

Freedom of Conscience and Human Rights

Michelle Davis, BSc, MDiv, ThM

A series of *Bioethics Matters* will look at the Ontario Human Rights Commission, the Ontario Human Rights Code, and the Canadian Charter of Rights and Freedoms to explore the issues of religious discrimination, the right to be free from discrimination based on creed (religion), and the freedom of conscience and religion.

The main reason for doing so is that in 2008 the Ontario Human Rights Commission examined the policy of the College of Physicians and Surgeons of Ontario (CPSO), asking whether some practices might be discriminatory if based on moral or religious beliefs of physicians.

In December 2008, after extensive input by members and other interested parties, CPSO produced a policy statement in which it reminded physicians that refusing to provide services to a patient based on the physician's religious beliefs may be discriminatory. The statement reads "[W]ithin the [Human Rights] Code, there is no defence for refusing to provide a service on the basis of one of the prohibited grounds. This means that a physician who refuses to provide a service or refuses to accept an individual as a patient on the basis of a prohibited ground such as sex or sexual orientation *may* be acting contrary to the Code, even if the refusal is based on the physician's moral or religious belief."¹ The policy stated that the law is not clear on this issue, and the College is unable to advise physicians on how the Commission, the Tribunal, or courts will decide cases where they must balance the rights of physicians with those of patients.² The Ontario Human

Rights Code does not appear to protect freedom of conscience which is guaranteed under the Canadian Charter of Rights and Freedoms.

THE ONTARIO HUMAN RIGHTS COMMISSION (OHRC)

The OHRC was established in 1961 to administer the Ontario Human Rights Code (referred to as the Code). The Code was the first of its kind in Canada and was implemented to protect the people of Ontario against discrimination in employment, accommodation, goods, services and facilities, and membership in vocational associations and trade unions.³ There are fifteen grounds of discrimination. They are: race, ancestry, place of origin, ethnic origin, citizenship, colour, creed (religion), disability, sex (including pregnancy), sexual orientation, age (18 and over, 16 and over in occupancy of accommodation), marital status (including same sex partners), family status, receipt of public assistance (in accommodation only), and record of offences (in employment).⁴

The Commission has a full time Chief Commissioner and a number of part time commissioners. The OHRC is intended to be an independent statutory body which provides leadership for the promotion, protection, and advancement of human rights, and to build partnerships across human rights systems.⁵ The Commission achieves its objectives through empowering people to realize their rights and ensuring they are upheld. The OHRC works with the Human Rights Tribunal of Ontario (HRTO) and the Human Rights Legal Support Centre. The Commission works to develop and encourage the implementation of human rights policies and conducts research.⁶ It

uses its legal powers to pursue remedies in the public interest.⁷ An annual report on the activities and concerns of the OHRC is presented to the Speaker of the House of the Ontario Government. Previously this report was sent to the Attorney General of Ontario.

HUMAN RIGHTS CODE

AMENDMENT ACT

In June 2008, changes to the Human Rights system came into effect. The Human Rights Code Amendment Act was passed in December 2006 and changed several aspects of the OHRC. The OHRC no longer processes human rights complaints. Instead, an individual files a complaint directly to the Human Rights Tribunal of Ontario (HRTO) and a new agency, the Human Rights Legal Support Centre, will offer legal services and advice to individuals with human rights complaints and/or concerns.⁸

This Act expanded the role of the OHRC and it was given the power to “expand its work in promoting a culture of human rights in the province, conduct public inquiries, initiate [their] own applications, intervene in proceedings at the Human Rights Tribunal of Ontario, and focus on engaging in proactive measures to prevent discrimination using public education, policy development, research and analysis.”⁹ The OHRC has the power to monitor and report on anything related to human rights. The new law allows the OHRC to determine if legislation is inconsistent with the intent of the Code.¹⁰ The role of developer of “public policy on human rights is made explicit in the new legislation, as is the way those policies can be used in issues that are before the Tribunal.”¹¹

This may give the impression that an OHRC policy is law. Only the Code is law. The OHRC can examine the policy of a particular workplace and strongly recommend policy changes that the OHRC believes are necessary in order to comply with the Code,

or risk potential complaints of discrimination based on that policy. While this can be a positive step, it may also raise legal concerns such as how to interpret the code in certain circumstances. A policy may appear discriminatory but upon detailed analysis may not be so and vice versa.

SECTIONS 1 AND 18 OF THE CODE

Sections 1 and 18 of the Code are of particular interest about the right to services and the right to be exempt from providing certain services. Section 1 of the Code states that “every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability.”¹² This would mean that people cannot be denied services because of their creed, sex or any other grounds covered by the Code. It does not address the rights of the person providing the services. The Code does not define “creed,” but the OHRC in its *Policy on Creed and the Accommodation of Religious Observances*, defines it as “religious creed or religion. It is defined as a professed system and confession of faith, including both beliefs and observances or worship. A belief in a God or gods, or a single supreme being or deity is not a requisite.”¹³ Further, the document states that “the existence of religious beliefs and practices are [*sic*] both necessary and sufficient to the meaning of creed, if the beliefs and practices are sincerely held and/or observed.”¹⁴

By way of example, Section 18 of the Code addresses the solemnization of marriage by religious officials. Section 18.1 (1) states that “the rights under Part I to equal treatment with respect to services and facilities are not infringed where a person registered under section 20 of the Marriage Act refuses to solemnize a marriage, to allow a sacred space to be used for solemnizing a marriage or for

an event related to the solemnization of a marriage, or to otherwise assist in the solemnization of a marriage, if to solemnize the marriage, allow the sacred place to be used or otherwise assist would be contrary to, (a) the person's religious beliefs; or (b) the doctrines, rites, usages or customs of the religious body to which the person belongs."¹⁵ This section protects the rights of a person providing a service. A person is not required to provide a service which would be contrary to his/her religious beliefs or the doctrine of the person's religion.

Section 1 protects the rights of a person to receive services, goods and facilities, free from discrimination, on a variety of grounds. Section 18 protects the rights of certain individuals regarding the provision of services which would be contrary to their creed. Ministers of religion and their premises are protected. However, in the case of physicians, there is no apparent protection of their rights to refuse to provide services which would be contrary to their creed and religious beliefs. This, of course, is a dangerous situation for all people in health care, not only physicians, and raises questions about consequences, should physicians act in accordance with conscience. Physicians who refuse to provide abortion services or make referrals to such services seem to have no protection under the Code, and could face legal proceedings for not providing such services.

CONCLUSION

Moves are afoot in the US, UK, Canada and other countries to remove traditional "protection of conscience" from professional codes, from civil servants, educators, and others. We need to be alert to these moves, and to challenge them when they are made. Protection of conscience is vital to membership in a pluralistic and relativistic society which mistakenly gives weight to the rights of those demanding services over those providing services, whether in the field of

health care, education, the civil service, or other areas. ■

Michelle Davis, BSc, MDiv, ThM is a school chaplain in the Diocese of St. Catharines, and, formerly, a researcher with the Canadian Catholic bioethics Institute.

¹ The College of Physicians and Surgeons of Ontario, Policy Statement #5-08 "Physicians and the Ontario Human Rights Code." <http://www.cpso.on.ca/policies/policies/default.aspx?id=2102&terms=ontario+human+rights+commission> Accessed on March 16, 2009.

² *Ibid.*

³ The Ontario Human Rights Commission-About Us. <http://www.ohrc.on.ca/en/commission/about> Accessed on March 13, 2009.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

⁸ The Ontario Human Rights Commission-Our Changing Mission. "*The New Mandate of the Ontario Human Rights Commission.*"

<http://www.ohrc.on.ca/en/commission/mission> Accessed on March 16, 2009.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² The Ontario Human Rights Code. http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90h19_e.htm Accessed on March 16, 2009.

¹³ Ontario Human Rights Commission, *Policy on Creed and the Accommodation of Religious Observances*. <http://www.ohrc.on.ca/en/resources/Policies/PolicyCreedAccomodEN> Accessed on March 16, 2009.

¹⁴ *Ibid.*

¹⁵ The Ontario Human Rights Code. http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90h19_e.htm Accessed on March 16, 2009.

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