5 Access to recreational facilities and common areas

Age based restrictions on access to recreational facilities and common areas may be found to discriminate based on *Code* grounds including family status. For example, rules banning use of certain areas or facilities by children, or restricting their use as compared to other occupants have a negative effect on families.¹⁷⁶

Example: A housing co-op restricts use of its swimming pool and recreational facilities by people under age 18 to the hours between 3:00 p.m. and 5:00 p.m. For families who do not have an adult at home during working hours, this essentially means that they cannot use the pool or recreational facilities with their children. This may constitute grounds for a human rights complaint.

There may be legitimate health and safety concerns about children using certain facilities. Where a rule restricts or prohibits access to facilities or areas in a way that affects family use, the burden will be on the landlord to show that the rule is a *bona fide* requirement, and that a more inclusive rule could not be implemented without undue hardship.

VI. The duty to accommodate

Under the *Code*, housing providers have a duty to accommodate the *Code*-related needs of tenants, to make sure that the housing they supply is designed to include people identified by *Code* grounds, and to take steps to remove any barriers that may exist, unless to do so would cause undue hardship.

“Housing providers” includes landlords and other responsible parties, such as governments or agencies that provide housing-related services. The obligation of government to meet its own duty to accommodate does not relieve housing providers and others from fulfilling their respective duties under the *Code*. For example, in constructing new social housing buildings, governments have a responsibility to consider inclusive design requirements; where accommodation

¹⁷⁵ *Ward v. Godina* (1994), *supra*, note 54.

¹⁷⁶ In *Leonis v. Metropolitan Toronto Condominium Corp. No. 741* (1998), 33 C.H.R.R. D/479 at para. 62 (Ont. Bd. Inq.): rules banning people under 16 from accessing certain facilities, and severely restricting the use of others were found to discriminate based on family status. For a related case, see *Dellostritto v. York Condominium Corporation No. 688*, 2009 HRT0 221 (H.R.T.O.).

needs continue to exist, however, housing providers have a duty to accommodate these remaining needs.

1. The legal test

Housing providers are only required to implement accommodations that would not amount to undue hardship. The test for undue hardship is set out fully in the OHRC's *Policy and Guidelines on Disability and the Duty to Accommodate*. The same standard applies to all grounds of the *Code*.

The *Code* prescribes three considerations when assessing whether an accommodation would cause undue hardship. These are:

- cost
- outside sources of funding, if any
- health and safety requirements, if any.

No other considerations, other than those that can be brought into these three, can be properly considered. For example, a housing provider is not justified in denying accommodation to a tenant based on the discriminatory views of other tenants.

Example: A housing provider takes steps to child-proof the apartment of a tenant who becomes pregnant, even though several of the building's older tenants would prefer that the building remain "adults only."

The onus of proving that an accommodation would cause undue hardship lies on the housing provider. The evidence needed to show undue hardship must be real, direct, objective, and in the case of costs, quantifiable.

In most cases, accommodations for *Code*-identified people will not require significant expenditures, and will often have the potential to benefit many other tenants not just in the present, but also in the future.

Example: Installing a ramp for a tenant who uses a wheelchair has the potential to make the premises more accessible for other people with mobility disabilities, older people, and families with children in strollers.

In other cases, accommodation may simply involve making policies, rules and requirements more flexible. This may involve some administrative inconvenience, but inconvenience by itself is not a factor for assessing undue hardship. Section 11 of the *Code*, combined with section 9, operates to prohibit discrimination that results from requirements, qualifications, or factors that may appear neutral but that have an adverse effect on people identified by *Code* grounds. Section 11 allows a housing provider to show that the requirement, qualification or factor is reasonable

and *bona fide* by showing that the needs of the tenant cannot be accommodated without undue hardship.

The Supreme Court of Canada has set out a framework for examining whether the duty to accommodate has been met.¹⁷⁷ If *prima facie* discrimination is found to exist, a housing provider must establish on a balance of probabilities that the standard, factor, requirement or rule

1. was adopted for a purpose or goal that is rationally connected to the function being performed
2. was adopted in good faith, in the belief that it is necessary for the fulfilment of the purpose or goal, and
3. is reasonably necessary to accomplish its purpose or goal, in the sense that it is impossible to accommodate the claimant without undue hardship.¹⁷⁸

As a result of this test, the rule or standard itself must be inclusive and must accommodate individual differences up to the point of undue hardship rather than maintaining discriminatory standards and then providing accommodation for people who cannot meet them. This makes sure that each person is assessed according to their own personal abilities instead of being judged against presumed group characteristics.¹⁷⁹

The ultimate issue is whether the housing provider has shown that they have provided accommodation up to the point of undue hardship. In this analysis, the procedure to determine what changes are needed is as important as the substantive content of the accommodation.¹⁸⁰

The following non-exhaustive factors should be considered during the analysis:¹⁸¹

- whether the housing provider investigated alternative approaches that do not have a discriminatory effect
- reasons why viable alternatives were not put in place
- ability to have differing standards that reflect group or individual differences and capabilities
- whether the housing provider can meet their legitimate objectives in a less discriminatory way

¹⁷⁷ *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* ["Meiorin"] [1999] 3 S.C.R. 3 at para. 54.

¹⁷⁸ See *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000*, (2008) SCC 43 for the Supreme Court of Canada's recent comments on what the third part of this test means, in a practical sense, in the context of a disability accommodation in the workplace.

¹⁷⁹ *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 at para. 20.

¹⁸⁰ *Meiorin*, *supra*, note 177 at para. 66.

¹⁸¹ *Meiorin*, *ibid*, at para. 65.

- whether the standard is properly designed to ensure the desired qualification is met without placing undue burden on those to whom it applies
- whether other parties who are obliged to assist in the search for accommodation have fulfilled their roles.

2. Principles of accommodation

The duty to accommodate is comprised of three principles:

- 1) respect for dignity
- 2) individualization
- 3) integration and full participation.

2.1 Respect for dignity

Dignity will include consideration of how accommodation is provided and the person's own participation in the process. Housing providers should consider different ways of accommodating people identified by *Code* grounds along a continuum, ranging from those ways that most respect privacy, autonomy, integration and other human rights values, to those that least respect those values.

2.2 Individualization

There is no set formula for accommodating people identified by *Code* grounds. Each person's needs are unique and must be considered afresh when an accommodation request is made. While some accommodations may meet one person's needs and not another's, housing providers will likely find that many of the identified changes that they implement will benefit large numbers of people.

2.3 Integration and full participation

Accommodations should be developed and implemented with a view to maximizing a person's integration and full participation. Achieving integration and full participation requires barrier-free and inclusive design and removing existing barriers. Where barriers continue to exist because it is impossible to remove them at a given point in time, then accommodations should be provided to the extent possible, short of undue hardship.

Example: In response to concerns from an older tenant with a hearing loss, a landlord installs, as part of the building's fire safety system, a visual alerting component with a flashing light. This feature allows the tenant, and all other tenants with hearing loss, to live their lives independently and not have to rely on their neighbours in the event of an emergency.

3. Inclusive design

The Supreme Court of Canada has made it clear that society must be designed to include all people.¹⁸² It is no longer acceptable to structure systems in a way that ignores needs related to *Code* grounds. Instead, systems should be designed in a way that does not create physical, attitudinal or systemic barriers for people identified by *Code* grounds.

Housing providers, and other responsible parties, including government, should use the principles of universal design when they are developing and constructing the physical features of housing, and when they are designing housing policies, programs, and procedures. New barriers should never be created when building new facilities or when renovating old ones. Instead, design plans should incorporate current accessibility standards such as the Canadian Standards Association's Barrier-Free Design¹⁸³ and the Principles of Universal Design.¹⁸⁴ This type of planning makes premises attractive to a larger pool of prospective tenants and decreases the need to remove barriers and provide accommodations at a later date.

Example: As part of a renovation initiative to modernize her rental housing complex, a housing provider decides to sound-proof five of her units. This example of forward-thinking inclusive design will allow her to provide comfortable units to older tenants who use canes or walkers, and families with small children. It will also stave off potential complaints from other tenants about excessive noise.

Example: A co-op housing program ensures that design plans for a new housing complex include units of varying sizes, ranging from bachelor units to four-bedroom apartments. This design choice is meant to make its premises accessible to a diverse range of tenants, from people who have mental illnesses who may prefer to live alone, to new Canadians or extended families who may have multiple generations living under one roof.

¹⁸² In *Meoirin*, *ibid*, at para. 68, the Supreme Court said:

Employers designing workplace standards owe an obligation to be aware of both the differences between individuals and differences that characterize groups of individuals. They must build conceptions of equality into workplace standards. By enacting human rights statutes and providing that they are applicable to the workplace, the legislatures have determined that the standards governing the performance of work should be designed to reflect all members of society, in so far as this is reasonably possible.

¹⁸³ Document available at:

www.csa-intl.org/onlinestore/GetCatalogItemDetails.asp?mat=2004958&Pa

¹⁸⁴ See www.design.ncsu.edu/cud/about_ud/udprinciples.htm

The Ontario *Building Code Act*¹⁸⁵ governs the construction of new buildings and the renovation and maintenance of existing buildings. The OHRC has expressed concerns that the accessibility requirements set out in the *Building Code* do not always result in equal access to people with disabilities as required by the *Human Rights Code*.¹⁸⁶ Many housing providers continue to rely only on the requirements of the Ontario *Building Code* without considering their obligations under the *Human Rights Code*. However, the *Human Rights Code* prevails over the *Building Code* and housing-providers may be vulnerable to a human rights claim if their premises fall short of the requirements of the *Human Rights Code*. Relying on relevant building codes has been clearly rejected as a defence to a complaint of discrimination under the *Human Rights Code*.¹⁸⁷

The *Accessibility for Ontarians with Disabilities Act*¹⁸⁸ provides a mechanism for developing, implementing and enforcing accessibility standards to provide full accessibility for Ontarians with disabilities in goods, services, facilities, accommodation, employment, buildings, structures and premises by January 1, 2025. Under the AODA, housing providers will be required to comply with accessibility standards for people with disabilities. Accessibility Standards for Customer Service have already been passed into Regulation and begin to apply to designated public sector organizations on January 1, 2010 and for other providers of goods and services on January 1, 2012. Accessibility standards for communications, transit, employment, and the built environment have been proposed, but have not yet passed into regulation as of the date of this *Policy*. If accessibility standards under the AODA fall short of the requirements in the *Code*, the requirements of the *Code* will prevail.

Inclusive design is not just a principle of human rights - it also makes good sense. Housing providers who do not consider the *Code*-related needs of people are likely to experience higher levels of vacancy, and turnover among tenants. Flexible and inclusive practices can be a considerable draw in attracting and retaining tenants. Similarly, housing providers who do not take into account the *Code*-related needs of people and families may alienate a significant potential target market.

Along with the expectation to prevent barriers at the design stage through inclusive design, organizations should be aware of systemic barriers in systems and structures that already exist. They should actively identify and seek to remove these existing barriers. Where barriers have been identified,

¹⁸⁵ Ontario *Building Code Act*, 1992, S.O. 1992, c. 23. See also O.Reg. 350/06 under the *Building Code Act*.

¹⁸⁶ In March 2002, the OHRC provided extensive input to the Ministry of Municipal Affairs and Housing on the barrier-free access requirements of the *Building Code*. The OHRC's submission outlined ways the *Building Code* can incorporate human rights principles, and emphasized the need to achieve greater harmonization between the two *Codes*. The OHRC's full submission to the *Building Code* consultation is available on the OHRC Website at www.ohrc.on.ca

¹⁸⁷ See, for example, *Quesnel v. London Educational Health Centre* (1995), *supra*, note 18.

¹⁸⁸ *Accessibility for Ontarians with Disabilities Act*, 2005, S.O. 2005, c. 11.

organizations must remove the barriers rather than making “one-off” accommodations, unless to do so would cause undue hardship.

Administrative tribunals and other decision-makers should also take steps to make sure that their facilities, procedures and requirements are designed inclusively. For example, decision-makers might consider making information about their processes available in multiple languages to ensure equal access to people whose first language is not English. Interpretation services for adjudicative proceedings and other more informal procedures should also be available.

4. Appropriate accommodation

Where an accommodation need related to *Code* grounds has been identified, a housing provider must identify and implement the most appropriate accommodation, short of undue hardship. Determination of what is and is not an appropriate accommodation is separate from an undue hardship analysis.

An accommodation will be considered appropriate if it will result in equal opportunity to attain the same level of performance or to enjoy the same level of benefits and privileges experienced by others, or if it is proposed or adopted to achieve equal opportunity and meets the person's *Code*-related needs.

Example: A housing co-op sends out its monthly newsletter and other communications in both electronic and print versions so that it is accessible to members who have visual disabilities and use assistive devices.

The most appropriate accommodation will be the one that most promotes inclusion and full participation, respects dignity, meets individual needs, and effectively addresses any systemic issues.

A housing provider that has not taken steps to investigate and implement policies and practices that support and include all people will have a more difficult time justifying a failure to accommodate individual requests for flexibility.

Where the most appropriate accommodation would cause undue hardship, a housing provider should consider next-best, phased-in, or interim accommodations.

Example: Within a short time, a landlord receives several requests for *Code*-related accommodations that, when combined, would require significant capital outlay. Because the total cost of the changes would amount to a financial undue hardship that would jeopardize the organization's viability, the landlord develops a timeline for completing

the work required. The timeline projects that all of the accommodations would be completed within the calendar year. After the landlord completes the work, he creates a reserve fund and makes regular monthly deposits. The sole purpose of the fund is to cover the cost of *Code*-related accommodation expenses that may arise in the future.

Appropriate accommodation should be provided promptly. Housing providers may contravene the *Code* if they do not provide accommodations in a timely way.¹⁸⁹

A housing provider need not provide more than a tenant requires to meet the actual identified needs related to grounds in the *Code*. For example, if a tenant with a physical disability cannot shovel snow and cut grass as part of his co-op duties, it would be an appropriate accommodation to relieve him of these specific duties. It would not be necessary, however, for the co-op to relieve him of *all* co-op duties if the tenant is able to complete other tasks, such as office paperwork.

Not all of a tenant's disability-related accommodation needs will necessarily fall under the direct responsibility of the housing provider. Some tenants might rely on attendant care or other support services, personal assistive devices, mobility aids, or public para-transit services. In these situations, a housing provider may have a duty to help facilitate a tenant's access to and use of such accommodations, where appropriate.

5. Forms of accommodation

There are various ways a housing provider may be called upon to accommodate a person's *Code*-related needs. People with disabilities, older people, families and others may have specific requirements that necessitate accommodation in the housing context.

Example: To make his high-rise apartment building accessible to families with children, a building manager installs safety devices on all the windows and balconies.

Inaccessible buildings and non-inclusive housing design are among the obstacles people with disabilities often face. Accommodations may include physical modifications such as installing ramps and elevators, visual fire alarms and doorbells for the hearing impaired, different door handles, lower counters, *etc.*

¹⁸⁹ *Di Marco v. Fabcic* (2003), *supra*, note 63.

Example: A tenant in a rental unit develops arthritis. She requests that doorknobs in her suite and to common areas such as the laundry room be changed from round knobs that are difficult to grip to handles that are suitable for people with arthritis. The landlord willingly makes this change as it is not an undue hardship to do so. It will also benefit other tenants in the building who are aging.

The duty to accommodate may require waiving or changing a rule (for example, allowing guide dogs or other service animals in a building with a “no pets” policy.¹⁹⁰) It may also require flexibility when enforcing rules and requirements.¹⁹¹ In social housing programs, for example, tenants must promptly report changes in income and family size. Where a tenant is unable to meet a reporting deadline for a *Code*-related reason, the duty to accommodate may require a housing provider to extend the timeline.

Example: Due to unforeseen symptoms arising from a change in medication, a tenant with a mental disability fails to meet the deadline for filing information on a change in income. Before this incident, the tenant had complied fully with the rules and requirements of his social housing program and had been very proud of his demonstrated ability to live independently. The social housing provider, in this instance, uses his discretion to extend the deadline, thus avoiding much embarrassment for the tenant and a possible revocation of the tenant’s subsidy.

Housing providers may need to inquire further into a prospective tenant’s inability to meet a specific rental requirement, and, where appropriate, provide alternative ways for a tenant to satisfy the requirement. New Canadians, women who are leaving an abusive relationship, and people who have spent time in public institutions may not have a recent rental history, for example. In such circumstances, the lack of a rental history should not count against the applicant. An appropriate accommodation may be for the landlord to allow the tenant to establish their reliability in other ways. At all times, a housing provider’s inquiries should be consistent with the *Code*’s housing regulation and with *Code* objectives, that is, to prevent discrimination and unequal treatment, and to respect a tenant’s dignity and privacy.

Often, it is neither difficult nor a major imposition for a housing provider to provide needed accommodations. In one case, a tenant alleged discrimination because of disability due to the landlord’s lack of designated “disabled” parking. Under a settlement, the landlord agreed to provide two designated parking spots for

¹⁹⁰ See *Di Marco v. Fabic* (2003), *ibid*.

¹⁹¹ See *Walmer Developments v. Wolch* (2003), 67 O.R. (3d) 246 (Ontario Superior Court of Justice).

tenants, one designated spot for visitors and further designated spots for tenants as needed so that each tenant entitled to a spot would have one. The landlord also agreed to maintain the parking spots by clearing snow, sanding or salting the parking spots and the route to the door of the building.¹⁹²

6. Balancing the duty to accommodate with the needs of other tenants

There may be situations where the conduct of one tenant causes tension and affects the enjoyment of the living environment by others. A housing provider, when faced with such a situation, may feel challenged to meet the needs of an individual tenant or family while also preserving the harmony of the larger housing community. Situations where a tenant's conduct is disruptive, or perceived to be disruptive, may be linked to a *Code*-protected ground. For example, a family with small children may be perceived by a neighbour to be too noisy. Or, the behaviour in question may be linked to the ground of disability. Certain forms of mental illness, for example, may lead to disruptive behaviour. Disruptive behaviour may also stem from a tenant reacting to being harassed or treated differently based on a *Code* ground, such as race or sexual orientation.

Under the *Code*, a housing provider has a duty to consider such factors and take prompt and appropriate action, to the extent possible, including exploring and implementing any interim or long-term accommodation solutions that might help address the situation. At the same time, housing providers are also responsible for managing the legitimate concerns of other tenants, while not tolerating any discriminatory views and preferences. Tenants may be asked to cooperate and help facilitate situations, to the best of their ability, including aiding in the provision of accommodation to themselves and, where appropriate, to their fellow tenants.

The duty to accommodate under the *Code* exists for needs that are known. Housing providers and others responsible for accommodation are not, as a rule, expected to accommodate *Code*-related needs of which they are unaware. However, some people may be unable to disclose or communicate their needs, particularly in a situation that involves some forms of mental illness. While most people with a mental illness will be capable of identifying their own needs and fully taking part in the accommodation process, some people will have difficulty acknowledging a mental illness, or will be unable to do so due to the nature of their disability.

¹⁹² *J.R. v. S.W.M.I.*, (August 22, 1994), No. 642 (Ont. Bd. Inq.) [unreported].

Before taking any kind of punitive action, a housing provider should try to offer assistance and accommodation, where appropriate, to a person who is clearly unwell or perceived to have a disability. Even if a housing provider or landlord has not been formally advised of a mental disability, the perception of such a disability will engage the protection of the *Code*.

Several decisions stand for the principle that decision-makers must consider a tenant's *Code*-related circumstances and needs and whether that person could be accommodated before considering or ordering an eviction.¹⁹³ *General Comment 7: The Right to Adequate Housing: Forced Evictions* by the United Nations Committee on Economic, Social and Cultural Rights also states that forced evictions are incompatible with the *Covenant*, and that evictions should not result in a person ending up homeless.¹⁹⁴ A housing provider has a duty to assess each tenant individually before imposing measures that may affect the tenant negatively, such as threatening eviction, starting eviction proceedings, revoking subsidies, etc.

Before considering evicting or sanctioning a tenant for disruptive behaviour, a housing provider should try to determine whether the conduct in question is related to a *Code* ground, and whether any mitigating circumstances (for example, harassment) are present. If the behaviour is connected to a *Code* ground (for example, a mental health disability), then the housing provider should consider:

- accommodation-related medical information supplied by the tenant, or the tenant's support worker or representative
- observations of the tenant
- whether the accommodations provided were appropriate
- whether the tenant's disability impaired their ability to understand the impact and consequences of their conduct
- whether the tenant's disability impaired their ability to control the conduct in question
- whether the tenant has undetected *Code*-related needs that require accommodation.

Where a tenant's conduct is objectively disruptive, housing providers and landlords must consider a range of strategies to address such behaviour.

¹⁹³ See, for example, *Walmer Developments v. Wolch* (2003), *supra*, note 191; *Ottawa Housing Corporation and Mongeon*, [2002] O.R.H.T.D. No. 36 (Ontario Rental Housing Tribunal); and, *Longo Properties Limited v. Patricia Clarke*, [2002] TSL-35686-SA (Ontario Rental Housing Tribunal). The Supreme Court of Canada has made it clear that administrative decision-makers are required to consider and apply the *Code*: see *Tranchemontagne v. Ontario (Dir. Disability Support Program)* [2006] 1 S.C.R. 513.

¹⁹⁴ See United Nations, *General Comment 7: The Right to Adequate Housing: Forced Evictions*, available on-line at: [www.unhcr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+Comment+7.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/CESCR+General+Comment+7.En?OpenDocument) (date accessed: May 13, 2009).

Strategies will include assessing, and where necessary, reassessing and modifying any accommodations that are already in place for the tenant, and/or providing or arranging for additional supports.

Example: The erratic behaviour of a woman with schizophrenia had the potential to endanger the safety of other tenants in her building. For example, on several occasions, she screamed loudly in the halls and other common areas, and once she left food on her stove unattended. By working with the woman and members of her family, a housing provider developed a crisis response plan, which included the woman's brother and mother being available by phone and being willing to intervene when the tenant's behaviour was disruptive.¹⁹⁵

Tension and conflict between tenants can often be minimized by putting appropriate accommodations in place.

Example: A tenant using a walker made thumping noises as he walked around his apartment, causing considerable disruption to the tenants who lived beneath him. The landlord installed carpeting in the man's apartment, thus minimizing the noise for other tenants.

It may be necessary to tolerate a certain amount of disruptive behaviour in the interim, while more ideal accommodations or solutions are being worked out. However, an accommodation that would call for permanent tolerance of significantly disruptive behaviour may be neither appropriate nor required.

Being a tenant comes with a number of responsibilities, including: paying the rent on time, keeping your unit clean, avoiding damage to the property, respecting health, fire, safety and noise regulations, not disturbing the peace and well-being of others, and generally being a good neighbour.

The extent of a housing provider's obligation to accommodate a tenant's behaviour related to a *Code* ground may be limited if ultimately the tenant is unable to substantially fulfill the responsibilities of being a good tenant, particularly where there is a real risk to the health and safety of other tenants, the landlord, *etc.* See "Health and Safety Concerns" in the "Undue Hardship Standard" section of the *Policy* for more detailed information.

Once a landlord has provided appropriate accommodation to a tenant, the tenant can then be expected to live in the housing environment without causing unreasonable disruption to the greater harmony of the housing community. Where a tenant's conduct continues to interfere significantly with the tranquility of the larger housing environment, despite appropriate accommodations being in place and despite diligent and active participation on the part of the housing provider to engage in the accommodation process, the housing provider may

¹⁹⁵ See *Walmer Developments v. Wolch* (2003), *supra*, note 191.

have no other choice than to end the tenancy. It is important, however, that housing providers not rush to such a conclusion, and continue, where possible, to explore possible solutions where they exist.

While housing providers and tenants have a responsibility to come together to develop creative solutions to help address disruptive behaviour, government and other social service agencies may offer programs and services that can also help tenants live independently as good neighbours.¹⁹⁶ Housing providers may still have a role to remove any existing barriers, design systems and practices inclusively, and otherwise help facilitate these external forms of support.

6.1 Smoking

Smoking can be a major source of tension when balancing the rights of tenants.

Social policy already helps promote the well-being of tenants in many ways including current fire, health and building code standards and inspections.¹⁹⁷ Public health laws such as the *Smoke-Free Ontario Act*¹⁹⁸, as well as public awareness initiatives on curbing the harmful affects of cigarette smoke have advanced considerably in the last decade or so in other areas, particularly in the workplace, restaurants, bars and hotel services. Improved standards for elements that affect indoor air quality for occupants, especially people with environmental sensitivities, have been set out in the proposed Accessible Built Environment Standard under the *Accessibility for Ontarians with Disabilities Act*.¹⁹⁹ The proposed Standard identifies a number of building contaminants including gases from materials used in construction and finishes, poor ventilation, cleaning chemicals, scented personal care products, and tobacco smoke. Advocacy organizations are also seeking further progressive change on such issues.²⁰⁰

It is clear that cigarette smoke can have a detrimental effect on the health and well-being of others, particularly people with respiratory and chemical sensitivity related disabilities, pregnant women and children. Landlords may be asked to

¹⁹⁶ As this *Policy* has noted, it is the OHRC's view that governments have a primary role to play in ensuring that appropriate alternative housing is available to meet the needs of individuals who require more support than the average rental housing provider can reasonably provide.

¹⁹⁷ While Section 5.4. of *Ontario Building Code Regulation 350/06* addresses air leakage between building components separating interior from exterior space and environmentally dissimilar interior spaces giving consideration to the health or safety of building users, it does not appear to address air leakage between apartment units.

¹⁹⁸ *Smoke-Free Ontario Act*, S.O. 1994, c. 10.

¹⁹⁹ For the proposed Accessible Built Environment Standard, see:

www.cfcs.gov.on.ca/mcss/english/pillars/accessibilityOntario/accesson/business/environment/built_standard/air.htm

²⁰⁰ The Heart and Stroke Foundation of B.C. & Yukon, for example, commissioned a legal opinion to determine the legality, process and challenges for creating smoke-free multi-unit dwellings in compliance with the *British Columbia Residential Tenancy Act*. See: smokefreehousingbc.ca/tenants/legal-opinion.html.

provide accommodation to tenants whose disabilities are worsened by exposure to second-hand smoke.

At the same time, the medical community recognizes that smoking is an addiction detrimental to one's health. Different forms of addictions, such as alcohol and drug dependences, have been found to be a disability within the meaning of the *Code*. At this time, the case law is divided on whether addiction to nicotine is a disability.²⁰¹

Smoking has also been shown to be related to other disabling conditions such as emphysema and cancer. Research shows that people with mental illness are about twice as likely to smoke as other people.²⁰² Similarly, the OHRC has heard that people with physical disabilities, such as multiple sclerosis or chronic back pain, may smoke cigarettes or may be prescribed medicinal marijuana to control symptoms.²⁰³

A housing provider has a duty to explore accommodation requests from tenants with any form of disability. Tenants may also be asked to cooperate and help facilitate the provision of accommodation for themselves, and where appropriate, for their fellow tenants as well.

However, given the inherent risks associated with smoking, a housing provider may have little or no obligation to accommodate a tenant's need to smoke when to do so would amount to undue hardship, for example, by negatively affecting the health and safety of other tenants. For more information, see the "Undue Hardship Standard" section of this *Policy*.

²⁰¹ Heavily addicted smokers have been found to have a disability by an arbitrator in the labour relations context: see *Cominco Ltd. v. United Steelworkers of America, Local 9705*, [2000] B.C.C.A.A. No. 62, where a company policy, that affected workers addicted to nicotine by subjecting them to symptoms of withdrawal, was found to constitute discrimination based on disability. However, addiction to nicotine was found not to be a disability within the meaning of the *Charter of Rights and Freedoms* in a case challenging a smoking ban at a detention centre: see *McNeill v. Ontario Ministry of the Solicitor General and Correctional Services*, [1998] O.J. No. 2288 (Ont. Ct. Gen. Div.). More recently, in *Club Pro Adult Entertainment Inc. v. Ontario*, [2006] O.J. No. 5027 (S.C.J.), the court acknowledged the possibility that it might reach the conclusion that smoking is a disability within the meaning of the *Charter* if the court had before it the type of evidence that was before the arbitrator in *Cominco*. The Court of Appeal did not comment on this observation; see *Club Pro Adult Entertainment Inc. v. Ontario*, [2008] O.J. No. 777 (C.A.). In a recent interim decision, the British Columbia Human Rights Tribunal agreed to hear a case alleging discrimination against a smoker based on disability: *Stevenson v. City of Kelowna, B.C.*, (2009), 2009 B.C.H.R.T. 50.

²⁰² K. Klasser, MD *et al.*, "Smoking and Mental Illness: A Population-Based Prevalence Study" (2000) 284 No. 20 *The Journal of the American Medical Association* 2608 (Reprinted).

²⁰³ Vancouver Sun, *Woman claims right to smoke-free housing* (February 5, 2008).

7. Roles and responsibilities

Accommodation is a multi-party process. Everyone in the accommodation process should work together cooperatively and respectfully to develop and implement appropriate accommodation solutions.

The person seeking accommodation is responsible for telling the accommodation provider (landlord, housing provider, decision-maker, *etc.*) that they have *Code*-related needs that require accommodation.

Before asking the housing provider, landlord, *etc.* for accommodation, people may be expected to make reasonable efforts to first avail themselves of outside resources available to them, such as funding through government programs. However, such resources should most appropriately meet the accommodation needs of the person. Accommodation seekers are often in the best position to identify and evaluate such outside resources. At the same time, it is a best practice for landlords, housing providers, decision-makers, *etc.* to help people to find information on such resources; for example, by keeping information in a common location, or posting information on a website.

Accommodation providers should accept requests in good faith, unless there are objective reasons not to do so. Where necessary, landlords and other accommodation providers may make reasonable requests for information that is necessary to clarify the nature and extent of the accommodation need.

Example: A woman applying for tenancy in a housing complex asks the landlord if he will accept a guarantor in lieu of a credit history. She explains that she is leaving an abusive relationship and that her spouse controlled all of the couple's finances during the years they were together. She states that she is staying at a women's shelter and is in the process of setting up a bank account, ordering cheques, getting a credit card, *etc.* The landlord asks for a letter from the women's shelter to verify the woman's explanation. Upon being satisfied that the explanation is legitimate, the landlord accommodates the woman's needs.

The accommodation provider may also ask a tenant about any available outside resources that the person has enquired into.

As information related to *Code* grounds may be highly personal, landlords and other accommodation providers should take steps to make sure that information related to accommodation requests is kept confidential, and shared only with people who need it.

Adjudicative bodies and other decision-makers are responsible for making their proceedings accessible to people identified by *Code* grounds. Where an accommodation need is identified, these bodies have a duty to accommodate

that need to the point of undue hardship. For example, where a person is not able to make submissions in writing due to a disability, a decision-maker should provide an alternative way for them to provide the required information. Also, all documents should be available in alternate formats. Where a person's failure to comply with required procedures is due to a *Code*-identified ground, decision-makers have a duty to accommodate related needs.

Example: A woman fails to show up at an eviction hearing before an adjudicative tribunal. Rather than proceed with the eviction in her absence, the tribunal adjourns. In follow-up communication, the woman reveals that she has a mental illness that she is generally able to manage quite well, but that on the date of the hearing she had a crisis that prevented her from attending. The tribunal agrees to re-schedule the hearing and allow the woman to bring a representative with her for support.

Accommodation providers should act in a timely way, take an active role in seeking solutions, and bear any appropriate costs associated with the accommodation. Accommodation seekers should cooperate in the accommodation process, provide relevant information, and meet any agreed-upon standards once accommodation has been provided.

Before initiating the revocation of a subsidy, eviction proceedings, or any other measure that may affect the tenant in a negative way, a housing provider is expected to consider whether a *Code*-related need exists, and whether that need has been accommodated appropriately.

Example: A tenant fails to make his rent payment on time. Before contemplating consequences, his landlord inquires into the tenant's circumstances and discovers that he has been bedridden in the hospital due to a workplace accident. He allows the tenant to pay his rent late as it is not an undue hardship for him to do so.

The *accommodation seeker* has a responsibility to:

- advise the accommodation provider of the need for accommodation related to a *Code* ground
- make their needs known to the best of their ability, so that the accommodation provider can make the requested accommodation
- answer questions or provide information on relevant restrictions or limitations, including accommodation-related information from health care professionals, where appropriate and as needed
- take part in discussions on possible accommodation solutions
- co-operate with any experts whose assistance is required
- fulfill agreed-upon responsibilities
- work with the accommodation provider on an ongoing basis to manage the accommodation process

- advise the accommodation provider of difficulties they may be experiencing with arranged accommodations.

As a party to the accommodation process, the *accommodation provider* (landlord, housing provider, decision-maker, *etc.*) has a responsibility to:

- accept an accommodation seeker's request for accommodation in good faith (even when the request does not use any specific formal language), unless there are legitimate reasons for acting otherwise
- take an active role in making sure that alternative approaches and possible solutions are investigated
- get expert opinion or advice where needed, and, in the case of a larger housing provider, bear the costs of any required information or assessment, up to the point of undue hardship
- maximize an accommodation seeker's right to privacy and confidentiality, including only sharing information with people directly involved in the accommodation process
- limit requests for information to those reasonably related to the nature of the need or limitation, and only to facilitate access to housing
- deal with accommodation requests in a timely way
- take immediate remedial action in situations where harassment is or may be taking place.

In providing housing, a *housing provider* has a responsibility to:

- review the accessibility of the living environment as a whole, including all recreational services
- design and develop new or revised facilities, services, policies, processes, rules and requirements inclusively, with the needs of people identified by the *Code* in mind
- make sure that accommodation costs are spread as widely as possible throughout the operation, if required and where appropriate.

Housing providers, tribunals, government and others responsible for making housing decisions can plan to meet accommodation needs by proactively putting in place policies and procedures and informing themselves about the primacy of the *Code* and the duty to accommodate to the point of undue hardship.²⁰⁴

²⁰⁴ The OHRC's publication, *Guidelines on Developing Human Rights Policies and Procedures*, provides guidance on how organizations, including housing providers, can prevent and address human rights issues. It states that a complete human rights strategy with these goals should include a barrier prevention, review and removal plan, anti-harassment and anti-discrimination policies, an internal complaints procedure, an accommodation policy and procedure and an education and training program. Please see Ontario Human Rights Commission, *Guidelines on Developing Human Rights Policies and Procedures*, (March 2008): www.ohrc.on.ca/en/resources/Policies/gdpp/view

As mentioned previously, the duty to accommodate *Code*-related needs exists for needs that are known. Housing providers and others responsible for providing accommodation are not, as a rule, expected to accommodate needs they are unaware of. However, some tenants and others seeking housing-related accommodation may be unable to identify or communicate their needs because of the nature of their disability. There may be cases where housing providers should try to help the accommodation seekers, by offering assistance and accommodation. Once *Code*-related needs are known, the legal onus shifts to those with the duty to accommodate.

A housing provider is also responsible for facilitating accommodations provided by others, where appropriate. As mentioned previously, some tenants may rely on third parties for attendant care or other support services, personal assistive devices, mobility aids, public para-transit services, *etc.*

8. Undue hardship standard

Under the *Code*, every tenant who is identified by a *Code* ground is entitled to accommodation up to the point of undue hardship. The *Code* sets out only three factors that may be considered when assessing whether an accommodation would cause undue hardship: cost; outside sources of funding, if any; and health and safety requirements, if any.

It is the OHRC's longstanding position that only factors that can be brought within these three factors will be considered.²⁰⁵

Example: A housing provider tells a tenant who has just announced her pregnancy that she will have to find another place to live once she has the baby as the majority of his tenants are older and some have expressed concern about the baby compromising the peace and quiet of the building. Unless the housing provider can show that allowing the woman to maintain her tenancy will cause undue hardship based on one of the three factors set out above, the preferences and opinions of other tenants will not, by themselves, be enough to establish undue hardship.

²⁰⁵ The broad and purposive interpretation of the *Code* and human rights generally means that rights must be construed liberally and defences to those rights should be construed narrowly. There are a number of cases that confirm this approach to the interpretation of human rights statutes. The Supreme Court has summarized these cases and outlined the relevant principles of human rights interpretation: see *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, 2000 SCC 27. Moreover, as per section 47(2), the *Code* has primacy over other legislation.

To claim the undue hardship defence, the party responsible for accommodation has the onus of proof. The accommodation seeker does not have to prove that the accommodation can be accomplished without undue hardship. As mentioned previously, the nature of the evidence required to prove undue hardship must be objective, real, direct, and, in the case of cost, quantifiable. The accommodation provider must provide facts, figures and scientific data or opinion to support a claim that the proposed accommodation in fact causes undue hardship. A mere statement, without supporting evidence, that the cost or risk is “too high” based on impressionistic views or stereotypes will not be sufficient.

Objective evidence includes, but is not limited to:

- 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 identified by *Code* grounds.

8.1 Elements of the undue hardship defence

8.1.1 Costs

The costs standard is a high one. Where possible, an accommodation provider may take steps to recover the costs of accommodation. This can be done, for example, by obtaining grants, subsidies and other outside sources of funding that help to offset accommodation expenses. Tax deductions and other government benefits flowing from the accommodation may also be considered. Also, inclusive design and other creative design solutions can often avoid expensive capital outlay.

In determining whether a financial cost would alter the essential nature or substantially affect the viability of a housing operation, consideration will be given to:

- The size of the operation – what might prove to be a cost amounting to undue hardship for a small housing operation will not likely be one for a larger housing operation.
- Can the costs be recovered in the normal course of operation?
- Can other divisions, departments, etc. of the housing operation help to absorb part of the costs?
- Can the costs be phased in – so much per year?

- Can the housing provider set aside a certain percentage of money per year to be placed in a reserve fund to be used for accommodation issues?²⁰⁶
- Will the housing-related amenities, services, conditions, *etc.* for all tenants be substantially and permanently altered?

The government is required to make sure that social housing providers have access to sufficient funding to ensure equal access to housing. Where a housing provider receives funding from government for promoting accessibility and meeting the accommodation needs of tenants, the housing provider should track accommodation data and alert the government to any funding deficiencies that exist.

Housing providers cannot use limited resources or budget restrictions as a defence to the duty to accommodate without first meeting the formal test for undue hardship based on costs. Further, housing providers are not to decide which accommodations are most appropriate for a tenant based on financial considerations or budgetary constraints. Whether an accommodation is “appropriate” is a determination completely distinct and separate from whether the accommodation would result in “undue hardship.” If the accommodation meets the tenant’s needs and does so in a way that most respects dignity, then a determination can be made as to whether or not this “most appropriate” accommodation would result in undue hardship.

Accommodation is a process and a matter of degree, rather than an all-or-nothing proposition, and can be seen as a continuum. At one end of this continuum would be full accommodation that most respects the person's dignity. Next is phased-in accommodation over time, followed by the most appropriate accommodation only being implemented once sufficient reserve funds have been set aside. Alternative accommodation, or “next best” accommodation, might be next on the continuum when the most appropriate accommodation is not feasible. Alternative accommodation might also be accomplished at a later date if immediate implementation would result in undue hardship. Or, alternative accommodation might be implemented as an interim solution while the most appropriate accommodation is being phased in or implemented at a later date.

If an accommodation exceeds a housing provider’s pre-determined accommodation budget, the housing provider must look to its global budget, unless to do so would cause undue hardship.²⁰⁷

²⁰⁶ Note that both phasing in and establishing a reserve fund are to be considered only *after* the accommodation provider has shown that the most appropriate accommodation could not be accomplished immediately.

²⁰⁷ This is consistent with the OHRC’s approach in the employment context, where an employer or other entity cannot refuse to accommodate an employee with *Code*-related needs because the accommodation would exhaust the funds that the employer had earmarked for *Code*-related accommodations.

Example: A social housing provider informs a tenant with small children that they cannot install child locks on her windows and balcony door because they only have a certain amount of resources to fund accommodations to tenants, and that they have already spent the money on the “most needy” tenants. The housing provider in this instance would be required to review its overall budget before supporting a conclusion that the accommodation could not be provided without causing undue hardship based on costs.

In larger housing operations, the costs of accommodation should be distributed as widely as possible within the operation so that no single complex or division disproportionately assumes the costs of accommodation. The appropriate basis for evaluating the costs is based on the budget of the housing operation as a whole, not the specific complex or division in which the tenant has requested an accommodation.

Larger housing operations may be in a better position to set an example or provide leadership in accommodating people with *Code*-related needs, as accommodation costs will likely be more easily absorbed by them.

8.1.2 Outside sources of funding

Housing providers are expected to investigate and access outside sources of funding, where they exist, to help defray costs associated with accommodation. Before being able to claim that it would be an undue hardship based on costs to accommodate a tenant with disability-related needs, for example, a housing provider would have to show that they took advantage of any available government funding (or other) program to help with such costs.

A tenant is also expected to avail themselves of any available outside sources of funding to help cover expenses related to their own accommodation.

8.1.3 Health and safety concerns

Maintaining a safe housing environment is clearly an important objective. Health and safety issues will arise in various housing contexts and have the potential to affect individual tenants and the broader housing community. Depending on the nature and degree of risk involved, it may be open to a housing provider to argue that accommodating a tenant’s *Code*-related needs would amount to an undue hardship.

A housing provider can determine whether modifying or waiving a health or safety requirement or otherwise providing an accommodation will create a significant risk by considering the following:

- Is the tenant willing to assume the risk in circumstances where the risk is solely to their own health or safety?²⁰⁸
- Would changing or waiving a requirement or providing any other type of accommodation be reasonably likely to result in a serious risk to the health or safety of other tenants, or staff, where appropriate?²⁰⁹
- What other types of risks are assumed within the housing operation, and what types of risks are tolerated within society as a whole?

In evaluating the seriousness or significance of risk, the following factors may be considered:

- The nature of the risk: What could happen that would be harmful?
- The severity of the risk: How serious would the harm be if it occurred?
- The probability of the risk: How likely is it that the potential harm will actually occur? Is it a real risk, or merely hypothetical or speculative? Could it occur often?
- The scope of the risk: Who will be affected if it occurs?

If the potential harm is minor and not very likely to occur, the risk should not be considered serious. If there is a risk to public safety, consideration will be given to the increased numbers of people potentially affected and the likelihood that the harmful event may occur.

Where a tenant identified by a *Code* ground engages in behaviour that affects the well-being of others, it may be open to a housing provider to argue that to accommodate that tenant would cause undue hardship based on health and safety concerns, specifically, that the accommodation would pose a risk to public safety. However, the seriousness of the risk will be evaluated only *after* accommodation has been provided and only after appropriate precautions have been taken to reduce the risk. It will be up to the housing provider to provide objective and direct evidence of the risk. Suspicions or impressionistic beliefs about the degree of risk posed by a tenant, without supporting evidence, will not be enough.

A claim of undue hardship must stem from a genuine interest in maintaining a safe environment for all tenants, rather than as a punitive action. Even where a tenant poses a risk to him or herself or the safety of others, a housing provider still has a duty to canvass accommodation options, where possible and appropriate.

Ultimately, a housing provider must balance the rights of the tenant with the needs of the larger housing community. There may be situations where a tenant poses a health and safety risk to themselves or to others that would amount to an undue hardship, or an otherwise appropriate accommodation

²⁰⁸ Risk is evaluated after all accommodations have been made to reduce it.

²⁰⁹ *Ibid.*

is impossible to implement in the particular circumstances. However, it is important that housing providers not rush to such a conclusion. Further training for staff in larger housing complexes, or additional supports for the tenant may resolve the issue. The accommodation process must be fully explored, to the point of undue hardship.

VII. Social housing

Social housing often fills the gap for low-income people by providing supportive housing, government-funded subsidies and rent-geared-to-income (RGI) housing that would not necessarily be available to tenants in the private rental housing market.²¹⁰ When they are properly funded²¹¹ and operated efficiently, social housing programs have the potential to provide viable housing options to people and families who cannot compete in the private rental market. It is the OHRC's position that widely-available government-subsidized social housing should be an essential component of Canada's strategy to fulfill its international commitments to provide adequate housing to Canadians.

As stated earlier, there is a strong correlation between low levels of income and *Code* grounds such as sex, race, marital status, family status, citizenship, place of origin, disability, age and the receipt of public assistance.

Many tenants in social housing units will be identified by *Code* grounds. There are several broad categories of social housing tenants: older people applying for the support, community, and income security offered by older persons' housing projects; low-wage people experiencing a shortfall in earnings; people with disabilities; and people who are homeless or have special needs. This latter group includes many people receiving social assistance.

While many of the issues and examples already identified throughout this *Policy* also relate to the social housing context (for example, negative attitudes and stereotypes, harassment and systemic discrimination), there are also unique issues arising in this type of housing that merit separate consideration.

²¹⁰ Note that there are various types of social housing arrangements available in Ontario, and not all social housing is geared toward people with low incomes. For example, the main objective of some social housing providers is to provide fully accessible buildings and units for people with disabilities, or to provide supportive housing for older Ontarians.

²¹¹ The OHRC has commented extensively on the serious shortage of affordable housing options in Ontario (see the OHRC's housing background paper, *supra*, note 12, and the housing consultation report, *supra*, note 14). In particular, the OHRC recognizes the significant challenges faced by social housing providers operating within tight budgetary constraints. In this regard, the OHRC has recommended that the Government of Ontario "increase availability of supportive housing and appropriate support services and ensure that social housing providers have sufficient funds to meet their duty to accommodate." See Recommendation #15 of the OHRC's housing consultation report, *supra*, note 14.

1. Waiting lists

Waiting lists for social housing placements are based on date of application, with victims of domestic violence having priority across the province. In mixed-income social housing, the waiting lists are often divided into two separate lists: one list for people on social assistance and another list for people who can afford the market rent. The U.N. *Committee on Economic, Social and Cultural Rights* has identified the extreme length of waiting lists for subsidized housing as a concern in its recent observations.²¹² For example, waiting lists for subsidized housing with Toronto Community Housing are between seven and eight years long.²¹³ Excessive waiting times for subsidized units means that subsidized housing is not a viable option for a large majority of low-income tenants in Ontario. In the years between when one applies for subsidized housing and when a unit becomes available, a person's situation may have changed dramatically. For example, children may have grown up, or, in an extreme scenario, a person may have become homeless.

The chronological order of waiting lists may have a negative impact on people who have a more urgent need for social housing, such as youth and young families. Applicants for social housing are more likely to be people identified by *Code* grounds than applicants in the private rental market, and it is acknowledged that many applicants will have what could be considered an urgent need for social housing. Social housing providers should try to take individual circumstances into consideration when allocating housing. Where it is clear that an applicant would be at imminent personal risk if they are unable to secure housing immediately, a social housing provider should consider whether it is feasible and appropriate to by-pass the waiting list.

In recognition of the dire shortage of subsidized social housing options, the OHRC supports government programs that facilitate access to adequate housing and that best meet human rights principles such as integration, full participation and respect for dignity.

Example: As part of a pilot project, the government includes a portable housing allowance as a component of social assistance. This would allow recipients to avoid long waiting lists for social housing by opening up a much larger pool of available units in the private rental market. It would

²¹² *Concluding Observations* of the Committee on Economic, Social and Cultural Rights, *supra*, note 86 at para. 28.

²¹³ The Ontario Non-Profit Housing Association's 2009 Report on Waiting List Statistics for Ontario states that waiting lists for social housing in the province are getting longer, with a 4% increase in 2008. The Association reports that 130,000 households are currently on the waiting list for social housing, but that this number may be a very conservative estimate given that many households, discouraged by the lengthy waiting times, walk away without filing an application. For the full report, see: www.onpha.on.ca.

allow people to re-locate, if necessary, without worrying about losing a subsidized unit. And, if provided directly to the recipient, a portable housing allowance would allow a tenant to maintain their privacy and autonomy over their income.

2. Eligibility requirements

As in the private rental market, blanket rental rules and requirements for social housing eligibility may have an adverse impact on people identified by the *Code*. For example, to be eligible for rent-geared-to-income assistance, an applicant must not owe money to a social housing provider. Some social housing providers require a “clean” 12-month rental record and will not consider people for housing until all rent arrears or fees for damages to previous rental units have been paid. However, it should be noted that some people may have fallen into temporary arrears for *Code*-related reasons, such as the sudden onset of a disability. A blanket policy of this nature does not provide for individualized assessment and does not accommodate people on an individual basis. Unless it will cause undue hardship, social housing providers should take an individualized approach to imposing rental requirements that may have an adverse impact on *Code*-identified people.

Social housing providers should also try to provide some flexibility in other eligibility requirements. For example, if an applicant has a past incident of rental arrears, a social housing provider should inquire into the reasons for this. Where there is a reasonable explanation, the provider should allow the applicant to show responsibility in other ways (for example, by establishing a repayment plan, providing a guarantor, *etc.*) The same flexibility should be applied if an applicant is unable to provide the exact information typically required by a social housing provider (*e.g.* bank account information, specific identification, *etc.*) Some people identified by the *Code*, for example, a new Canadian or a person with a mental illness, may not be able to comply completely with these requirements, but may be able to establish their reliability in other ways.

All eligible Ontarians are entitled to apply for social housing. While there are some social housing programs in the province that aim to help specific disadvantaged groups with high core housing needs, members of these groups should not be prevented from applying to other available forms of social housing. For example, an Aboriginal person seeking social housing may be referred to an Aboriginal social housing agency. However, that person should also be allowed to apply to non-Aboriginal social housing programs at the same time.

3. Occupancy policies

A number of common occupancy policies and practices among social housing providers may create systemic barriers for people identified by the *Code*. Some of these occupancy policies (for example, guest policies and policies stating minimum number of bedrooms) have already been identified as issues within the private rental market and the principles discussed earlier in this *Policy* apply equally here.²¹⁴ Other policies are unique to the social housing context (for example, requirements to report changes in income or household size), but may also have an adverse impact on people identified by *Code* grounds.

A social housing provider should avoid blanket occupancy policies. Where it will not cause undue hardship, a social housing provider should conduct an individualized assessment of a tenant's circumstances before imposing a penalty such as the revocation of a subsidy.

Example: A mother receiving a subsidy fails to quickly report to her social housing provider the addition of a child to her household. When she explains to her housing provider that the delay was due to complications arising out of labour and childbirth that required extended bed-rest, the provider uses his discretion to extend the timeframe for reporting.

Many of the occupancy policies used by social housing providers and co-operatives are written down in policies and by-laws that are not easy to modify and are sometimes based on government guidelines. For example, Regulation 298/01 under the *Social Housing Reform Act* sets out the standard that there has to be one bedroom for every two members of the household.²¹⁵ The “National Occupancy Standard,” developed by the Canada Mortgage and Housing Corporation, suggests that parents should have a bedroom separate from their children and opposite sex children above age five should not share a bedroom.²¹⁶ However, it is not consistent with human rights principles for a housing provider to apply and enforce such policies if they do not meet the tests for *bona fide* requirements established by the Supreme Court of Canada in *Meiorin*.²¹⁷ If social housing providers identify barriers that are imposed on

²¹⁴ See the section of this *Policy* entitled “Occupancy Policies” for more detailed information, particularly with regard to the specific *Code*-identified individuals and groups that are most likely to be affected by such policies. For example, “minimum number of bedrooms” requirements will have an adverse impact on a lone mother of two opposite-sex children who cannot afford a three-bedroom apartment.

²¹⁵ *Social Housing Reform Act 2000*, O. Reg. 298/01, s. 28(2)(a).

²¹⁶ Canada Mortgage and Housing Corporation, “Housing in Canada Online,” online: www.data.beyond2020.com/cmhc/HiCODefinitions_EN.html#_Housing_Standards. See also Industry Canada, Audit and Evaluation Services, *Co-operative Housing Programs Evaluation* (2003), online: www.dsp-psd.pwgsc.gc.ca/Collection/NH15-418-2003E.pdf

²¹⁷ *Meiorin*, *supra*, note 177. See also: *Fakhoury v. Las Brisas Ltd.* (1987), *supra*, note 52; *Desroches v. Québec (Comm. des droits de la personne)* (1997), *supra*, note 52; and *Cunanan v. Boolean Developments Ltd.* (2003), *supra*, note 52.

them by government (or others) then they have an obligation to follow up with government to seek changes or the removal of those barriers.²¹⁸ The OHRC is also of the view that government, in turn, has an obligation to work with the provider to remove those barriers.

At all times, it must be remembered that the *Code* has primacy over other pieces of legislation, unless otherwise stated. This means that where there is a conflict between the *Code* and another piece of provincial legislation, such as the *Social Housing Reform Act* or the *Co-operative Corporations Act*, the *Code* will prevail.

4. Dispute resolution mechanism

Social housing providers should provide an effective and transparent mechanism to resolve disputes that arise in administering and allocating social housing. Social housing tenants should have timely access to a mechanism that will hear and resolve issues about selecting tenants, making disability-related and other accommodations, changing occupancy rules, modifying administrative timelines, denying or revoking subsidies, and any other issues that may arise.

The purpose of a dispute resolution mechanism should be to identify problems and determine ways to solve them that would permit a tenant access to social housing with a minimum of delay. A social housing provider should facilitate this process and provide reasonable assistance to tenants. Dispute resolution procedures that are not timely or effective could amount to a failure of the duty to accommodate. For more detailed information on developing an appropriate internal dispute resolution mechanism, consult the OHRC's *Guidelines on Developing Human Rights Policies and Procedures*.²¹⁹

VIII. Co-op housing²²⁰

The principles outlined throughout this *Policy* apply equally to co-op housing. The following information discusses some of the issues that are unique to the co-op housing context.

When it is available, co-op housing can also be an attractive source of quality accommodation for Ontarians who cannot afford adequate options in the private rental housing market, and/or who wish to live in a more community-oriented setting. As with social housing, however, waiting lists for co-op housing units are extremely long, and new co-op developments are rare in Ontario.

²¹⁸ Iness, *supra*, note 66, at paras. 302 to 335.

²¹⁹ See the OHRC's *Guidelines on Developing Human Rights Policies and Procedures*, *supra*, note 204.

²²⁰ As mentioned previously, this *Policy* interprets residential tenancies as including not-for-profit co-operative housing arrangements.

Co-op housing operates effectively through a system of by-laws and the obligations of members and the co-op to each other. A co-op generally has an elected board responsible for decision-making about the co-op's administration. It is important to note, however, that the *Code* has primacy over the policies, procedures and by-laws of co-ops. Where there is conflict between a co-op by-law (even if it is member-approved) and the *Code*, the by-law must give way to the requirements of the *Code*.

Example: In one case, a housing co-op sought to evict an occupant for failing to perform the two hours of volunteer work each month required by the co-op's by-law, despite the fact that she had provided a doctor's note that she was incapable of performing the volunteer work for medical reasons. The Ontario Divisional Court stated that the co-op had a duty to respect the rights of its occupants under the Ontario *Human Rights Code* and to accommodate the needs of an occupant with a disability, to the point of undue hardship.²²¹

A co-op housing provider should be aware of the ways that "neutral" rules, such as those contained in occupancy policies, may have an adverse impact on people identified by the *Code*. For example, a transfer policy that is based on length of tenure may have a negative impact on *Code*-protected individuals whose need to transfer may be urgent.

Example: A recently widowed older woman may not be able to pay the rent of the two bedroom unit that she occupied with her spouse. If she is not able to transfer to a more affordable one-bedroom unit without delay, she may face homelessness.

A co-op housing provider should conduct an individualized assessment of a co-op member's circumstances when implementing and applying by-laws. Where the member has needs related to a *Code* ground, the co-op housing provider is expected to modify or waive the by-law requirement and to accommodate the *Code*-related needs if to do so would not cause undue hardship.

²²¹ The Court applied the *Code* and the OHRC's *Policy and Guidelines on Disability and the Duty to Accommodate*, *supra*, note 19 and held that it would have been reasonable and appropriate for the co-op to obtain answers from the occupant's doctor to determine if any of the volunteer tasks could be performed, notwithstanding her medical condition. If so, it could have accommodated her by assigning her tasks she could perform, but if not, the cost of accommodating her by exempting her from the volunteer work requirement would be unlikely to impose an undue hardship. The Court concluded that it would be unjust in all the circumstances to evict the occupant: *Eagleson Co-Operative Homes, Inc. v. Théberge*, [2006] *supra*, note 19.

Example: A co-op requirement that members who receive social assistance pay the full “shelter allowance” portion of their social assistance as rent has been found to be discriminatory.²²² Housing co-operatives must treat the income of all members in the same way, whether it is from public assistance or employment. Co-op members who receive a rental subsidy should also be treated in the same way, no matter what the source of their subsidy.

IX. Organizational responsibility

The ultimate responsibility for a healthy and inclusive housing environment rests with landlords, housing providers and other housing-related organizations covered by the *Code*. There is an obligation to make sure that environments are free from discrimination and harassment. It is not acceptable from a human rights perspective to choose to remain unaware of the potential existence of discrimination or harassment, or to ignore or fail to act to address human rights matters, whether or not a human rights claim has been made.

A housing provider or other related organization violates the *Code* where it directly or indirectly, intentionally or unintentionally infringes the *Code*, or where it does not directly infringe the *Code* but rather authorizes, condones, adopts or ratifies behaviour that is contrary to the *Code*. Organizations should make sure that rules, policies, procedures, decision-making processes and organizational culture are non-discriminatory on their face, and do not have a discriminatory impact.

Example: A building manager who instructs her superintendent not to rent to people of a particular ethnicity because their food “smells too much” would be engaging in discrimination. The manager could also be named in a human rights claim because she used the superintendent indirectly to discriminate against people based on their ethnic origin.²²³

In addition, there is a human rights duty not to condone or further a discriminatory act that has already occurred. To do so would extend or continue the life of the initial discriminatory act. The obligation extends to people who,

²²² *Iness v. Caroline Co-operative Homes Inc. (No.5)*, 2006, *supra*, note 66. Ms. Iness was expected to pay the full shelter component of her social assistance as rent to her co-operative, instead of paying 25% of her income as rent, which she had done previously. As a result, she was no longer able to pay her insurance and hydro costs out of the shelter portion of her benefit, resulting in her having to cover these out of her basic living costs. The tribunal found that Ms. Iness was treated differently from other low-income tenants, who were not in receipt of social assistance and were expected to pay a percentage of their income in rent.

²²³ See *Fancy v. J & M Apartments Ltd.* (1991), *supra*, note 39; *Chauhan v. Norkam Seniors Housing Cooperative Association* (2004), *supra*, note 40; and *Peroz v. Yaremko*, (2008), *supra*, note 40.

while not the main actors, are drawn into a discriminatory situation nevertheless, through contractual relations or otherwise.²²⁴ A housing provider should also refrain from punishing a person because of how they responded to discrimination or harassment: people who reasonably believe that they are being discriminated against can be expected to find the experience upsetting and might well react in an angry and verbally aggressive manner.

Human rights decisions often find organizations liable, and assess damages, based on an organization's failure to respond appropriately to address discrimination and harassment. An organization may respond to complaints about individual instances of discrimination or harassment, but they may still be found to have failed to respond appropriately if the underlying problem is not resolved. There may be a poisoned environment, or an organizational culture that excludes or marginalizes people based on *Code* grounds, despite sanction of individual harassers. In these cases, the organization should take further steps, such as training and education, to address the problem more appropriately.

The following factors have been suggested as considerations for determining whether an organization met its responsibilities to respond to a human rights complaint:

- procedures in place at the time to deal with discrimination and harassment
- the promptness of the institutional response to the complaint
- the seriousness with which the complaint was treated
- resources made available to deal with the complaint
- whether the organization provided a healthy living environment for the person who complained
- the degree to which the action taken was communicated to the person who complained.²²⁵

Under section 46.3 of the *Code*, a corporation, trade union or occupational association, unincorporated association or employers' organization will be held

²²⁴ *Payne v. Otsuka Pharmaceutical Co. (No. 3)* (2002), 44 C.H.R.R. D/203 (Ont. Bd. Inq.) at para. 63: "The nature of when a third party or collateral person would be drawn into the chain of discrimination is fact specific. However, general principles can be determined. The key is the control or power that the collateral or indirect respondent had over the claimant and the principal respondent. The greater the control or power over the situation and the parties, the greater the legal obligation not to condone or further the discriminatory action. The power or control is important because it implies an ability to correct the situation or do something to ameliorate the conditions."

²²⁵ *Wall v. University of Waterloo* (1995), 27 C.H.R.R. D/44 at paras. 162-67 (Ont. Bd. Inq.). These factors assist in assessing the reasonableness of an organization's response to harassment. A reasonable response by the organization will not affect its liability but will be considered in determining the appropriate remedy. In other words, a housing provider that has reasonably responded to harassment is not absolved of liability but may face a reduction in the damages that flow from the harassment.

responsible for discrimination, including acts or omissions, committed by employees²²⁶ or agents in the course of their employment. This is known as vicarious liability and it applies to human rights violations in housing.

Example: A contracted maintenance worker makes homophobic comments to two gay men who are leaving their apartment unit. The men complain to their landlord. The landlord has a duty to promptly address the conduct of the worker and to make sure that the living environment is inclusive and poison-free.

Simply put, it is the OHRC's position that vicarious liability automatically makes an organization responsible for discrimination arising from the acts of its employees or agents, done in the normal course, whether or not it had any knowledge of, participation in, or control over these actions.

Vicarious liability does not apply to breaches of the sections of the *Code* dealing with harassment. However, since the existence of a poisoned environment is a form of discrimination, when harassment amounts to or results in a poisoned environment, vicarious liability under section 46.3 of the *Code* is restored. Further, in these cases the "organic theory of corporate liability" may apply. That is, an organization may be liable for acts of harassment carried out by its employees if it can be proven that it was aware of the harassment, or the harasser is shown to be part of the management or "directing mind" of the organization. In such cases, the decisions, acts, or omissions of the employee will engage the liability of the organization where:

- the employee who is part of the "directing mind" engages in harassment or inappropriate behaviour that is contrary to the *Code*
- the employee who is part of the "directing mind" does not respond adequately to harassment or inappropriate behaviour of which they are aware, or ought reasonably to be aware.

Generally speaking, managers and central decision-makers in an organization are part of the "directing mind." People with only supervisory authority may also be part of the "directing mind" if they function, or are seen to function, as representatives of the organization. Even non-supervisors may be considered to be part of the "directing mind" if they have *de facto* supervisory authority or have significant responsibility.

More often than not, many people share the responsibility to protect and promote human rights. In some cases, fellow tenants may be asked to be flexible to facilitate a person's accommodation needs.

²²⁶ "Employee" in this context could refer to a landlord, a co-op Board member, a housing agent, a housing manager, service personnel, etc.

Example: A man who rents an apartment in a housing complex is on a waiting list for a transfer to a larger unit within his building. A family that has recently immigrated to Canada also living in the building receives word that their bid to sponsor their in-laws has been successful. If they are not able to move to a larger unit quickly, they will not be able to help their in-laws adjust to their new country. The man understands the family's situation and agrees to let them by-pass him in the transfer waiting list.

While housing providers may not necessarily be responsible for the full extent of a tenant's *Code*-related accommodation needs, they may need to assist and cooperate with others who are.

Example: A co-op with a singular mandate to offer mixed income housing (but offering no other support services), may not have any obligation to accommodate a tenant's personal care needs within their unit. On the other hand, they may need to make sure the building is physically accessible, and may need to provide disability-related support services at monthly or annual general meetings, particularly if the tenant does not have access to outside resources for this purpose.

Note that in addition to the *Code*, housing providers will have obligations under the *Accessibility for Ontarians with Disabilities Act* and regulations including: the new Customer Service Accessibility Standard and the forthcoming Information and Communications, Employment and Accessible Built Environment standards, and possibly the Accessible Transportation Standard for providers who also offer bus or other forms of transportation services to their residents.

X. Preventing and responding to discrimination in rental housing

Housing providers can take a number of steps to prevent and appropriately address human rights complaints. Important elements of a housing provider's strategy to address human rights issues include:

1. Anti-harassment and anti-discrimination policies and complaint procedures

Anti-discrimination and anti-harassment policies are valuable tools in promoting equity and diversity within a housing operation. Adopting, implementing and promoting these policies can help to limit potential harm, and reduce the housing operation's liability in the event of a human rights claim. These policies should explicitly address discrimination based on all *Code* grounds.

A detailed description of best practices for developing and implementing such policies and procedures can be found in the OHRC's publication, *Guidelines on Developing Human Rights Policies and Procedures*.²²⁷

2. Programs for reviewing and removing barriers

Housing providers should take proactive steps to make sure that policies, programs, rules and requirements do not have an adverse impact based on *Code* grounds. Housing providers should do regular reviews, and based on their findings, develop and implement barrier removal strategies.

Example: A social housing provider collects data on the effects of its allocation of subsidized housing based on chronological waiting lists, to identify ways to remove barriers for people identified by *Code* grounds.

Example: An association representing rental housing providers develops a voluntary certification program. Upon complying with specific designated criteria, a landlord receives an endorsement from the association. The criteria are developed with human rights requirements and principles in mind.

Housing providers should also make sure that whenever new policies, procedures, rules and requirements are developed, their possible impact on people identified by *Code* grounds is considered, and that the most inclusive options are selected, short of undue hardship.

3. Education and training

Education and training are essential components of any housing provider's human rights strategy. A housing provider should have a solid understanding of the requirements of the *Code*, the provider's own human rights policies and procedures, and the common barriers and stereotypes faced by people identified by *Code* grounds.

Education and training are not a panacea for all human rights issues: they will work most effectively when partnered with strong and effective policies and procedures, and a proactive strategy for developing an inclusive housing operation.

²²⁷ See the OHRC's *Guidelines on Developing Human Rights Policies and Procedures*, *supra*, note 204.

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

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