POLICY AND GUIDELINES ON DISCRIMINATION BECAUSE OF FAMILY STATUS

ONTARIO HUMAN RIGHTS COMMISSION

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PLEASE NOTE

This Policy contains the Commission's interpretation of provisions of the Ontario *Human Rights Code* relating to family status. It is subject to decisions of the Superior Courts interpreting the *Human Rights Code*. Any questions regarding this Policy should be directed to the staff of the Ontario Human Rights Commission.

Commission 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 Commission's interpretation of the *Code* at the time of publication. While they are not binding on the human rights tribunal or on courts, they are often given great deference,[1] applied to the facts of the case before the court or tribunal, and quoted in the decisions of these bodies.

TABLE OF CONTENTS

I. Introduction

The Ontario *Human Rights 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. The provisions of the *Code* are aimed at creating 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 be free from discrimination and harassment on the basis of family status, in the social areas of employment, services, goods, facilities, housing accommodation, contracts, and membership in trade and vocational associations.

The ground of family status has been part of the *Code* since 1982, but has received relatively little analysis or attention, either in Ontario or in other Canadian jurisdictions. This is the first time the human rights issues related to family status have been explored in depth. It is to be expected that the understanding and public awareness of this ground of the *Code* will continue to develop over time.

The ground of family status, by its nature, raises complex and difficult issues related to the treatment of caregivers[2] in our society. The Supreme Court of Canada has stated, "That those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged seems to bespeak the obvious". [3] The results of the Ontario Human Rights Commission's ("the Commission") research and consultation on family status indicate that, on the contrary, caregivers continue to face significant and ongoing disadvantage because of their role. It is the Commission's hope that this *Policy* will provide a meaningful step towards addressing this issue.

This *Policy* is based on extensive research and consultation on issues related to family status. In May 2005, the Commission published a Discussion Paper, *Human Rights & the Family in Ontario*, which outlined key issues and invited submissions from interested parties. At the same time, the Commission distributed a questionnaire and posted it on its website, inviting individual Ontarians to share their stories of how their family status had impacted on their access to housing, employment and services. The Commission heard from approximately 120 organizations and individuals, including employers, unions, housing providers, government, academics, community organizations, legal clinics, service providers, professional organizations, and advocacy groups. During the fall of 2005, the Commission held four roundtables on specific issues of concern: issues affecting older Ontarians, the definition of family status, employment, and housing. The Commission is simultaneously releasing a

Consultation Report, *The Cost of Caring*. The Report examines the broad range of issues impacting on the ability of families with caregiving responsibilities to equally access and benefit from employment, housing and services, and outlines roles and responsibilities for government, institutions, and the Commission itself.

Several themes emerged from this consultation, and have shaped this *Policy*:

- There is a profound lack of awareness among employers, housing providers, service providers, community advocates and the general public regarding rights and responsibilities under the *Code* with respect to family status.
- Persons providing care for family members face a range of serious systemic barriers to full participation in employment, housing and services, and experience ongoing disadvantage because of their family status. Employment, housing and services have often not been designed in ways that include persons with caregiving responsibilities.
- The existence and nature of these barriers are not widely understood, and issues related to family status are often viewed as 'personal problems' rather than human rights concerns.
- There are many different kinds of families in today's Ontario. Steps must be taken to ensure that all of these families are included and treated with respect and dignity.
- Each person's experience of his or her family status will be significantly affected by their race, sex, marital status, sexual orientation, age, creed, and whether that individual or a family member has a disability.
- Negative attitudes and stereotypes persist about the character and capabilities of persons based on certain types of family status, such as, for example, lone parents.
- Employers, housing providers, service providers, government and individuals must work together to remove existing barriers for persons identified by family status.

This *Policy* sets out the Commission's position on discrimination on the basis of family status as it relates to the provisions of the *Code*. It deals **only** with issues that fall within the *Code* and that could be the subject of a human rights complaint. At the same time, the *Policy* interprets the protections of the *Code* in a broad and purposive manner, consistent with the principle that the quasi-constitutional status of the *Code* requires that it be given a liberal interpretation that best ensures its anti-discriminatory goals are attained. The Commission's Consultation Report contains a broader examination of social policy issues affecting persons disadvantaged by family status. In addition to this *Policy*, the Commission will continue to engage in promotion and advancement initiatives to address the broad systemic context of discrimination based on family status.

Commission policy statements contribute to creating a culture of human rights in Ontario. This *Policy* is intended to help the public understand the *Code*

protections against discrimination and harassment because of family status. It is also meant to assist individuals, employers, organizations, providers of services and housing, and policy-makers in understanding their responsibilities and acting appropriately to ensure compliance with the *Code*.

The analysis and examples used in the *Policy* are based on the Commission's research on discrimination on the basis of family status, international standards, complaints that have come before the Commission, tribunal and court decisions, and the input of individuals and organizations in the Commission's consultation process.

II. International Protections

The Supreme Court of Canada has indicated that the values and principles enshrined in international law constitute part of the legal context in which legislation is interpreted and applied. [4] Additionally, human rights commissions have been identified as key institutions in implementing and protecting international human rights standards. Accordingly, the Commission uses applicable international standards in its policy development and to inform its applications and interpretation of the *Code*.

The needs and rights of persons with familial responsibilities have been recognized in numerous international covenants to which Canada is a signatory, including the *Universal Declaration of Human Rights*,[5] the *International Covenant on Civil and Political Rights,* [6] *the International Covenant on Economic, Social and Cultural Rights,*[7] the *Convention on the Elimination of all Forms of Discrimination Against Women,*[8] and the *Convention on the Rights of the Child.*[9] As a signatory to these international human rights instruments, Canada has recognized that the family is a fundamental group unit of society, and has committed to provide the widest possible protection and assistance to the family.

Through these international human rights instruments, Canada has agreed to recognize the particular needs of families with young children, and to render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and to ensure the development of institutions, facilities and services for the care of children.

As well, a number of these covenants recognize the unique role that women continue to play in providing care for families, and require states parties to ensure a proper understanding of maternity as a social function, to promote recognition of the common responsibility of men and women in the upbringing and development of their children, and to take steps to ensure that women are not prevented from reaching their full potential, particularly in the workplace, because of caregiving responsibilities.

III. *Code* Protections for Relationships

1. Code *Definitions*

Contemporary families in Ontario are extremely diverse. There have always been families that did not fit the "traditional" family model: that is, a father in the paid workforce who is married to a mother who is a full-time caregiver for their children. However, demographic shifts over the past few decades mean that this model is no longer the norm. The Vanier Institute of the Family indicates that fewer than half of all Canadian families now consist of a married heterosexual couple with one or more children.[10] Some of the most important demographic shifts regarding families are noted below.[11]

- Almost one-quarter of families with children are now lone-parent families, in most cases headed by women.
- Increasing divorce rates have led to a rise in blended and dual custody families.
- There has been growing recognition of families headed by gay, lesbian, bisexual, and transgendered (LGBT) persons, whether as lone parents or part of a couple.[12]
- With the growing diversity of Ontario's population has come a broader range of cultural constructs of the family, often including increased emphasis on extended family networks.
- As Ontario's population continues to age, families are increasingly grappling with eldercare responsibilities.
- The movement *en masse* of women into the paid labour force has led to shifts in gender roles and expectations within families.

These familial relationships of care and commitment are essential, both to individual well-being and to the effective functioning of society. Persons who are providing care to family members are benefiting society as a whole, and should not face discrimination, exclusion or disadvantage as a result.

The *Code* provides explicit protection against discrimination for specific relationships, through prohibitions on discrimination because of marital status and family status.

Section 10(1) of the *Code* broadly defines the ground of marital status as follows:

> "marital status" means the status of being married, single, widowed, divorced or separated and includes the status of living in a conjugal relationship with a person outside of marriage.

This definition includes both same-sex and opposite-sex relationships.

The ground of "family status" is more narrowly defined in section 10(1) as "the status of being in a parent and child relationship".

These two grounds intersect to cover a range of family forms, including lone-parent and blended families, and families where parents are in same-sex or "common-law" relationships.

These grounds do not, however, cover the full range of relationships that most would consider familial, including relationships with siblings, or with members of the extended family, such as grandparents and grandchildren, aunts and uncles, nieces and nephews, and cousins. It excludes the kinds of "chosen families" often adopted by LGBT persons, as well as the diverse forms of support networks developed by persons with disabilities. Persons discriminated against because of these relationships cannot file complaints on the basis of "family status" unless they can demonstrate a parent-child type of relationship, as is further discussed below. While not all familial relationships attract negative stereotyping or disadvantage, a broad definition can ensure that the needs of caregivers in various familial relationships will be accommodated.

In its Consultation Report on Family Status, *The Cost of Caring*, the Commission states that the current *Code* definition excludes important familial relationships, and has an adverse impact on individuals identified by sexual orientation, gender identity, sex, disability, age, creed, and race and race-related grounds (ethnic origin, place of origin, ancestry, citizenship, and colour) of the *Code* and concludes that the *Code* should be amended to recognize the broad spectrum of family types in today's Ontario.

The Commission recommends that, as a best practice, employers, housing providers, and service providers recognize and accommodate a broader range of familial relationships than those described by the grounds of marital and family status.

> **Example:** When drafting its policy on accommodating caregiving needs, an employer includes siblings, extended family, and other persons dependent on the employee for care and assistance.

2. The Scope of the Ground of "Family Status"

In accordance with the principle that a broad and purposive approach must be taken to the interpretation of human rights protections, tribunals and courts have taken an expansive approach to the interpretation of the ground of family status, which is currently defined as the "status of being in a parent and child relationship".

The ground of family status protects non-biological parent and child relationships, such as families formed through adoption, step-parent relationships, foster families, and non-biological gay and lesbian parents.[13]

An Ontario Board of Inquiry has set out the principle that the definition of family status covers all those who are in a parent and child "type" of relationship:

> [S]omeone acting in the position of a parent to a child is, in our view, embraced by this definition; for example, a legal guardian or even an adult functioning in fact as parent. Occasionally, for example, due to death or illness of a relative or friend, someone will step in and act as parent to a child of the deceased or incapacitated adult. Thus, if a nephew were to reside with an aunt for an indefinite period, in our view their relationship would fall within the meaning of "family status" …[14]

The ground of family status may therefore embrace a range of circumstances where there are no blood or adoptive ties, but relationships of care, responsibility and commitment that resemble a parent-child relationship.

> **Example:** When a single mother has difficulty caring for her two young children because of her economic circumstances, her cousins offer to take them in until she is back on her feet. When that couple attempts to find rental housing that will accommodate these two young children, a landlord turns them away on the basis that this is an "adult-oriented building". The couple files a complaint of discrimination on the basis of family status.

The Commission has taken the position that the ground of family status includes care relationships between adult children and those who stand in parental relationship to them. For example, individuals providing eldercare for aging parents are protected from discrimination under the ground of family status. The protection extends to include anyone in a "parent type" of relationship with the caregiver. For example, a person providing eldercare to a grandparent who played a significant role in his or her upbringing may be protected under the ground of family status.

The ground of family status has been interpreted to prohibit differential treatment between various forms of families. For example, there is a lengthy history of differential treatment of families formed through adoption or fostering, compared to biological families. A Canadian Human Rights Tribunal found that citizenship rules that distinguished between biological and adoptive children discriminated on the basis of family status.[15]

Human rights protections for marital and family status include protection against discrimination based on the particular identity of a spouse or family member.[16] For example, it would be discriminatory for an employer to take negative actions towards an employee because of personal animosity towards that person's child or parent.

> **Example:** A man works in a family-run company with his brothers-in-law. When his daughter raises allegations of sexual abuse against one of her uncles, he is abruptly fired from his job. He successfully files a human rights complaint of discrimination based on family status.

It should be noted that, in some circumstances, *Code* protections related to the ground of family status overlap with those for the ground of sex, which includes pregnancy. Under this ground, a woman is protected against discrimination because she is, was or may become pregnant, or because she has had a baby. It includes the period following childbirth, including the post-delivery period and breastfeeding. Employers and service providers may, for example, have a duty to accommodate the needs of breastfeeding mothers. A full discussion of these issues is set out in the Commission's *Policy on Discrimination because of Pregnancy and Breastfeeding.*

3. Alternative Grounds

There may be situations where a person who believes he or she has faced negative treatment because of his or her role as a caregiver does not fall within the grounds of family or marital status, but may file complaints based on other *Code* grounds.

3.1 Sex Discrimination

Caregiving has traditionally been regarded as a feminine role. Historically, it has been assumed that women are, and ought to be, primarily responsible for providing care for children, aging parents and relatives, and family members who are ill or have disabilities. Women and men who failed to conform to their assigned gender roles faced significant negativity and opposition.

Stereotypes and assumptions about caregiving roles, while less pervasive than in the past, remain powerful, to such an extent that issues about caregiving are frequently characterized as "women's issues". While gender roles are becoming more flexible, caregiving responsibilities remain highly gendered, with women providing the bulk of caregiving for children, aging parents or relatives, or family members with disabilities. [17] These caregiving responsibilities contribute significantly to women's ongoing inequality, and in particular to their ability to obtain, maintain, and advance in employment. The status of women in employment, housing and services is fundamentally linked to their roles as primary caregivers. Men may also in some circumstances find themselves disadvantaged by these gender roles, in that, where they do take on primary caregiving responsibilities, these responsibilities are less likely to be recognized and supported.

The failure to recognize and accommodate caregiving responsibilities, because it is related to long-standing gender roles and assumptions, has an adverse impact on women and in some cases men, and may in appropriate circumstances be considered discrimination on the basis of sex, as an alternative to, or in addition to discrimination on the basis of family status.

> **Example:** Because Eva is the only daughter in her family, her parents and brothers have always assumed that, as her parents age, Eva will take on the role of primary caregiver to one of her brothers, who has a significant cognitive disability. After Eva's parents die, she finds it very difficult to attend to her caregiving responsibilities as well as her demanding job. She asks her employer for temporarily reduced work hours while she puts supports in place. Her manager tells her that he can reduce her work hours, but since work will no longer be her top priority, he will demote her to an entry level position. Eva files a human rights complaint on the ground of sex discrimination.

3.2 Discrimination Because of Association

Section 12 provides that the *Code* is violated where discrimination occurs because of a relationship, association, or dealings with a person or persons identified by a prohibited ground of discrimination. A person who is denied a service or housing, for example, because of his or her relationship with a person who is identified by a *Code* ground can file a complaint of discrimination on the basis of association. This ground may extend to protect persons who are providing care for persons identified by the ground of disability.

> **Example:** A man who lives with, and is providing care for, a relative with a mobility-related disability, is turned away by a landlord who fears that they might request accessibility-related upgrades to the apartment. The man files a complaint of discrimination on the basis of association with a person with a disability.

IV. Relationship Between Family Status and Other Code Grounds

The experience of discrimination based on family status may differ based on other aspects of a person's identity. Whenever an issue relating to family status is raised, it is important to take into account the intersecting impact of the person's sex, marital status, sexual orientation, race and age, as well as whether the person or his or her family member has a disability.

1. Sex

As noted in Section III.3.1 above, because caregiving is at the heart of the ground of family status, and caregiving roles and responsibilities have historically been, and largely remain, closely tied to gender roles and stereotypes, the issues related to family status cannot be adequately understood without thoughtful consideration of the impact of gender.

As a result, systemic discrimination on the basis of family status will often have an adverse impact on the ground of sex as well. As well, the experience of being in a parent-child relationship will generally differ for men and women because of the different expectations, assumptions and stereotypes about mothering and fathering. Therefore, when considering complaints related to family status, gender issues should always be taken into account.

> **Example:** After the birth of his first child, a father tells his supervisor that he is considering requesting a reduced work week. When he ultimately tells his supervisor that he will not be making a request for reduced work hours, his supervisor tells him "That's good. We tolerate this kind of thing from the women because we have to, but we really don't expect it from the men. Really, it would be a 'career limiting move' for you". The employee feels that his work environment has been poisoned by this comment, and that it is now impossible for him to request any accommodations related to his family status.

2. Marital Status

The experience of caregiving will vary widely depending on whether one is married or single, or part of a blended or dual-custody family.

The situation of female lone parents deserves special attention. Female-headed lone-parent families are the most economically vulnerable of all families,[18] as well as being the subject of persistent negative stereotypes; for example, that they are "failed families". These stereotypes are often particularly virulent for female-headed lone-parent families from racialized or Aboriginal communities. These families often face massive practical barriers in accessing housing, employment and services.

> **Example:** A Black lone mother asks to meet with her son's teacher because he seems to be struggling with a certain aspect of the curriculum. Based on stereotypes about Black lone mothers, the teacher assumes that the child is not being properly supported and supervised at home, and is not likely to succeed at school. The teacher tells the child's mother that, "All things considered, we really shouldn't set our sights too high".

Families shaped by divorce, such as dual custody and blended families, may require complex arrangements for childcare, housing, and services, and their needs may not be taken into consideration by those who design housing, employment, and services.

> **Example:** A school bussing service has a mandate to provide transportation to all children who require it and who live within specified boundaries. It has a rule that it will only do pick-ups and drop-offs at a single location. A dual custody family asks for an exemption. The child in question rotates on a weekly basis between his parents' homes, both of which are within the bus services boundaries. The bus service refuses, stating that the parents must chose one or the other of their homes as the sole pick-up and drop-off point. The parents file a complaint of discrimination based on family status.

3. Sexual Orientation and Gender Identity

Often, the families of lesbians, gays, bisexuals and transgendered persons are not recognized as valid families, and are therefore invisible to others. As well, these individuals may face negative stereotypes about their fitness or capacity to parent. Discrimination, homophobia and transphobia may make it difficult for LGBT persons to openly discuss their families and request appropriate services or accommodations. Family members of LGBT persons may find themselves harassed, bullied or ostracized because of their relationship.

> **Example:** The daughter of gay parents comes home crying from school because her classmates are ostracizing and teasing her about her parents. After unsuccessful attempts to have the school take steps to deal with the problem, the parents help their daughter to file a human rights complaint on the basis of family status.

4. Disability

Persons with disabilities may rely on caregiving networks that include not only spouses, parents and children, but also extended family, and a range of unique arrangements such as homesharing, supported decision-making networks and alternate family arrangements.[19] The lack of adequate social supports for persons with disabilities makes such caregiving relationships crucial. Those who are providing such support to persons with disabilities face challenges and barriers beyond those faced by others with caregiving responsibilities, and require accommodation and support in order to access employment, housing, and services. [20]

> **Example:** A lone mother of a child with a disability is frequently asked to pick up her child from school because of behaviours associated with her

child's disability. Eventually, her employer meets with her because of her "persistent absenteeism". When the employee explains her situation, the employer explores accommodation options, and puts into place a flexible work hours arrangement that meets her needs.

As well, persons with disabilities who are themselves caregivers may face stereotypes regarding their ability to parent, or may face difficulties in finding services for caregivers that are accessible.

5. Age

Young parents, particularly young lone-parents, are frequently the subject of negative assumptions and stereotypes, such as that they are irresponsible, or lack parenting skills. This may make it difficult for them to access employment, housing or services. As well, young parents are disproportionately likely to be poor: in 2001, 48% of all families where the main income earner was under the age of 25 were low income.[21]

On the other end of the spectrum, aging parents of adult children with disabilities face many difficulties, as they find themselves less able to provide the extensive care their children need, but may be unable to access the necessary community supports to ensure their children's wellbeing.

As well, there are increasing numbers of grandparents providing primary care for their grandchildren. Many of these caregivers have significant health and mobility limitations, and their needs are often overlooked by those designing and providing services.

6. Race and Race-related Grounds

The *Code* prohibits discrimination on the grounds of race, ethnic origin, place of origin, colour, ancestry, citizenship and creed (religion). These grounds intersect with family status in complex ways.

There continue to be common negative stereotypes about the parenting practices and abilities of various racialized communities, and these stereotypes can have a significant impact on how members of these communities access housing, as well as important services such as education.

As well, services, employment and housing are often designed around definitions of family that are not inclusive of cultural differences. For example, immigrant and refugee families arriving from countries where average family sizes are larger may face extreme difficulty locating adequate housing.

As well, ongoing marginalization of racialized communities, including disproportionate levels of poverty, and the continued existence of discrimination and systemic barriers, leave these families especially vulnerable to the effects of discrimination based on family status.

> **Example:** Upon arrival in Canada, a family of refugees attempts to find rental housing. Because they are new to Canada and from a racialized community, a landlord assumes that they are less likely to pay the rent, and more likely to be disruptive. The landlord insists that she can only rent to them if they can provide her with a security deposit of three months' rent paid in advance.

V. Discrimination Based on Family Status

1. Defining Discrimination

The *Code* provides that every person has the right to be treated equally without discrimination because of family status. 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. In many cases, differential treatment because of family status will clearly be discriminatory. However, in other cases it may be necessary to consider whether the treatment can be said to constitute "discrimination" in the sense of being something protected by human rights law. Not every distinction may be considered discriminatory.

There are several ways of defining and identifying discrimination based on family status. Discrimination because of family status includes any distinction, including exclusion, restriction or preference based on family status, that results in the impairment of the recognition of human rights and fundamental freedoms.

In keeping with the decision of the Supreme Court of Canada in *Andrews v. Law Society of British Columbia,*[22] discrimination based on family status may be described as any distinction, conduct or action, whether intentional or not, but based on a person's family status, which 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, and advantages available to other members of society.

In the context of equality claims under s. 15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), the Supreme Court of Canada has offered the following three inquiries as a tool for determining whether discrimination has occurred[23]:

1) Differential Treatment
Was there substantively differential treatment, either because of a distinction, exclusion or preference, or because of a failure to take into account the individual's already disadvantaged position within Canadian society?

2) An Enumerated Ground
Was the differential treatment based on an enumerated ground, in this case family status?

3) Discrimination in a Substantive Sense
Finally, does the differential treatment discriminate by imposing a burden upon, or withholding a benefit from, an individual? The discrimination might be based on stereotypes of a presumed group or personal characteristics, or might perpetuate or promote the view that an individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society who is equally deserving of concern, respect and consideration. Does the differential treatment amount to discrimination because it makes distinctions that are offensive to human dignity?

2. Forms of Discrimination Based on Family Status

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 family status.

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

This type of deliberate discrimination generally arises from negative attitudes and biases related to family status.

Attitudes about caregiving and caregivers are deeply embedded in our society, and negative comments or assumptions about caregivers are often not perceived to be a serious human rights issue. It is a principle of human rights that persons 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 an individual's access to services, employment and housing. Individual assessment combats the effects of negative attitudes and stereotypes based on *Code* grounds such as family status.

Given that providing care for others is generally viewed as a positive attribute, it may seem strange that family status may be the source of negative attitudes and

stereotypes. However, there are a number of ways in which attitudes and stereotypes related to family status may manifest.

Those who provide caregiving, or who are perceived to be caregivers, may be assumed to be less competent, committed, intelligent and ambitious than others. This is often influenced by gender stereotypes. For example, when female employees become parents or take on other significant caregiving responsibilities, they may find themselves shunted on to the "mommy track", and passed over for promotions, learning opportunities, and recognition because of biases, conscious or unconscious, about the attributes of mothers.[24] On the other hand, men who take on significant caregiving responsibilities may be viewed as less "manly" because of their failure to conform to stereotypical gender roles.

There are also assumptions and stereotypes regarding who should and who should not be providing caregiving. Stereotypes about persons with disabilities, or about individuals who are LGBT may dictate that these persons do not have the capacity to parent well, and should not be responsible for children. As well, it may be assumed that LGBT persons do not have "real" families, and that they have no caregiving responsibilities, when in fact stereotypical notions of the family are effectively making these families and their caregiving needs "invisible". There are also stereotypes about the parenting capacities of members of various racialized groups, as well as about the responsibility and capabilities of lone parents and young parents.

Treatment of persons identified by family status may also be influenced by attitudes regarding various family forms. For example, disapproval of lone parent families, foster families, families with large numbers of children, or families headed by LGBT persons may result in negative treatment and discrimination. Families formed by adoption may be treated as if they are less "real" or valid than biological families.

As well, access to services and housing by persons identified by family status may be impeded by negative attitudes towards children – for example, that they are noisy, disruptive, and have a lesser right to public spaces or housing than do adults.

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.

Discrimination based on a *Code* ground need only be one of several reasons for the decision or treatment.[25]

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 family status was a factor in the treatment a person received.

> **Example:** When a woman returns to work after the birth of her first child, she notices that her career, which had seemed to be on a 'fast-track', now appears to have stalled. She is given smaller and less important projects to manage, and is passed over for several training opportunities. When she asks about a promotional opportunity, her manager tries to discourage her, stating that the job requires 'super-dedication' and 'killer hours'.

It can be difficult to determine whether subtle discrimination is indeed a factor in such situations. They may therefore require investigation 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. It is not necessary for language or comments related to family status to be present in the interactions between the parties to demonstrate that discrimination on the basis of family status has occurred. However, where such comments are made, they can be further evidence that family status has been a factor in an individual's treatment.

2.3 Harassment

Section 5(2) of the *Code* provides that all employees have a right to freedom from harassment in the workplace by the employer, employer's agent, or by another employee because of, among other grounds, family status. This right to be free from harassment includes the workplace but also the "extended workplace", *i.e.* events that occur outside of the physical workplace or regular work hours but which have implications for the workplace such as business trips, company parties or other company related functions.

Section 2(2) of the *Code* provides that 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 among other grounds, family status.

The *Code* contains no explicit provisions dealing with harassment in the areas of services, goods and facilities (section 1 of the *Code*), contracts (section 3 of the *Code*) or membership in trade and vocational associations (section 6 of the *Code*). However, it is the position of the Commission that harassment because of family status in such situations would constitute a violation of sections 1, 3 and 6 of the *Code,* which provide for a right to equal treatment without discrimination with respect to services, goods and facilities, contracts and membership in trade and vocational associations respectively.

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 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 his or her behaviour is being received. This knowledge may arise in different ways. In some situations, it should be obvious that the conduct or comments will be offensive or unwelcome. Some conduct or comments relating to a person's family status may not, on their face, be offensive. However, they may still be "unwelcome" from the perspective of a particular individual. If similar behaviour is repeated despite indications from the individual that it is unwelcome, there may be a violation of the *Code*.

> **Example:** Many of the female employees at a particular business become pregnant within a relatively short period of time. Their male manager begins to make jokes that "there must be something in the water cooler". Other employees do not find this offensive or threatening, and there is no indication that pregnant employees are being penalized; however, one employee fears that the comments indicate that the manager is concerned about the number of pregnancies, and that he looks on her pregnancy with disfavour. She raises her concerns with her manager. If he continues to make such comments, the employee may have a basis for filing a complaint of harassment based on pregnancy or family status.

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.[26]

It is important to note that there is no requirement that the individual have objected to the harassment at the time, in order for a violation of the *Code* to exist, or for a person to claim their rights under the *Code*. An individual who is the target of harassment may be in a vulnerable situation, and afraid of the consequences of speaking out. Employers, landlords, and service 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

> 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.

Because stereotypes relating to family status differ according to race, sex, marital status, age, sexual orientation, or disability, harassment on the basis of family status may take on different forms depending on whether the impacted individual is identified by other *Code* grounds. It is the Commission's position that where multiple grounds intersect to produce a unique experience of discrimination or harassment, this must be acknowledged to fully address the impact of discrimination or harassment on the person who experienced it.

> **Example:** A lesbian mother brings her small child to an infant music class at her community centre. After her partner joins them for one of the sessions, the music teacher makes repeated comments referring to the child's lack of "proper role models" and a "real family".

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.[27] A poisoned environment is based on the nature of the comments or conduct and the impact of these on the individual, rather than on the number of times the behaviour occurs. A consequence of creating a poisoned environment is that certain individuals are subjected to terms and conditions of employment, tenancy, services, *etc*. that are quite different from those experienced by individuals who are not subjected to those comments or conduct. Such instances give rise to a denial of equality under the *Code*.

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.[28] Management personnel who know or ought to know of the existence of a poisoned atmosphere but permit it to continue thereby discriminate against affected employees even if they themselves are not involved in the production of that atmosphere.[29]

While the notion of a poisoned environment has predominantly arisen in an employment context, it can apply equally where it results in unequal terms and conditions in occupancy of accommodation, the provision of services, contracting or membership in a vocational association.

2.5 Systemic Discrimination and Societal Dimensions

Discrimination on the basis of family status 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 which create or perpetuate a position of relative disadvantage for persons identified by family status. These may appear neutral on the surface, but nevertheless have an exclusionary impact on the basis of family status. Systemic or institutional discrimination is a major barrier for persons identified by family status.

Systemic discrimination on the basis of family status may be linked to systemic issues related to gender roles and stereotypes. As well, systemic discrimination based on family status may be experienced differently based on intersection with other grounds of discrimination, such as age, disability, marital status, creed, receipt of social assistance, race, and race-related grounds. Systemic or institutional discrimination must be addressed in the context of the interacting impacts of multiple *Code* grounds.

Systemic discrimination may have its roots in broader societal structures and social attitudes. Conceptions of the family have historically centred around a set of assumptions about gender, marital status, and sexual orientation, with the "ideal" family being centred on heterosexual, marital relationships in which roles are defined according to strict gender norms. There have always been lone-parent and same-sex families, as well as those in which women and men do not conform to gender norms regarding caregiving roles; however, these families have frequently been denied recognition as families, and have been the subject, not only of negative attitudes, but also of outright discrimination and marginalization.

Institutional or systemic discrimination is tied to, and influenced by, wider societal patterns. In particular, the lack of adequate social supports for childcare, eldercare and for persons with disabilities places caregivers at significant disadvantage in accessing employment, housing and services. For example, where evening and weekend childcare services are difficult to access, caregivers may find themselves significantly disadvantaged in finding employment in sectors that require regular shift work, such as nursing or retail. Where caregivers for persons with disabilities must spend considerable time and advocacy to locate and maintain services for their loved ones, this will impact on their ability to find and maintain employment or pursue educational opportunities. Persons with caregiving responsibilities may find themselves having to make extremely difficult decisions in order to meet their caregiving responsibilities. For example, the lack of legal protections for those who must take time off work to care for aging relatives means that individuals may have to chose between losing their jobs or being unable to provide care for their loved ones when they most need it. The

lack of social supports weighs most heavily on those who are already disadvantaged and cannot make up, through private funds, for gaps in social supports. These persons are disproportionately women, youth, older persons, lone parents, persons with disabilities and their caregivers, and persons from racialized communities.

The interaction between these societal realities and institutional policies and practices is complex. For example, the situation of a mother of small children who loses her job because of her inability to "balance" her work and familial responsibilities may be the result of the compounding effects of her employer's rigid and inflexible scheduling policies, the lack of adequate social supports for caregiving, and prevailing gender norms about the role of women as primary caregivers. Employers, housing providers and service providers must take into account the broader societal context in determining whether their programs, policies and services may be having a disproportionate impact on those identified by family status. Failure to take this broader context into account may perpetuate the disadvantage of persons identified by family status and lead to a violation of the *Code.*

Systemic discrimination may therefore arise when institutions fail to take into account the reality of contemporary family structures when designing their policies, programs and structures. Where organizations fail to design in a way that includes persons with caregiving responsibilities, persons identified by family status may find themselves disadvantaged and excluded.

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

i. Organizational Culture

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

ii. Numerical Data

Numerical data that demonstrates that members of certain groups are disproportionately represented may be an indicator of systemic or institutional discrimination. For example, the under-representation of women with young children in senior positions in an organization, together with over-representation in entry-level positions may indicate inequitable practices in hiring, training, promoting and accommodating persons identified by sex and family status. By itself, numerical data is usually not proof of systemic discrimination; however, it may form strong circumstantial evidence of the existence of inequitable practices.

iii. Policies, Practices and Decision-making Processes

Policies, practices and decision-making processes that do not take into account the realities of persons identified by family status may lead to exclusion for persons who are in a parent-child relationship, and result in systemic discrimination.

Specific policies and practices that may create systemic barriers for persons identified by family status are outlined in the sections on Employment, Housing, and Services.

3. Special Programs and Special Interest Organizations

Section 14 of the *Code* permits the use of special programs in all social areas. This allows preferential treatment or programs aimed only at persons identified by family status, if the purpose of the program is to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve equal opportunity.

> **Example:** Based on research that indicates that female lone-parents often have difficulty finding and maintaining employment because of the lack of affordable childcare options, a community centre develops a childcare program specifically for low-income female-led lone-parent families.

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 successful challenge of the program and a finding that it is discriminatory.[30]

The Commission's *Guidelines on Special Programs* provide detailed information on how a special program can be planned, implemented and monitored.

Section 18 of the *Code* allows certain types of organizations to limit participation or membership based on *Code* grounds including family status:

> 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 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.*

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

VI. The Duty to Accommodate

The duty to accommodate will only arise where a *prima facie* case of discrimination on the basis of family status has been demonstrated, as discussed above. Generally, the duty to accommodate will only become an issue in cases where rules, policies, practices, or institutional structures, assumptions or culture are perpetuating or leading to the disadvantage of persons identified by a particular family status.

In the context of family status, accommodation is usually associated with caregiving needs. Accommodation is central to overcoming the disadvantages experienced by caregivers, particularly in the areas of employment and services. Most of us will be both providers and recipients of care over the course of our lifetimes, so that accommodation of caregiving needs benefits us all.

An individual's caregiving needs will vary over the course of a lifetime. The nature of the needs associated with caring for children will be, for example, significantly different from the nature of the needs associated with caring for an aging parent. Some needs will remain stable over lengthy periods of time, while others may arise on an emergency basis.

Most often, accommodation of caregiving needs is neither burdensome nor costly; rather, it is a matter of flexibility. A flexible and accommodating approach is ultimately a significant advantage to employers in attracting and maintaining good employees, and to service providers and landlords in expanding their potential markets.

The following sections set out the basic legal test that persons responsible for accommodation must meet, the principles of accommodation, and the shared responsibilities of all parties to the accommodation process.

1. The Legal Test

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 which have an adverse effect on persons identified by family status. Section 11 allows the person responsible for accommodation to demonstrate that the requirement, qualification or factor is reasonable and *bona fide* by showing that the needs of the group to which the complainant belongs cannot be accommodated without undue hardship.

The Supreme Court of Canada sets out a framework for examining whether the duty to accommodate has been met.[31] If *prima facie* discrimination is found to exist, the person responsible for accommodation 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.

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 supplemented by accommodation for those who cannot meet them. This ensures that each person is assessed according to his or her own personal abilities instead of being judged against presumed group characteristics.[32]

The ultimate issue is whether the person responsible for accommodation has shown that accommodation has been provided up to the point of undue hardship. In this analysis, the procedure to assess accommodation is as important as the substantive content of the accommodation.[33]

The following non-exhaustive factors should be considered in the course of the analysis: [34]

- whether the person responsible for accommodation investigated alternative approaches that do not have a discriminatory effect;
- reasons why viable alternatives were not implemented;
- ability to have differing standards that reflect group or individual differences and capabilities;
- whether persons responsible for accommodation can meet their legitimate objectives in a less discriminatory manner;
- whether the standard is properly designed to ensure the desired qualification is met without placing undue burden on those to whom it applies; and
- whether other parties who are obliged to assist in the search for accommodation have fulfilled their roles.

2. Inclusive Design

Many aspects of society have been designed around traditional notions of the 'ideal family', and may exclude members of families that do not conform to these

conceptions. For example, standard hours of work and overtime schedules reflect an era when it was common for families to have a member at home to provide full-time care for children and elders; policies for birth registration did not until very recently recognize the families created by gays and lesbians; school board policies on bussing may not acknowledge the needs of dual-custody families; and lack of access to part-time university programs excludes persons with significant caregiving requirements. The failure to design with the needs of persons disadvantaged by family status in mind may lead to the creation of barriers, and to discrimination against such persons.

The Supreme Court of Canada has made it clear that society must be designed to be inclusive of all persons, regardless of membership in a *Code* protected group.[35] It is no longer acceptable to structure systems in a way that ignores needs related to family status; rather the systems should be designed in a way that does not create physical, attitudinal or systemic barriers for persons disadvantaged by family status.

As a corollary to this notion that barriers should be prevented at the design stage through inclusive design, where systems and structures already exist, organizations should be aware of the possibility of systemic barriers, and actively seek to identify and remove them. Where barriers have been identified, organizations must remove the barriers rather than making "one-off" accommodations, unless to do so would cause undue hardship.

Inclusive design is not only a principle of human rights, it makes good sense. Employers who fail to consider the needs of persons with caregiving responsibilities are likely to experience higher levels of absenteeism, burnout, and turnover among employees. Flexible and inclusive practices can be a considerable draw in attracting and retaining highly skilled and motivated workers.[36] Similarly, service providers who do not take into account the needs of families may alienate a significant potential target market.

3. Identifying Needs Related to Family Status

In most cases, accommodation needs related to family status will be connected to caregiving responsibilities. Human rights tribunals have found that the ground of family status must be interpreted to include the caregiving needs associated with the parent-child relationship.[37]

Not every circumstance related to family status and caregiving will give rise to a duty to accommodate. As noted above, the duty to accommodate only arises where a *prima facie* case of discrimination has been shown. Where rules, requirements, standards or factors have the effect of disadvantaging persons who have significant caregiving responsibilities related to their family status, either by imposing burdens that are not placed on others or withholding or

limiting access to opportunity, benefits or advantages available to others, a duty to accommodate caregiving needs related to family status may arise.[38] In most circumstances where there is a significant conflict between an important caregiving responsibility and an institutional rule, requirement, standard or factor, a duty to accommodate will arise. [39]

In considering whether a duty to accommodate has arisen, the following considerations may be of assistance:

1. **The nature of the caregiving responsibility, and of the conflict between that responsibility and the organization's rules, requirements, standards, processes or other factors**

This factor must be assessed on a case-by-case basis. The more substantial the caregiving obligation at stake, and the more serious the interference of that rule, requirement or factor, the more likely it is that a duty to accommodate will arise. For example, it is more likely that a duty to accommodate will arise with respect to a serious illness on the part of a family member, than with respect to a desire to attend a child's recreational activity.[40] The assessment of the caregiving responsibility at stake should be grounded in the practical, lived reality of caring for children, elders, or persons with disabilities. It should also take into account the range of family forms that exist: for example, stereotypical assumptions about LGBT people may make their families, and thereby their accommodation needs, "invisible" to employers.

2. **The systemic barriers faced by caregivers, including intersectional impacts based on disability, age, gender, sexual orientation, race and race-related grounds, and marital status.**

It is all too easy to consider individual caregiving needs as isolated personal issues. An employee seeking reduced work hours or a flexible schedule to attend to the needs of their children or their aging parents may easily be viewed as simply expressing their personal preferences regarding balancing their various responsibilities. Viewed in the broader light of the disadvantage faced by caregivers, particularly those who are vulnerable by virtue of being racialized, low-income, newcomer, female, disabled or lone-parent, these "one-off personal issues" may be seen in a different light.

In assessing requests for accommodation based on family status, organizations should consider whether systemic barriers may exist within their own organization, including the representation of persons with significant caregiving responsibilities, the organizational culture, and the inclusiveness of its policies, procedures and decision-making practices. Specific systemic barriers facing caregivers in employment, housing and services are discussed in the relevant sections.

3. The availability and adequacy of social supports for caregiving needs

In determining whether a rule, factor or requirement significantly interferes with a caregiving responsibility, it is important to take into account whether adequate social supports and services are available for the individual to resolve their caregiving needs without accommodation. For example, workers who find that there simply are no adequate childcare or eldercare supports available in the evenings or the weekends may need accommodation from their employers in terms of shifts. Both the adequacy and availability of supports should be taken into account: caregivers should not be required to place their loved ones into situations of significant risk of physical, emotional or psychological harm in order to meet the needs of their employer, landlord, or service provider.

4. Appropriate Accommodation

Where an accommodation need related to family status has been identified, the organization must identify and implement the most appropriate accommodation, short of undue hardship. The determination of what is and is not an appropriate accommodation is a separate determination 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 it if is proposed or adopted for the purpose of achieving opportunity and meets the individual's needs related to family status.

> **Example**: Rather than require employees with caregiving needs to use their vacation days in order to attend to caregiving needs, and therefore receive a lower level of benefits than other employees, an employer allows employees to use their standard sick days for both their own sicknesses and those of persons they are caring for.

Organizations need not provide more than the individual requires in order to meet the actual identified needs related to family status. For example, if rescheduling of work hours would enable an employee to attend to an important caregiving responsibility, the employer need not provide a paid day off.

The most appropriate accommodation will be that accommodation that most promotes inclusion and full participation, and effectively addresses any systemic issues.

> **Example:** Rather than making a one-time exemption for a student with substantial caregiving responsibilities to complete his degree on a part-time schedule, an educational institution re-examines whether the

> requirement that students complete their studies full-time is a *bona fide* requirement. When it determines that it is not, it alters the rule, and permits part-time studies.

It will be more difficult for an organization that has not taken steps to investigate and implement policies and practices that support and include caregivers to justify a failure to accommodate individual requests for flexibility.

It is a principle of human rights law that there is no set formula for accommodation: each person's needs are unique and must be considered afresh when an accommodation request is made. Accommodations must take into account individual situations and requirements. However, it is also the case that many accommodations will benefit large numbers of persons identified by the ground of family status.

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

Accommodations must acknowledge the practical realities of caregiving. An accommodation that is not in accordance with good caregiving practices, or that would place an undue burden on the family, will not be considered appropriate.

> **Example:** A parent of a child with a disability has found a centre that can provide expert programming and care for the child after school hours. However, the centre closes at 5:00. The alternative is to leave the child with a neighbouring teenager for the after-school hours; however, due to the nature of the child's complex medical needs, the parent is very concerned that any error or inattention on this teenager's part would place the child at risk. While the parent's employer would prefer the second option because its standard hours run from 9:00 until 5:30, it recognizes that this would not an appropriate accommodation, and instead allows the parent to work from 8:00 until 4:30.

Examples of potential accommodation strategies in the employment context are provided in section IX.3.

5. 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 has a responsibility to inform the accommodation provider that he or she has caregiving needs related to a parent-

child relationship, and that there is a conflict between those needs and the organization's rules, requirements, standards, processes or procedures.

Persons seeking accommodation may be expected to make reasonable efforts to first avail themselves of outside resources available to them prior to making accommodation requests to an employer, landlord, or service provider. However, such resources should:

- most appropriately meet the accommodation needs of the individual,
- be consistent with good caregiving practices, and
- not place an undue burden on the family.

Accommodation seekers are in the best position to identify and evaluate such outside resources. However, it is a best practice for employers and service providers to provide assistance to individuals in locating information regarding such resources; for example, through Employee Assistance Programs.

Accommodation providers should accept requests in good faith, unless there are objective reasons not to do so. Where necessary, organizations may request documentation of the validity of the accommodation-seeker's needs, such as medical documentation related to a family member's disability, or illness.

> **Example:** An employee has a lengthy history of absenteeism, and has in the past been disciplined for failing to provide valid reasons for absences. When this employee requests flexible start and finish times to address a new eldercare responsibility, the employer requests further information to verify that the need exists.

Organizations may make reasonable requests for information that is necessary to clarify the nature and extent of the accommodation need.

> **Example:** An employee requests a lengthy leave of absence to attend to a serious illness of a child. The employee provides the employer with medical documentation verifying the child's illness and setting out the length of time that the illness is expected to last.

The organization may also seek reasonable information regarding any available outside resources that the individual has enquired into.

> **Example:** An employee's father has had a serious fall and is no longer able to manage household tasks on his own. The employee asks for a temporarily reduced workweek so that he can attend to the needs of his father. He indicates to his employer that he has looked into homecare services for his father, and that there is a waiting list of approximately six months. The employer provides him with a reduced workweek for six months.

However, organizations should not seek details of private family arrangements, unless there are objective reasons to believe that the accommodation seeker is not acting in good faith. For example, an employer may not be entitled to know why another sibling is not taking a greater role in caring for an aging parent. Accommodation providers should not make enquiries based on stereotypical assumptions (such as, "Why can't your wife do it?").

As information related to family needs and arrangements may be highly personal, organizations should take steps to ensure that information related to accommodation requests is kept confidential, and shared only with those who need it.

Organizations should act in a timely manner, take an active role in seeking accommodation solutions, and bear any required 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.

6. Undue Hardship

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

The *Code* prescribes three considerations in assessing whether an accommodation would cause undue hardship. No other considerations, other than those that can be brought into these three, can properly be considered. These are:

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

The onus of proving that an accommodation would cause undue hardship lies on the accommodation provider. The evidence required to demonstrate undue hardship must be real, direct, objective, and in the case of costs, quantifiable. A mere claim, without supporting evidence, that the cost or risk is "too high" based on impressionistic views or stereotypes will not be sufficient.

In most cases, accommodations for needs related to family status will not require significant expenditures; rather, they involve increasing the flexibility of policies, rules and requirements. This may involve some administrative inconvenience, but inconvenience by itself is not a factor for assessing undue hardship.

Accommodation for persons identified by family status may in some cases cause resentment among others, who perceive these individuals to be receiving unjustified "perks" and privileges. Using an inclusive design approach to accommodation will address some of these concerns, since all may benefit from approaches that increase flexibility and choice. Given that all of us will be either the recipients or the providers of care at some point during our lives, accommodation for needs related to family status ultimately benefits us all. In any case, accommodation providers should take positive steps to educate their organizations about the *Code*, and ensure that accommodation seekers are not subjected to a poisoned environment.

VII. Organizational Responsibility

The ultimate responsibility for a healthy and inclusive environment rests with employers, landlords, unions, vocational and professional organizations, service providers, and other organizations and institutions covered by the *Code*. There is an obligation to ensure 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 complaint has been made.

An 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 ensure that rules, policies, procedures, decision-making processes and organizational culture are non-discriminatory on their face, and do not have a discriminatory impact.

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 those who, while not the main actors, are drawn into a discriminatory situation nevertheless, through contractual relations or otherwise.[41] An organization should also not punish a person because of how they responded to discrimination or harassment: persons 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.

Unions, vocational, and professional organizations are responsible for ensuring that they are not engaging in, condoning, or contributing to discrimination or harassment. They may be liable for discriminatory policies or actions to the same extent as an employer, and share the same obligation to take measures to address harassment or a poisoned environment. Where a union, or vocational or

professional organization obstructs an accommodation process, it may be the subject of a human rights complaint.

Human rights decisions frequently 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 persons based on family status, despite sanction of individual harassers. In these cases, the organization should take further steps, such as training and education, in order to more appropriately address the problem.

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 work environment for the person who complained; and
- the degree to which the action taken was communicated to the person who complained.[42]

Under section 46.3 of the *Code,* a corporation, trade union or occupational association, unincorporated association or employers' organization will be held responsible for discrimination, including acts or omissions, committed by employees or agents in the course of their employment. This is known as vicarious liability. It applies not only to human rights violations in the workplace, but also in housing accommodation, goods, services and facilities, contracting, and membership in unions and vocational associations.

Simply put, it is the Commission's position that vicarious liability automatically attributes responsibility for discrimination to an organization for 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, although 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*; or
- The employee who is part of the ‘directing mind” does not respond adequately to harassment or inappropriate behaviour of which he or she is aware, or ought reasonably to be aware.

Generally speaking, managers and central decision-makers in an organization are part of the “directing mind”. Employees 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 for the guidance of employees. For example, a member of the bargaining unit who is a lead hand may be considered to be part of the “directing mind” of an organization.

VIII. Preventing and Responding to Discrimination Based on Family Status

Organizations and workplaces can take a number of steps to prevent and appropriately address human rights complaints. Important elements of an organization’s strategy to address human rights issues related to family status 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 an organization. Adoption, implementation and promotion of these policies can help to limit potential harm, and reduce the organization’s liability in the event of a complaint. These policies should explicitly address discrimination based on all grounds of the *Code*, including family status.

These elements should be developed in co-operation with workplace or organization partners where they exist, such as unions. Unions are important partners in the creation of a non-discriminatory workplace. As part of a "best practices" initiative, they should work with employers in the development of internal policies and procedures.

A detailed description of best practices for developing and implementing such policies and procedures can be found in the Commission’s publication, *Human Rights at Work*.[43]

2. Barrier review and removal programs

Organizations should take proactive steps to ensure that policies, programs, rules and requirements are not having an adverse impact based on family status. Organizations should undertake regular reviews, and based on their findings, develop and implement barrier removal strategies. Examples of common barriers are found in the sections on Employment, Housing, and Services.

As well, organizations should ensure that whenever new policies, procedures, rules and requirements are developed, their possible impact on persons identified by family status 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 organization's human rights strategy. Both management and staff should have a solid understanding, not only of the requirements of the *Code* and of the organization's own human rights policies and procedures, but also of the common barriers and stereotypes facing persons identified by *Code* grounds, including family status.

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 organization.

IX. Employment

To a significant degree, the workplace is still built on the assumption that families are composed in a 'traditional' fashion, of two married heterosexual parents, one of whom is providing full-time caregiving for children, aging relatives, and other family members as necessary. Work schedules, policies and benefits all too often reflect the assumption that employees do not have substantial caregiving obligations. The corollary to this assumption is the belief that workers who do have substantial caregiving obligations are in some way inferior and undesirable employees.

However, the reality is that all employees will, at some point in their careers, have to juggle the demands of work and caregiving. The recognition of employees' familial responsibilities is an important element of hiring, retaining, and getting the best possible performances from employees.

It is also the law. Section 5 of the *Code* requires employers to provide their employees with equal treatment without discrimination because of family status. Section 11 provides that requirements that have an adverse impact on employees who are identified by family status will be discriminatory, unless the requirement is reasonable and *bona fide*, and the employer has accommodated to the point of undue hardship. In *Brown v. M.N.R., Customs and Excise,* the Canadian Human Rights Tribunal ruled that employers have a duty to accommodate needs related to family status, including employees' needs to strike a "fine balance between family needs and employment requirements".[44] The British Columbia Court of Appeal has ruled that there will be a *prima facie* case of discrimination, and a resulting duty to accommodate, where a change in a term or condition of employment imposed by an employer results in a serious interference with a substantial parental or other family duty or obligation of the employee.[45]

1. Negative Attitudes and Assumptions Related to Family Status

Because of stereotypes and negative attitudes associated with caregiving roles, employers may assume that persons with significant caregiving responsibilities will not be willing to work longer hours, do overtime, or take on challenging or complex projects, and may consciously or unconsciously slot such individuals into workplace roles consistent with these assumptions. Because of continuing societal assumptions regarding gender roles, these stereotypes may have particularly significant impact on women in the workforce.

As well, the stigma that some continue to associate with being a lone parent, a young parent, or an LGBT parent may result in significant disadvantage in the workplace. In *Moffat v. Kinark Child and Family Services (No. 4)*, a human rights Board of Inquiry found that a gay man had suffered discrimination based on family status and sexual orientation when he was subjected to workplace rumours, harassment and false accusations because he was the foster parent to an adolescent boy.[46]

Decisions regarding hiring, promotion, training, or dismissal should not be directly or indirectly based on assumptions related to family status. Family status need only be one of the reasons for a decision or treatment in order for it to be considered discriminatory. Employers should ensure that, rather than judging individuals against presumed group characteristics, they are considered and assessed as the unique individuals they are. For example, rather than assuming that an individual with caregiving responsibilities would not be interested in a relocation or a promotion, he or she should be offered the same opportunities to apply and qualify as other staff.

> **Example:** When interviewing applicants for a promotion, a manager repeatedly asks a candidate who has recently returned from maternity

> leave whether she is truly "committed" to her career, emphasizing, "this job is not for those who are nine-to fivers". The candidate is ultimately passed over in favour of an employee who is childless.

Stereotypes may operate during the hiring process, as well as on the job. Employers should therefore be careful during the hiring process not to ask for information that may reveal the family status of applicants. For example, employers should not ask:

- Whether a person has or is planning to have children;
- Whether a person has family responsibilities; or
- Whether the person's family responsibilities may limit their availability.

Questions regarding irregular hours or ability to travel may reveal the family status of applicants and have the effect of screening out such persons. Questions about the ability of an applicant to undertake such hours or to travel may *only* be asked where irregular hours or regular travel are a *bona fide* occupational requirement. In order for a workplace rule to be a *bona fide* occupational requirement, it must meet the test set out at section VI.1; as part of that test, the employer must demonstrate that it would be impossible to accommodate without undue hardship.

The *Code* makes an exception for nepotism and anti-nepotism policies. Section 24(1)(d) of the *Code* specifically permits employers to grant or withhold employment or advancement in employment to someone who is the spouse, child or parent of the employee. For example, an employer can have a policy that spouses, parents or children cannot be employed in positions where one would report to the other. An employer could also have a policy providing preferential treatment to children of current employees for summer employment. Where such policies are in place, an employer may make inquiries during the hiring process as to whether an applicant is the child or parent of a current employee.

Information about an employee's family status may be relevant to the provision of benefits. Where this is the case, such information should only be requested after the person has been hired. Information that may disclose an employee's family status should be kept confidential. All information should remain exclusively with designated personnel (such as human resources staff) in a secure filing system.

Co-workers as well as managers and supervisors may hold negative attitudes and stereotypes related to family status, and such attitudes may give rise to harassment or a poisoned work environment. Employers should take positive steps to ensure that their workplaces are free of discriminatory attitudes and stereotypes, and that they are welcoming to persons identified by family status.

2. Workplace Policies, Practices and Culture

Described below are some workplace policies and practices that commonly form barriers for persons identified by family status. Employers should carefully consider their policies on these issues to determine whether they may be posing barriers based on *Code* grounds, and if so, whether they are *bona fide* requirements.

2.1 Absenteeism Policies and Leaves of Absence

It is common for persons with family care responsibilities to find that their responsibility to provide care for family members requires absences from work. Such absences may be very short, or much more lengthy. Absences may be planned, or may arise as emergencies.

It is a legitimate goal for employers to ensure that employees are able to reliably and effectively perform their duties. Employers are entitled to manage absenteeism. However, rigid attendance management programs and absenteeism policies that do not take into account the needs of persons with caregiving responsibilities may discriminate on the basis of family status.

> **Example:** An employer's attendance policy states that any employee absence during a three-month probationary period is cause for termination. A new employee's mother has a serious fall. He takes two days off from work to attend to her at the hospital and to arrange supports for her return home. Upon his return to work, he is dismissed because of his violation of the attendance policy.

As well, employers may fail to take into account the needs of persons identified by family status when designing their programs and policies. For example, it is not uncommon for employers to allow employees to take time off from work for their own sickness, but to make no provision at all for caring for the needs of sick family members or to require employees to use their vacation days to attend to the needs of their family members. Employees should not find themselves disadvantaged in the provision of benefits as compared to other employees because of their needs related to family status. Where employers provide paid leaves of absence to employees for needs related to disability, creed, pregnancy or for other reasons, employees with needs related to family status should receive comparable treatment. [47]

The Ontario *Employment Standards Act*[48] provides some minimum entitlements for caregivers:

- Employers of over 50 employees must provide up to 10 days of unpaid leave for employees to attend to urgent family matters, including a death,

severe illness, injury or medical emergency. "Family" in this context includes spouses (including same-sex spouses), children (including step and foster children), grandparents, siblings, spouses of children and any other relatives that are dependent on the employee for care and assistance.[49]

- Employees are entitled to up to eight weeks of unpaid leave to provide care or support to family members who are at significant risk of death within the next six months.[50]
- Pregnant employees are entitled to pregnancy leave if they meet certain qualifications, and their job security, seniority and benefits are protected during that leave.[51]
- Parental leaves are provided to employees who meet the requirements. Job security, seniority and benefits are protected during such leaves.[52]

The *Employment Standards Act* and the Ministry of Labour should be consulted for detailed information on these entitlements. It should be emphasized that these are minimum standards only and should be interpreted and implemented in the light of the *Code*. The *Code* duty to accommodate takes precedence over the requirements of the *Employment Standards Act*, and employers may be required by the *Code* to go beyond these minimum requirements.

2.2 Hours of Work and Overtime

Inflexible, excessive, or unpredictable work hours may pose barriers to persons with caregiving responsibilities. Court and tribunal decisions have found that employers may be required to consider modifications to work hours and schedules in order to accommodate needs related to family status.[53]

Inflexible schedules for work hours and breaks may pose barriers for employees attempting to meet their responsibilities both to their employers and to their loved ones. For example, given that few daycares operate prior to 8:00 a.m. or after 6:00 p.m., even the most dedicated employee with children may find it difficult to comply with a work schedule that requires them to start precisely at 8:00 a.m. Of course, there will be circumstances where the nature of the work demands specific start, finish and break times. Where such timetables are not a *bona fide* requirement, employers should consider designing schedules in a more flexible manner, and should at minimum provide adjustments to accommodate *Code*-related needs.

Some professions or workplaces have a 'culture of hours' in which employees' value and dedication is judged by the number of hours they are visibly at work, regardless of their productivity or the quality of their work. Such workplace cultures are likely to exclude or undervalue persons with significant caregiving responsibilities, regardless of their skills and accomplishments.

Individuals who have multiple or very heavy caregiving responsibilities may find it impossible to work lengthy hours on a regular basis. Where such hours are not a *bona fide* requirement, employers should consider offering temporary or permanent reductions in work hours, or other alternative work arrangements.

Similarly, employees with significant caregiving responsibilities may be unable to be consistently available for last-minute demands to stay late or work overtime.

Where social supports for childcare, eldercare, or for persons with disabilities are limited, employees with significant caregiving responsibilities may require accommodations to shift scheduling.

> **Example:** An employee worked rotating night and day shifts. Her husband, a police officer, was required to do the same. After their first child was born, they looked for night-time childcare, but were unsuccessful in finding any in their community. The employee requested her employer to schedule her for straight day shifts. The employer refused. A human rights tribunal found that the employer was required to enter into the accommodation process with the employee, and that it had violated the employee's human rights. [54]

2.3 Travel Requirements

Where employees have significant caregiving responsibilities, their ability to undertake regular or extensive travel may be limited. Of course, this is not the case for all employees with family responsibilities: employers should not make the assumption that, for example, a person with young children or other significant caregiving responsibilities will not be interested in work that involves travel. Some jobs require regular travel as an essential duty. Where it is not a *bona fide* requirement, employees should not be denied opportunities because their caregiving responsibilities prevent them from undertaking regular or extensive travel.

Even where travel is an essential duty of the job, employers can accommodate family-status related needs of employees by, for example, recognizing related dependent-care expenses or providing appropriate supports.

2.4 Access to Benefits

Employee benefit plans or employment practices that result in disadvantage because of family status constitute discrimination under the *Code*.

Persons with caregiving responsibilities are disproportionately likely to find themselves in part-time, casual or other non-standard work. [55] This is particularly true for women. Those in non-standard work are unlikely to have access to

pensions and health-related benefits. [56] This has long-term consequences for the economic security of caregivers and has the effect of disadvantaging persons identified by family status, particularly as it intersects with the ground of sex.[57] Where discrepancies in the treatment of full-time and part-time workers have an adverse impact on persons identified by family status, this may be grounds for a complaint under the *Code*.

2.5 Workplace Culture

Organizational culture may contribute to the marginalization of persons with caregiving responsibilities, either where it is not inclusive of persons with caregiving responsibilities, or where it supports negative attitudes towards persons disadvantaged by family status.

> **Example:** An employer that wishes to develop teamwork and camaraderie among employees sets up regular, non-mandatory after-hours social events for staff, at which colleagues often share information about training and promotion opportunities and workplace events. Employees with caregiving responsibilities, who are not able to regularly attend these events, begin to find themselves "out of the loop", and at a disadvantage in accessing workplace opportunities.

> **Example:** A mother of small children finds that, although she completes her work efficiently and her manager considers her a good performer, her co-workers assume that she is not "pulling her weight" because she does not regularly stay late at the office, and she is therefore the subject of gossip and resentful comments.

2.6 Reprisal

It is common for employees who need accommodations related to their caregiving obligations to fear that requesting or using such accommodations will be detrimental to their position at work. Employees who seek accommodations related to their family status should not be treated as less valuable or less committed to their work as a result. Employers are responsible for ensuring an environment where caregivers are not afraid to seek and use strategies to accommodate their needs.

> **Example:** A teacher seeks and obtains part-time work in order to balance her caregiving responsibilities with her work. However, she finds that her employer will no longer approve her requests for training opportunities, because the employer perceives her to be "on the parent track".

3. Workplace Accommodations for Caregiving Needs

Employers should take steps to ensure that the workplace is "family friendly" and has a positive work-life culture. Steps to achieve such a culture include:

- A visible, senior-level statement of continuing support for an inclusive, family-friendly workplace,
- Education and training programs for management and staff on the requirements of the *Code* respecting family status, and
- The development and implementation of an organizational strategy for ensuring the creation of an inclusive workplace.

Programs and policies should recognize and support the range and diversity of contemporary Canadian families. Recognition of only a narrow spectrum of families is not only not in harmony with the *Code*, but may create a negative reaction to the organization's policies and programs, with unintended negative consequences. As well, policies and programs should take into account the impacts of gender, sexual orientation, age, disability, and race-related grounds on the experience of family status.

In many cases, the best approach to accommodating needs related to caregiving is by increasing the flexibility and options available to all workers. This approach is in harmony with the principle of inclusive design, contributes towards employee satisfaction, productivity and retention, aids in employee recruitment, and reduces the need to deal with multiple individual requests. The following is a non-exhaustive list of common policies and programs that address needs related to family status:

Flexible Hours Programs: With a flexible hours program, the employer sets core work hours (for example, from 10 a.m. to 3 p.m.) during which all employees must be at work, and sets the length of a standard work day. Employees can then choose to work from 7 a.m. until 3 p.m., for example, or from 10 a.m. until 6 p.m.

Compressed Work Weeks: Under a compressed work week program, employees work a standard number of work hours but in fewer days – for example, by working 10 hours four days per week, rather than eight hours five days per week. There are many possible variations on this concept.

Reduced Work Hours: Employers may provide either permanent or temporary access to reduced work hours. Employees who work reduced hours should not be disadvantaged in terms of access to training, pro-rated benefits or quality of work.

Job Sharing: This is an innovative form of reduced work hours, in which two employees both reduce their hours and "share" a single position and set of responsibilities.

Leaves of Absence: Beyond the statutorily mandated maternity, parental, and family medical leaves, employers may provide extended or additional caregiving leaves for employees, whether short or long-term. They may include employer funded leaves, employer subsidized leaves, unpaid leaves, or self-funded leaves (where the employee pays in a portion of his or her salary over a period of time to fund the leave, and the employer administers the funds to provide salary continuance during the leave).

Childcare and/or Eldercare Services: This can include information and referral services, the provision of subsidies or vouchers, access to emergency dependent care services, or the provision of on-site care. For example, some large employers who regularly require employees to be available for night shifts have made arrangement to provide night-time childcare for employees.

Employee Assistance Programs: EAPs can provide a wide range of services, including information and referral for a range of programs, counselling, and other supports.

Telework: Under these arrangements, employees may work at least some of their regular scheduled hours at home.

X. Housing

Section 2 of the *Code* prohibits discrimination in housing based on family status. This right applies to renting, being evicted, building rules and regulations, repairs, harassment, and use of services and facilities.

There is a lengthy history of families with children being turned away from housing because of negative perceptions associated with family status. These negative perceptions are compounded for young families, lone parent families, families from racialized and Aboriginal communities, and those in receipt of social assistance. The pattern of complaints received by the Commission, as well as social science evidence, indicates that this is a persistent, endemic problem in the rental housing market. The continued prevalence of “adult only” housing despite the clear prohibitions of the *Code* is a strong example of this.

As well, families face a range of systemic barriers to accessing housing. Families with young children, lone parent families, parents with disabilities or parents of children with disabilities, families from racialized communities and Aboriginal and newcomer families are disproportionately likely to be low income. The shelter allowance rates for families on social assistance are far below market levels. This, together with tight rental housing supply in many parts of the province, puts families at a significant disadvantage when seeking shelter.

Families identified by multiple *Code* grounds face a double disadvantage when seeking housing – for example, a family that includes a member with a disability must find shelter that is both accessible and accepting of children.

1. Refusal to Rent to Families with Children

As noted above, families seeking shelter face a range of negative and discriminatory attitudes and stereotypes. 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 in receipt of social assistance, including stereotypes that they are less responsible, less reliable, and more likely to default on their rent.[58] Foster families also face extra difficulties in accessing housing because of negative attitudes towards foster children and foster families.

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 persons under a certain age.[59]

In some cases, landlords directly refuse applications because of the presence of children. They 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. Section 13 of the *Code* prohibits the publication or display before the public of any notice, sign, symbol, emblem or other representation that indicates the intent

to discriminate. Use of such phrases in advertisements may be considered such an announcement of an intent to discriminate.

Landlords should not require rental housing applicants to provide information that would reveal their family status. For example, application forms should not require applicants to reveal the age of co-occupants.[60] If landlords have a *bona fide* requirement for such information about tenants, they can request it after the housing application has been approved.

2. Rental Criteria

There are a number of criteria commonly used by landlords in assessing prospective tenants that may create systemic barriers for families with children. The *Code,* in section 21(3), provides specific guidance to housing providers with respect to the use of 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 restricts the manner in which these business practices may be used, and specifically reaffirms that landlords may not reject prospective tenants on the basis of *Code* grounds. None of these assessment tools may be used in an arbitrary manner to screen out prospective tenants based on *Code* grounds. The criteria must be used in a *bona fide* and non-discriminatory fashion. Where income information, credit checks, credit references, rental history, or guarantees are being applied in a fashion that creates systemic barriers for persons 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.

2.1 Use of Income Information

Section 21(3) and Regulation 290/98 permit landlords to seek and take into consideration income information from prospective tenants. “Income information” encompasses “information about the amount, source, and steadiness of a potential tenant’s income”.[61] The prohibitions in the *Code* against discrimination on the basis of receipt of public assistance mean that landlords cannot discriminate against potential tenants on the basis that the source of their income is social assistance benefits. Nor can landlords refuse to consider income such as allowances that are provided to foster families.

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. The assessment must be *bona fide*, meaningful, and non-discriminatory.

It has in the past been 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) or minimum income requirements. This practice was assessed in *Shelter Corp. v. Ontario*[62] and found to have a systemic impact on a range of groups protected by the *Code*, including those identified by family status[63]. The Board of Inquiry found that these practices were not *bona fide* requirements as they had no value in predicting whether a tenant would default on the rent. The subsequent addition of section 21(3) to the *Code* and the enactment of Regulation 290/98 do *not* permit landlords to use minimum income requirements or apply income ratios, as has been clarified in a subsequent decision of the Tribunal.[64]

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.

2.2 Rental History

Regulation 290/98 permits landlords to request information regarding rental history, and to consider it, either alone or in combination with other factors, in 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 following 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.[65] Where a prospective tenant lacks a rental history for reasons related to a *Code* ground, landlords should look at other available information regarding the prospective tenant to make a *bona fide* assessment of the tenant.

2.3 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.

Women returning to the workforce after lengthy periods of caregiving, young families, and newcomer families 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 should not reject tenancy applications on the basis of a lack of credit history.[66]

In any case, credit history must only be considered in a *bona fide* attempt to validly assess potential tenants.

2.4 Employment History

Some landlords require that potential tenants have 'stable' long-term employment. This requirement can be problematic for caregivers returning to the workforce after lengthy periods as full-time caregivers. Requirements 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.[67]

2.5 Guarantors and Security Deposits

Regulation 290/98 permits landlords to require guarantees for rent, or to pay security deposits in accordance with the *Residential Tenancies Act, 2006* (formerly the *Tenant Protection Act*). While the use of co-signors or security deposits may be appropriate where a tenant has poor references or a history of default, it is impermissible to require guarantors or security deposits because the prospective tenant is a member of a *Code* protected group, such as being a lone parent, or in receipt of social assistance.

When landlords request a co-signor or guarantor, they cannot require that this person meet minimum income requirements or rent-to-income ratios that would be impermissible to impose on the prospective tenant him- or herself.

2.6 Health and Safety Concerns

Landlords may not refuse to rent high-rise apartment units to families with young children on the basis of health and safety concerns. Landlords are required by the *Residential Tenancies Act, 2006* to maintain health and safety standards and ensure units are in a state of good repair. Moreover, the duty to accommodate needs relating to family status applies to landlords: where modifications are required to a housing unit to meet needs related to family status, the landlord must accommodate to the point of undue hardship.

> **Example:** A family with small children applies to rent an apartment that is on the 10th floor of the apartment building. The landlord is concerned about the safety of the children, because the apartment has a balcony. Rather than deny the apartment to the family, the landlord ensures that the balcony meets all appropriate safety standards.

3. Occupancy of Accommodation

3.1 Occupancy Policies

Occupancy policies must be based on *bona fide* requirements. Landlords are not obliged to permit overcrowding of their units. However, arbitrary rules regarding occupants per room or per bedroom may have an adverse impact on families with children. A human rights tribunal found a violation of the *Code* where a landlord denied a three bedroom apartment to a single mother of three children because the "Canadian standard" was that such apartments should be rented to couples with two children.[68] Similarly, landlords should not deny apartments to families on the basis of arbitrary rules regarding the sharing of bedrooms by children of the opposite sex.

3.2 No Transfer Policies

As children join a family, its housing needs will change and additional space will be required. In such circumstances, families may request transfers between rental units in the same building. An Ontario Board of Inquiry held that rules prohibiting transfers between rental units discriminate on the basis of family status.[69]

3.3 Access to Recreational Facilities and Common Areas

Age based restrictions on access to recreational facilities and common areas may discriminate on the basis of 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.[70]

> **Example:** A condominium restricts use of its swimming pool and recreational facilities by persons 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 regarding the use of certain facilities by children. Where a rule restricts or prohibits access to facilities or areas in a way that impacts on usage by families, the burden will be on the landlord to demonstrate that the rule is a *bona fide* requirement, and that a more inclusive rule could not be implemented without undue hardship.

4. Children's Noise

Persons living in multi-residential housing live in close quarters and children, by their very nature, can be noisy. It is natural that children cry, run, and play. Children's noise is frequently a source of conflict in apartment-type housing. It has been used as a reason for denial of housing, has been the source of evictions, and has led to harassment and poisoned environments for families with children.

The normal noise associated with children should not be a reason for denial of housing, eviction, or harassment of families. Parents are obliged to take steps in accordance with good parenting practices to manage the noise made by their children and to be good neighbours. However, it should be recognized that children will naturally make some noise.

Landlords should take steps to ensure that families with children are not harassed by neighbours because of the normal noise associated with children, just as they would with regard to harassment based on other *Code* grounds. Where necessary, landlords can explore options such as moving the complaining tenant, or providing soundproofing where it is possible to do so without undue hardship.

XI. Services

Section 1 of the *Code* prohibits discrimination on the basis of family status in services, goods and facilities. This includes, but is not limited to, educational institutions, hospitals, public transit services, social services, public places like malls and parks, and stores and restaurants.

1. Negative Attitudes and Stereotypes

Discrimination on the basis of family status in the area of services often arises because of negative perceptions regarding children, or regarding specific types of families. For example, female-headed lone parent families are heavily stigmatized, particularly when they are racialized or Aboriginal, or are in receipt of social assistance. These families may find themselves subjected to unwarranted scrutiny, denied services, or subjected to harassment when seeking services.

> **Example:** A social service provider tells an Aboriginal lone mother that she is just having babies to get money from the system, and subjects her to an extra audit of her compliance with program rules.

Similarly, some families may have difficulty in obtaining recognition from service providers that they are "real" families. This is particularly true for foster families and LGBT families. Services ordinarily available to families may be denied to them or only accessed with difficulty.

> **Example:** A gay man and his partner have cared for his mother for years. When she is in the final stages of her illness, she is admitted to the hospital. Due to the hospital rules, her son's partner can only visit her by pretending to be another of her sons.

2. Inclusive Design and the Duty to Accommodate

One prevalent source of discrimination against families is the failure to design services in ways that include them.

> **Example:** A law school student's mother is diagnosed with cancer. The law school agrees to provide a short-term leave of absence; however, when the leave is over, and the mother is still ill, the student is forced to drop out of school because part-time studies are not available.

Service providers can take steps to make their services more inclusive of families. Public facilities should install change tables in washrooms, both male and female, so that parents are not left in an awkward dilemma when taking their infants for an outing. Education providers can provide options for day or evening programs, leave of absence options, and quality distance education alternatives. Recreational facilities can provide family changerooms.

Inclusive design should take into account that families may include persons who have disabilities, are LGBT, or are from various cultural communities.

> **Example:** A parent with a disability is reliant on specialized transit services for transportation. Needing to visit a health care provider, she arranges to drop her child off at a childcare centre. However, because the specialized transit provider does not permit her to travel with her child, she finds she has no means of accessing either the childcare service or her healthcare appointment.

Families with young children, like persons with disabilities and older persons, face challenges from physically inaccessible buildings, and would benefit from barrier removal and inclusive design. Families with young children in strollers, for example, will have difficulty in accessing buildings with many stairs and heavy doors. Rules that ban or restrict stroller access pose barriers to families, particularly for parents who have disabilities and cannot carry their small children. Where, as a result of inaccessible design or stroller bans, persons with small children are not able to access a service, this may amount to a violation of the *Code*.

Like employers, service providers should take steps to provide accommodation for service recipients who have caregiving needs.

> **Example:** When a student's child falls gravely ill just before a final examination, the education provider agrees to defer the examination until the child has recovered.

Governments have a significant role to play in ensuring the accessibility of their services, regardless of family status. The Supreme Court of Canada has stated that, when governments provide benefits to the general population, they have an obligation to take positive steps to ensure that members of disadvantaged groups benefit equally from those services, subject of course to the undue hardship standard.[71]

> **Example:** A government social assistance program requires recipients to work, study or do volunteer work. Many recipients are lone parents and have significant childcare responsibilities. The program providers are required to ensure that appropriate childcare supports are available or that work, study or volunteer requirements are compatible with the recipient's caregiving needs.

3. Age-Based Restrictions and "Child-Free" Spaces

The *Code* prohibits discrimination in services on the basis of age only for persons aged 18 or older. In other words, service providers are entitled, under the *Code*, to restrict the services they provide to minors. However, a recent Tribunal decision has indicated that this provision of the *Code* can be an unjustifiable abridgement of the equality rights of children under the *Charter of Rights and Freedoms*.[72]

In any case, restrictions on services to children that have the effect of restricting the access to services for their parents may discriminate on the basis of family status. For example, in a British Columbia case, a restaurant that refused to allow customers with children to use its services, on the basis that other customers did not like being disturbed when children made a fuss, was found to have discriminated on the basis of family status.[73] Negative attitudes or intolerance towards children may lead to discriminatory behaviour towards families. It is the Commission's position that services that bar access to families with children under a certain age may be violating the *Code*.

There are, of course, valid reasons for treating minors differently than adults in some circumstances. It is legitimate to take steps to ensure that children do not have access to services or facilities that would compromise their safety or wellbeing. Where the health, safety or wellbeing of children would be put at risk, it is likely that a service-provider will have a *bona fide* reason for denying access to children. However, arbitrary age restrictions should not be used to enforce mere preferences for "child-free" spaces.

In some cases, behaviour that is typically associated with children may be incompatible with the nature of a particular service. For example, loud and persistent crying during a theatrical performance may substantially interfere with the ability of other patrons to hear and enjoy the performance. Children, like adults, vary in their behaviour, and judgements about children's behaviour cannot necessarily be made beforehand. Rather than using age-based restrictions, it may be more appropriate to specify the essential requirements for accessing the service in question: those who cannot meet those essential requirements may be excluded, regardless of their age.

> **Example:** A community swimming pool, rather than designating times for "adult swimming" and "family swimming", designates times for "lane swimming" and "free swimming". Children who are proficient swimmers, and adults who are boisterous, will each have access to the appropriate services.

The *Code* sets out specific exceptions where services may be denied on the basis of family status. Section 20(3) allows recreational facilities to restrict or qualify access to services or facilities and to give preference in membership dues or fees on the basis of marital and family status. This defence would likely protect a single's club, for example. As well, section 18 permits religious, philanthropic, educational, fraternal or social institutions or organizations that are primarily engaged in serving the interests of persons identified by a prohibited ground to restrict membership or participation to those who are similarly identified.

For Further Information

For more information about the Ontario Human Rights Commission or this policy statement, please call 1-800-387-9080 (toll free) or in Toronto (416) 326-9511 (TTY: (416) 314-6526 (local) and 1-800-308-5561 (toll free), during regular office hours from Monday to Friday. You can also visit our website at www.ohrc.on.ca.

Endnotes

[1] In *Quesnel v. London Educational Health Centre* (1995), 28 C.H.R.R. D/474 at para. 53 (Ont. Bd. Inq.), the Board of Inquiry applied the United States Supreme Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (4th Cir. 1971) to conclude that Commission 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.

[2] For the purposes of this *Policy*, the term "caregivers" refers to those persons who provide informal, unpaid assistance for the physical and emotional needs of another person who is reliant on them for that assistance. Generally, the recipient of care is a child, an older person, or a person with a disability. Caregiving can include a range of activities beyond direct physical care, such as advocacy on behalf of the care recipient, locating and organizing services, taking care recipients to appointments, carrying out errands, and monitoring needs or well-being. Persons identified by family status (that is, persons in a parent-child relationship) will generally pass through stages where they are and are not caregivers to their parents or children. Persons not identified by family status (such as, for example, siblings) may also have caregiving responsibilities in some circumstances.

[3] *Brooks v. Canada Safeway Ltd,* [1989] 1 S.C.R. 1219 at para. 40.

[4] See *Slaight Communications Inc. v. Davidson,* [1989] 1 S.C.R. 1038 and *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 70-71.

[5] 10 December 1948, General Assembly resolution 217A (III), UN Doc. A/810.

[6] 19 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).

[7] 16 December 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46 (entered into force 03 January 1976, accession by Canada 19 August 1976).

[8] 18 December 1979, 1249 U.N.T.S. 13, Can. T.S. 1982 No. 31 (entered into force 03 September 1981, accession by Canada 09 January 1982).

[9] 20 November 1989, GA Res. 44/25, Can. T.S. 1992 No. 3 (entered into force 02 September 1990, accession by Canada 12 January 1992, Article 18).

[10] Vanier Institute of the Family, *Profiling Canada's Families III* (2004): 18, online: Vanier Institute of the Family www.vifamily.ca.

[11] For a more detailed discussion of demographic trends relating to families, see the Ontario Human Rights Commission's Discussion Paper, *Human Rights & the Family in Ontario* (2005), online: Ontario Human Rights Commission www.ohrc.on.ca.

[12] See, for example, *M.D.R. v. Ontario (Deputy Registrar General)*, [2006] O.J. No. 2268 at paras. 111-15 (Ont. Sup. C.J.) in which the Court held that provisions of the *Vital Statistics Act* that prevented the inclusion of both lesbian parents on the Statement of Live Birth of a child conceived through artificial insemination violated the equality provisions of the *Charter* with respect to sex and sexual orientation. In a very recent decision by the Ontario Court of Appeal, *A.A. v. B.B.*, [2007] O.J. No. 2 at para. 7 (Ont. C.A.), the Court ruled that three legal parents could be recognized under the *Children's Law Reform Act*: a lesbian couple who were the child's guardians, and the child's biological father.

[13] *Moffatt v. Kinark Child and Family Services (No. 4)* (1998), 35 C.H.R.R. D/205 at para. 12 (Ont. Bd. Inq.) dealt with discrimination against a gay foster parent. Discrimination against adoptive families was dealt with in *McKenna v. Canada (Secretary of State*, (1993), 22 C.H.R.R. D/486 (CHRT) and *Pringle v. Alberta (Municipal Affairs)* (2003), 48 C.H.R.R. C/111 (Alta. H.R.P.).

[14] *York Condominium Corp. No. 216 v. Dudnik (No. 2) (*1990), 12 C.H.R.R. D/325 at para. 165 (Ont. Bd. Inq.), aff'd (1991), 14 C.H.R.R. D/406 (Ont. Div. Ct.).

[15] *Canada (Attorney General) v. McKenna* (1993), 22 C.H.R.R. D/486 at para. 58 (C.H.R.T.).

[16] *B. v. Ontario (Human Rights Commission)*, [2002] 3 S.C.R. 403 at para. 58.

[17] N. Zukewich, "Únpaid Informal Caregiving" *Canadian Social Trends* (Autumn 2003) 14; J.A. Frederick and J.E. Fast, "Eldercare in Canada: Who Does How Much?", *Canadian Social Trends* (Autumn 1999) 26; D. Cheal, M. Luxton and F. Woolley, *How Families Cope and Why Policy-Makers Need to Know* (Canadian Policy Research Network, 1998) at 30.

[18] In 1997, 56% of all female-headed lone-parent families were poor, compared to 14% of all families. As well, these families are more likely to experience persistent low income. Vanier Institute of the Family, *Family Facts* (2004), online: Vanier Institute of the Family <www.vifamily.ca>, R. Morisette, "On the Edge: Financially Vulnerable Families", *Canadian Social Trends* (Winter 2002).

[19] Homesharing involves two or three adults, at least one of whom has a disability, who chose to live together; one of the adults who does not have a disability is provided with some remuneration for being available to provide personal support to the adult with a disability. In a supported decision-making networks, one or more individuals are included in a personal network to assist in making personal, financial and health care decisions. In an alternate family, a person with a disability lives with a non-birth family, and family members are paid to provide support, similar to foster care arrangements. (See the ARCH Submission to the OHRC's Consultation on Discrimination Based on Family Status, September 2005, available online at www.archlegalclinic.ca).

[20] For example, a study by the Canadian Union of Postal Workers found that workers who had children with disabilities were more likely to turn down overtime hours, reduce their work hours and refuse promotions: *Moving Mountains: Work, Family and Children with Special Needs* (November 2002). Children with disabilities are more likely to live in poverty, and their parents are twice as likely to have social assistance as their primary source of income, according to a paper by the Canadian Association for Community Living, *Developing a Family Supportive Policy Agenda to Advance the Citizenship and Inclusion of People with Disabilities* (2006).

[21] Vanier Institute of the Family, *2005 Report on the Current State of Family Finances* (2005), online: Vanier Institute of the Family www.vifamily.ca.

[22] *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 174.

[23] *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 88 [hereinafter "*Law*"]. Whether or not this test is appropriately applied to human rights legislation has not yet been settled in the caselaw. In *Vancouver Rape Relief Society v. Nixon*, [2005] B.C.J. No. 2647 (B.C.C.A.), the British Columbia Court of Appeal declined to apply the *Law* test in determining whether discrimination had taken place, stating at para. 41 that "If …the Legislature has said that certain behaviour is prohibited and has established the available defences … the Legislature, as law-maker, has set the balance of competing rights in a way that we may not ignore and which is presumptively fair". On the other hand, in a recent decision by the Alberta Court of Appeal, *Alberta (Minister of Human Resources and Employment) v. Alberta (Human Rights, Citizenship and Multiculturalism Commission)*, [2006] A.J. No. 988 at para. 67 (Alta. C.A.), the Court relied on the *Law* analysis in ruling that it was not discriminatory to deny shelter allowances to social assistance recipients who are living with their parents. The Ontario Divisional Court recently applied the *Law* analysis in *Ontario Secondary School Teachers' Federation v. Upper Canada District School Board* , 78 O.R.(3d) 194 at para. 28.

[24] Some studies have indicated that individuals tend to perceive mothers as less competent and committed as employees than either fathers or childless persons of either sex, and that there is less interest in hiring, promoting and educating mothers, relative to fathers or childless employees. See Kathleen Fuegen et al, "Mothers and Fathers in the Workplace: How Gender and Parental Status Influence Judgments of Job-Related Competence", *Journal of Social Issues*, Volume 60, Issue 4, page 737, December 2004 and Cuddy et al, "When Professionals Become Mothers, Warmth Doesn't Cut the Ice", *Journal of Social Issues*, Volume 60, Issue 4, Page 701, December 2004.

[25] *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.).

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

[27] *Dhanjal v. Air Canada, ibid* at para. 209.

[28] *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.)
[29] *Ghosh v. Domglas Inc. (No.2)* (1992), 17 C.H.R.R. D/216 at para. 76 (Ont. Bd. Inq.); *Naraine v. Ford Motor Co. of Canada (No. 4) ibid* at para. 54.
[30] *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.).
[31] *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* [1999] 3 S.C.R. 3 [hereinafter *Meoirin*] at para. 54.
[32] *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights),* [1999] 3 S.C.R. 868 [hereinafter Grismer] at para. 20.
[33] *Meoirin, supra*, note 31 at para. 66.
[34] *Meoirin, supra,* note 31, at para. 65.
[35] In *Meoirin, supra,* note 31, the Supreme Court said at para. 68:

> *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.* [at 38]

[36] There are numerous studies on the business case for flexible work practices, and the costs to employers of lack of flexibility. See, for example, Catalyst, *Beyond a Reasonable Doubt: Building the Business Case fo Flexibility*, 2005; Aon Consulting, *Canada@Work Study*, 1999; Conference Board of Canada, *Survey of Canadian Workers on Work/Life Balance*, 1999; L. Duxbury et al., *An Examination of the Implications and Costs of Work-Life Conflict in Canada* (Ottawa: Health Canada, June 1999).
[37] In *Brown v. M.N.R., Customs and Excise* (1993), 19 C.H.R.R. D/39, the Canadian Human Rights Tribunal stated at para. 75 that:

> It is this Tribunal's conclusion that the purposive interpretation to be affixed to s. 2 of the *CHRA* is a clear recognition within the context of 'family status' of a parent's right and duty to strike that balance [between family needs and employment requirements] coupled with a clear duty on the part of an employer to facilitate and accommodate that balance within the criteria set out in the *Alberta Dairy Pool* case …. To consider any lesser approach to the problems facing the modern family within the employment environment is to render meaningless the concept of 'family status' as a ground of discrimination.

[38] In *Health Sciences Association of British Columbia v. Campbell River and North Island Transition Society*, [2004] B.C.J. No. 922 (B.C.C.A.) [hereinafter "*Health Sciences*"] the British Columbia Court of Appeal emphasized that prior to considering accommodation based on family status, a *prima facie* case of discrimination must be made out, stating at para. 38 that:

> [The parameters of the concept of family status] cannot be an open-ended concept … for that would have the potential to cause disruption and great mischief in the workplace; nor, in the context of the present case, can it be limited to 'the status of being a parent *per se*' as found by the arbitrator … for that would not address serious negative impacts that some decisions of employers might have on the parental and other family obligations of all, some or one of the employees affected by such decisions.

[39] "[A] *prima facie* case of discrimination is made out when a change in a term or condition of employment imposed by an employer **results in a serious interference with a substantial parental or other family duty or obligation of the employee**", *Health Sciences, ibid*, at para. 39.
[40] In a recent decision of the Saskatchewan Human Rights Tribunal, *Palik v. Lloydminster Public School Div. No. 99* 2006, CHRR Doc. 06-630 at para. 124, an employer's termination of an employee who attended her diabetic son's hockey tournament during the working day, without permission from her employer, was found not to constitute discrimination on the basis of family status, on the basis that there was no serious interference with a substantial parenting obligation.

[41] *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 complainant 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".

[42] *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, an employer that has reasonably responded to harassment is not absolved of liability but may face a reduction in the damages that flow from the harassment.

[43] Human Resources Professionals Association of Ontario and Ontario Human Rights Commission, 2004, at chapter V. See also the Commission's publication, *Developing Procedures to Resolve Human Rights Complaints within Your Organization* (1996), available online at www.ohrc.on.ca.

[44] (1993), 19 C.H.R.R. D/39 at para. 74 (C.H.R.T.).

[45] *Health Sciences, supra,* note 38 at para. 40 (B.C.C.A.).

[46] (1998), 35 C.H.R.R. D/205 at para. 232 (Ont. Bd. Inq.).

[47] In *Alberta Hospital Association v. Parcels* (1992), 17 C.H.R.R. D/167 at para. 23 *(*Alta. Q.B.), the Alberta Court of Queen's Bench found that, where an employer provided benefits to employees for health or disability-related absences, it was discriminatory not to provide similar benefits to employees who were absent for reasons related to pregnancy.

[48] *Employment Standards Act 2000*, S.O. 2000, c. 41.

[49] *Ibid.* at s. 50.

[50] *Ibid.* at s. 49.1. Under the *Employment Insurance Act*, S.C. 1996, c. 23, ss. 12 and 23, employees who take caregiving, pregnancy or parental leaves may be entitled to employment insurance benefits.

[51] *Ibid,*, ss. 46-47.

[52] *Ibid.* at ss. 48-49.

[53] See *Brown v. M.N.R., Customs and Excise*, *supra* note 37at para. 75 and *Health Sciences, supra*, note 38.

[54] *Brown v. M.N.R., Customs and Excise, ibid* at para. 78.

[55] Statistics Canada figures for 2004 found that 27.5 percent of all part-time workers aged 25-44 have chosen part-time work in order to care for children (CANSIM Table 282-0014 and 282-0001). This does not take into account caregiving for family members with disabilities, or aging relatives. Over the past 30 years, women have consistently represented 70 per cent of the part-time workforce.

[56] Derrick Comfort et al., *Part-time Work and Family Friendly Practices in Canadian Workplaces* (Ottawa: Statistics Canada and Human Resources Development Canada, 2003).

[57] In other jurisdictions outside Canada, discrepancies between the treatment of part-time and full-time workers have been the subject of successful human rights complaints. For example, in a case decided by the European Court of Justice, the differential treatment of the mainly female part-time cleaning staff with respect to calculation of length of service and possibility of appointment to permanent staff was found to be sex discrimination: *Nikoloudi v. Organismos Tilepikinonion Ellados AE*, OJ C-106, 30.04.2005, p.1.

[58] See, for example, *Flamand v. DGN Investments* (2005), 52 C.H.R.R. D/142 (HRTO). This case involved a landlord who denied housing to an Aboriginal woman who was a mother of one child, and subjected her to racial slurs.

[59] *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.).

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

[61] *Vander Schaaf v. M & R Property Management Ltd.* (2000), 38 C.H.R.R. D/251 at para. 105 (Ont. Bd. Inq.).
[62] (1998), 34 C.H.R.R. D/1, aff'd (2001), 39 C.H.R.R. D/111 (Ont. Sup. Ct.).
[63] *Ibid.* at para. 137.
[64] *Vander Schaaf v. M & R Property Management Ltd., supra* note 61at para. 110.
[65] *Ahmed v. 177061 Canada Ltd.* (2002), 43 C.H.R.R. D/379 (Ont. Bd. Inq.)
[66] *Ahmed v. 177061 Canada Ltd. ibid* at para. 85.
[67] *Sinclair v. Morris A. Hunter Investments Ltd.* (2001), 41 C.H.R.R. D/98 at paras. 36-37 (Ont. Bd. Inq.). This decision found discrimination on the basis of age, as younger persons are less likely to have permanent employment or lengthy job tenure. However, similar issues arise with respect to the ground of family status, particularly with respect to the situation of caregivers.
[68] *Cunanan v. Boolean Developments Ltd.* (2003), 47 C.H.R.R. D/236 at paras. 65-66 (HRTO).
[69] *Ward v. Godina* (1994), CHRR Doc. 94-130 at para. 50 (Ont. Bd. Inq.).
[70] 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 those under 16 from accessing certain facilities, and severely restricting the use of others were found to discriminate on the basis of family status.
[71] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para. 79.
[72] *Arzem v. Ontario (Ministry of Community and Social Services)* (No. 6) (2006), 56 C.H.R.R. D/426 at para. 157 (HRTO).
[73] *Micallef v. Glacier Park Lodge Ltd.* (1998), 33 C.H.R.R. D/249 at para. 37 (B.C.H.R.T.).