Ontario Human Rights Commission submission

Regarding


August 1, 2014

Overview

The Ontario Human Rights Commission (OHRC) is making this submission in response to the College of Physicians and Surgeons of Ontario’s (CPSO) review of its policy on Physicians and the Ontario Human Rights Code (Code).¹

The purpose of the CPSO’s policy is to help physicians understand their rights and obligations under the Code and to set out the CPSO’s expectation that physicians will respect the fundamental rights of individuals and patients who seek medical services.

Under the Code, everyone has a right to equal treatment in services, including receiving healthcare services, as well as in employment, contracts, vocational associations and housing accommodation, without discrimination because of creed, sex, sexual orientation, gender identity, age, marital status and disability, among other grounds. There is no hierarchy of rights.

The ground of creed includes protection from discrimination because of one’s religious beliefs and practices. It also protects those who have no creed. There is a duty to accommodate creed and other Code grounds short of undue hardship.

However, the courts have made it clear that no right is absolute; all rights can be limited by the rights and freedoms of others. When two sets of rights compete, there is an obligation to consider each situation in context and look for solutions that aim to respect both sets of rights, as much as possible.

The CPSO’s current policy already reflects a number of these principles and much of the input the OHRC provided in its 2008 submission on the CPSO’s initial draft policy.²
This submission makes several recommendations for clarifying the human rights and obligations that physicians and patients have under the Code. Among these, the CPSO's policy should:

- Reference the new Code grounds of gender identity and gender expression and clarify that the ground "creed" includes religious and other creed-based beliefs and practices and also protects people who have no creed
- Clarify that \textit{prima facie} ("on its face") discrimination under the Code might happen where physicians limit their services because of moral or religious beliefs unless there is a legitimate reason in the circumstances
- Rephrase competing rights principles in regard to the OHRC's Policy on Competing Human Rights and emphasize the aim to respect the importance of both sets of rights
- For physicians who limit services because of moral or religious beliefs, clarify their duties to patients under the CPSO's Practice Guide\textsuperscript{3} and under its policy on Physicians and Health Emergencies\textsuperscript{4}
- Clarify that physicians who limit their services because of moral or religious beliefs must make sure patients get the services they need in a timely way including referrals to other physicians when appropriate and necessary
- Require physicians who limit their services in settings such as hospitals, clinics and shared service practices, to inform administrators or fellow physicians accordingly to prevent any potential discriminatory impact on patients
- Clarify that organizations such as hospitals, clinics and professional associations also have a duty to accommodate physicians, not just patients; and that the duty to accommodate covers creed and other grounds, not just disability
- Clarify that the duty to accommodate might be limited by undue hardship because of cost, health or safety, or when there is significant interference with the legal rights of others.

\textbf{Human Rights Code applies}

The CPSO's policy appropriately recognizes that physicians must provide medical services without discrimination and cannot make decisions about whether to accept individuals as patients, whether to provide existing patients with medical care or services, or whether to end a physician-patient relationship on the basis of a person’s race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status and/or disability.

\textbf{The OHRC recommends} that the CPSO's policy also cite the new grounds of gender identity and gender expression that were added to the Code in 2012 to set out clear protection for transgender and gender diverse individuals. Accordingly, the reference at footnote 2 of the CPSO’s policy to the OHRC’s previous position interpreting gender identity under the ground of sex is no longer relevant or necessary.
The CPSO’s policy also appropriately recognizes that the CPSO itself is obliged to consider the Code when determining whether physician conduct is consistent with the expectations of the profession.

**Clinical competence**

The CPSO’s policy appropriately states that the duty to refrain from discrimination does not prevent physicians from making decisions in the course of practicing medicine that are related to their own clinical competence. This is consistent with a case decided by the Human Rights Tribunal of Ontario.\(^5\)

The CPSO’s policy expects physicians to clearly communicate their decision and reason to limit services. This is important so that individuals or patients understand the reason for a physician’s decision is based on actual lack of clinical competence rather than discriminatory bias or prejudice. It also provides the opportunity to address any misconceptions.

**Religious beliefs and the Human Rights Code**

The CPSO’s policy appropriately advises that if physicians have moral or religious beliefs that affect or may affect the provision of medical services, they are to proceed cautiously with an understanding of any implications related to human rights.

The CPSO’s policy also recognizes that personal beliefs and values and cultural and religious practices are central to the lives of many physicians and their patients.

**The OHRC recommends** that the CPSO clarify in its policy that personal beliefs and values and cultural practices alone do not necessarily fall within the meaning of “creed” under the Code. Creed does include religious and creed-based beliefs and practices. Code protection based on creed also includes the right of a person to not have a creed, and to be free from pressure to accept or comply with beliefs or practices relating to creed against their choosing.

**The OHRC recommends** that the CPSO clarify its policy statements on moral or religious beliefs and the Human Rights Code as follows:

Decisions to turn down individuals as patients, to restrict medical services offered, or to end physician-patient relationships, based on a physician’s moral or religious beliefs, might be *prima facie* (“on its face”) discrimination under the Code depending on the circumstances.

For example: because of their moral or religious beliefs, a physician does not take on an individual as a new patient or provide a treatment within their clinical competence because the individual is transgender. Or, a physician does not advise about birth control options for patients who are unmarried or in same sex relationships. These
actions are prima facie discrimination because of a patient's sex, gender identity, marital status, sexual orientation and/or creed (including freedom from religious pressure).

The physician and any other person or organization responsible would have to show a legitimate reason to justify actions that are prima facie discrimination in the circumstances. They would have to show the following:

- Providing the service would go against the core of the physician's sincerely held creed beliefs and practices
- Refraining from providing the service would otherwise have no significant impact on the patient's legal rights and health care services, and
- Patient access to health care would be facilitated, in an inclusive or seamless way, through referral to another physician for example, with dignity and respect, free from discrimination and harassment or a poisoned environment because of sex, sexual orientation, gender identity, creed (or lack thereof) or any other protected ground under the Code.

The law is becoming more and more clear and there are a number of legal principles that courts have identified when considering cases where equality rights clash with freedom of religion. For example:

- No right is absolute but is inherently limited by the rights and freedoms of others
- In the context of freedom of belief or religion, the freedom to hold beliefs is broader than the freedom to act upon them where to do so would interfere with the rights of others
- The core of a right is more protected than the periphery
- Rights must be interpreted in a context
- Aim to respect the importance of both sets of rights

The CPSO's policy identifies a number of these principles.

The OHRC recommends that the CPSO rephrase the legal principles in its policy having regard for the OHRC’s Policy on Competing Human Rights. The OHRC Policy sets out legal principles for reconciling rights along with an analysis and process, based in existing case law, to help parties understand and address their rights and obligations.

The process should be respectful of everyone and the context for each situation is important. For example: in a small town or rural area, or in an emergency situation, there may be limited options for accessing the required healthcare service elsewhere.

College expectations

The CPSO's policy appropriately sets out a number of expectations for physicians who do not accept individuals as patients, limit their practice, or end a physician-patient relationship on the basis of moral or religious belief. These include:
Communicating clearly and promptly about services the physician chooses not to provide because of moral or religious beliefs
Providing (and not withholding) information about all clinical options
Treating patients with respect
Not expressing personal judgments about the beliefs, lifestyle, identity or characteristics of an individual
Not promoting one’s own religious beliefs
Advising individuals they can see another physician and in some circumstances helping to make arrangements to do so.

The OHRC recommends that for physicians who would limit services because of moral or religious beliefs, the CPSO should clarify their duties under its Practice Guide and its policy on Physicians and Health Emergencies.

The OHRC recommends that the CPSO’s policy should clarify that physicians who limit their services because of moral or religious beliefs must make sure patients get the services they need in a timely way including referrals to other physicians when appropriate and necessary.

The OHRC also recommends that the CPSO’s policy should require physicians who work in settings alongside other physicians, such as hospitals, clinics and shared service practices, to inform administrators and fellow physicians of any limits on their service because of moral or religious beliefs in order to manage and prevent any potential discriminatory impact on patients.

Legal duty to accommodate under the Code

The CPSO’s policy focuses on the physician’s duty to accommodate the disability-related needs of existing patients or individuals short of undue hardship. The policy also recognizes the duty to accommodate may apply to other grounds under the Code.

The OHRC recommends that the CPSO expand this part of its policy to indicate that responsible organizations, such as hospitals, clinics, shared service practices, property owners or management companies and professional associations such as the CPSO, have a duty to accommodate physicians as well.

Also, the CPSO should give examples of the duty to accommodate based on other grounds such as creed, family status and age as well as disability. For example: patients or physicians may need flexibility around scheduling appointments because they cannot make alternative child care arrangements or they need to attend important worship services. Older patients may face unique barriers related to disability or aging in accessing a medical service facility. Similarly, physicians may also need accommodation related to a disability or creed or other ground under the Code.
There is a limit on the duty to accommodate if undue hardship is shown based on cost, health or safety, but this is a high threshold. It may also be limited where there is significant interference with the legal rights of others.\(^9\)

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1 See the CPSO’s current human rights policy online at http://policyconsult.cpso.on.ca/?page_id=3403
3 See the CPSO’s Practice Guide online at http://www.cpso.on.ca/Policies-Publications/The-Practice-Guide-Medical-Professionalism-and-Col
4 See the CPSO’s policy on Physicians and Health Emergencies online at http://www.cpso.on.ca/Policies-Publications/Policy/Physicians-and-Health-Emergencies
5 In Finan v. Cosmetic Surgicentre (Toronto), 2008 HRTO 47 paras 42-50 (CanLII), two transgender women alleged a doctor, who performs elective cosmetic plastic surgery, including on the genitals of both women and men, refused them services because they were trans. One woman was seeking plastic surgery on her labia and the other was seeking breast augmentation. The Tribunal found the trans women did experience \textit{prima facie} discrimination as the doctor denied the surgeries because they were trans. However, the HRTO accepted the doctor’s justification that he was not qualified to safely perform the surgeries the trans women were seeking and found there was no expectation that he go get the necessary skills.
6 See the OHRC’s Policy on Competing Human Rights online at http://www.ohrc.on.ca/en/policy-competing-human-rights
7 Supra, note 3.
8 Supra note 4. The CPSO’s policy on Physicians and Health Emergencies states that, “The College expects physicians to provide medical care during a health emergency”. The policy also references the Canadian Medical Protective Association on what is a health emergency: “a possible definition of a health emergency is an urgent and critical situation of a temporary nature that seriously endangers the lives, health and/or safety of the population”.