SUBMISSION OF ARCH DISABILITY LAW CENTRE

College of Physicians and Surgeons
Consultation on
Policy:
“Physicians and the Ontario Human Rights Code”

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ABOUT ARCH

ARCH Disability Law Centre ("ARCH") is a specialty community legal clinic dedicated to advancing the equality rights of people with disabilities. ARCH provides legal services to help Ontarians with disabilities live with dignity and participate fully in our communities. ARCH provides free and confidential legal advice and information to people with disabilities in Ontario. We provide legal representation to people with disabilities whose cases fall within our priority areas of work and who meet Legal Aid Ontario’s financial eligibility guidelines. We work with Ontarians with disabilities and the disability community on community development, law reform and policy initiatives. We also provide public legal education to people with disabilities and continuing legal education to the legal community. Information about ARCH can be obtained from our web site at www.archdisabilitylaw.ca.

ABOUT THIS SUBMISSION

ARCH Disability Law Centre thanks the College for the opportunity to consult on the policy “Physicians and the Ontario Human Rights Code” (“Policy”). ARCH supports the College of Physicians and Surgeons of Ontario (CPSO) in ensuring that physicians clearly understand their legal obligations under Ontario’s Human Rights Code. Improved access to medical services is of particular importance to people with disabilities.

In our submission, we have provided recommendations that will increase the Policy’s potential to achieve more accessible medical services for Ontarians. Since ARCH’s mandate is to defend and advance the equality rights of people with disabilities, our submissions are made in context of the need to advance the rights of people with disabilities to full access to medical services. People with
disabilities are often denied medical services and experience multiple barriers when accessing medical services. This Policy has the potential to improve this situation by ensuring that physicians do not refuse medical services to people with disabilities in a discriminatory manner. The Policy also has the potential to raise physicians’ awareness of the barriers faced by people with disabilities that may be present in their own practices. However, it is our opinion that in order to achieve this potential, the Policy must explain physicians’ human rights obligations in a manner that is complete.

Our submission is based on the observations and knowledge of ARCH staff gained from our clinic’s practice and in consultation with others regarding the experiences of people with disabilities in accessing health care services.

**Duty to Accommodate is Intrinsic to Obligation not to Discriminate**

A reading of the Policy as it is currently organized implies that accommodation of disability is a requirement that is separate from the obligation not to discriminate. In law, the duty to accommodate is intrinsic to the right to be free from discrimination. Without accommodation, people with disabilities would not have equal access to services, employment and participation in society. The Supreme Court of Canada has described accommodation as “...what is required in the circumstances to avoid discrimination.”¹ In *Policy and Guidelines on Disability and the Duty to Accommodate*, the Ontario Human Rights Commission has stated that, “(a)ccommodation is a fundamental and integral part of the right to equal treatment.”²

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ARCH submits that it is confusing and perhaps even misleading to speak solely of potential conflicts between physicians’ and patients’ moral and religious beliefs in the “Providing medical services without discrimination” section of the Policy and to only discuss the duty to accommodate disability in that section of the Policy. This could mislead a reader into thinking that accommodation of moral or religious beliefs is part of the obligation to provide medical services without discrimination, but accommodation of disability is not.

Through ARCH’s work with our community, we are made aware of situations in which people with disabilities are denied medical services because of their disability. In some instances a doctor may refuse to take the person on as a patient or refuse to continue to have them as a patient because of the nature of their disability such as patients who have an addiction or mental health issue. In other instances, doctor’s neglect or refuse to provide advice or information about health matters to patients with disabilities. ARCH is aware of instances in which a person with an intellectual disability is not provided with advice or information on sexual or reproductive health. ARCH has learned from our clients and those who support them that this withholding of medical advice or information is often based on the doctor’s unsubstantiated belief that the person with the intellectual disability does not have the capability to understand the consequences of engaging in sexual activity.

ARCH is also aware of situations in which a person with a disability was denied access to a medical procedure that is potentially life-saving but for which there may be limited resources. For example, people with intellectual disabilities or physical disabilities that impact their mobility are denied organ transplants based on the belief that people with such disabilities do not have any “quality of life” that could be improved with the transplant.

In other situations, physicians make decisions to refuse people with disabilities as patients or end the physician–patient relationship on the basis of the
physician’s own competence or manner of practice. These decisions are often made without taking any steps to understand the nature of the patient’s disability and engaging in the duty to accommodate process.

ARCH recommends that in order for the Policy to more clearly indicate a physicians’ obligation to not discriminate against people with disabilities in the delivery of their medical services, some examples of the duty not to discriminate by refusing service on the basis of a person’s disability should be included in the Policy.

In addition, the “Clinical Competence” section of the “Guidelines” on page 2 of the Policy, should include the explanation that before the physician determines his or her competence to accept or continue to treat the patient, the physician has a duty to engage in a dialogue with the patient to learn about the disability and the means by which the patient’s disability-related needs can be accommodated. Furthermore, the physician has an obligation to ensure that he or she is not making a decision about providing or continuing medical care before taking into account any accommodations for the patient’s disability. For example, a doctor should not conclude that he or she cannot properly treat a person with an intellectual disability because he or she is not a “specialist in intellectual disabilities”. Most often, the manner in which the doctor communicates with the patient with the intellectual disability is the barrier to accessing service and is not a competence issue. The doctor should learn about the ways in which he or she can communicate information to the patient or what supports the person needs to fully understand the information and then treat the patient for his or her medical needs as the doctor would treat any other patient. The doctor should not assume he or she is not competent to treat the patient simply because the patient has an intellectual disability.

In addition, the Policy indicates that the College expects physicians to communicate reasons for a decision to decline or discontinue treatment in a
clear, straightforward manner. It is also important to indicate that the decision must be communicated directly to the person and in a manner that accommodates the disability-related needs of that person.

**Duty to Accommodate Should be Explained in the Context of Provision of Medical Services**

In ARCH’s view, the Policy must articulate the concept of accommodation to the point of undue hardship in a way that is specifically relevant to the provision of medical services. It would be very useful to include examples of accommodations that physicians may be less likely to consider. For example, it is very important to the patient-physician relationship that the patient’s independence and right to make decisions are protected. At times, physicians may neglect to consider who is the patient and may take directions from the patient’s family members or friends. In order to preserve the patient’s decision making right, the physician may need to:

- Break down the medical information into smaller segments and use clear language rather that medical terminology so that the information is fully understood by the patient and the patient can make an informed and independent decision.
- Allow a patient to use a communication device such as an electronic or manual bliss or symbol board. The physician will need to take steps to understand how the patient communicates using the device and allow for a patient to have the time and support needed to be able to communicate his or her own decisions about treatment.

The Policy should also explain that the duty to accommodate is a process in which both the patient and the physicians have roles and responsibilities. For a
clear explanation of process, the Policy should refer physicians to the Ontario Human Rights Commission's *Policy on Disability*\(^3\).

The Policy states on page 4, “When physicians become aware that existing patients or individuals who wish to become patients have a disability *which may impede or limit access to medical services*...” ARCH takes issue with this statement. It is not the disability which impedes access but rather the physical, technical or attitudinal barriers that may be present in the physician’s practice. It is important for the Policy to clearly state that the duty to accommodate also requires that physicians take proactive steps to remove barriers that may prevent people with disabilities from accessing their services. The Policy should emphasize that undertaking human rights and disability accommodation training is a best practice towards enhancing the accessibility of a physician’s practice. The Ontario Human Rights Commission’s Policy\(^4\) strongly encourages professionals, including physicians, to undertake training in order to proactively remove disability-related barriers.

Examples of other proactive steps that physicians may undertake to remove disability-related barriers could include:

- ensuring that the building in which a medical office is located, the washrooms and the examination table are physically accessible to people with mobility disabilities
- training medical and non-medical staff to interact with patients with disabilities in a manner that is respectful and that best accommodates the person\(^5\)
- ensuring that there is a process in place for patients and potential patients to request accommodations in a confidential manner

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\(^3\) *Supra* note 2.

\(^4\) *Supra* note 2.

\(^5\) Physicians may also have an obligation to provide and undertake this training as part of their compliance with the *Accessibility of Ontarians with Disabilities Act*: [http://www.mcss.gov.on.ca/erv/mcss/programs/accessibility/customerService/](http://www.mcss.gov.on.ca/erv/mcss/programs/accessibility/customerService/)
• ensuring that staff in the physician’s office knows how to arrange for disability accommodation services, such as ASL interpreters, deaf-blind intervenors, etc.

The Human Rights Tribunal of Ontario considered the issue of whether a doctor was required to undertake professional training as part of the duty to accommodate in the decision *Finan v. Cosmetic Surgicentre (Toronto)*\(^6\). The extent to which training will be required will depend on the specific facts of the case and whether the training in question constitutes undue hardship. In Finan, the Tribunal found that the training was not required, as it would have been significant and would have made substantial changes to the physician’s practice or nature of his practice.

However, the Tribunal did not determine whether the result would be the same if the training would require less than substantial changes to the physician’s practice.

**Fuller Explanation of Undue Hardship**

ARCH recommends that the College include a more thorough discussion of the factors that are relevant in an assessment of whether the physician has fulfilled the duty to accommodate to the point of undue hardship.

The Policy should state that the *Human Rights Code* provides that the only factors that can be considered in determining whether the undue hardship standard has been met are costs, outside sources of funding, if any, and health and safety requirements, if any.\(^7\) The Policy should explain that generally, costs of providing accommodation will reach the undue threshold if they are so high

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\(^6\) 2008 HRTO 47 (CanLII)
\(^7\) *Human Rights Code*, RSO 1990, c H.19 at s.17(2).
that they affect the survival of the business or change its essential nature. Costs cannot be speculative; there must be objective evidence of how much the accommodation will cost. If the cost of providing an accommodation is significant, outside sources of funding such as government grants should be considered. If an accommodation is too large to implement at one time, it may be phased in.

With respect to health and safety, the Policy should state that where these requirements create barriers for people with disabilities, the medical services provider should assess whether the requirements can be waived or modified. There must be objective evidence of the nature of the health or safety risk and the probability of the risk occurring. To rely on undue hardship as a justification for not providing an accommodation, a service provider must demonstrate that health and safety concerns are sufficiently serious so as to override the principles of equal opportunity and free choice that the Code protects.

**Physicians should be Alerted to other Legal Obligations**

ARCH recommends that the Policy alert physicians to the presence of other legislation that places legal obligations on them that may be relevant to the provision of medical services in a manner that is accessible. One example is the *Accessibility for Ontarians with Disabilities Act (AODA).*

The AODA’s stated purpose is to develop, implement and enforce standards for accessibility in relation to goods, services, facilities, accommodation,

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8 *Supra* note 2 at 30.
10 *Ibid.* at 34.
12 S.O. 2005, c. 11.
employment, buildings, structures and premises in Ontario. The AODA requires the development of accessibility standards. Both the *Customer Service Standard* and the *Integrated Accessibility Standard Regulation* apply to doctors or organizations that have more than one employee and provide medical services to members of the public in Ontario. Among other things, the standard requires these doctors and organizations to establish policies and practices on providing services to people with disabilities and allow service animals to enter the business premises. The standard also requires the training of staff on interacting with people with disabilities. More information about the AODA and the Standards can be found at