

**SECTION: General**

Effective date: June 14, 2002  
**REVISED DATE: September 2, 2015**

**SUBJECT: DEFINITION OF DISCRIMINATION**

---

**Purpose:**

This policy is intended to assist in the interpretation of the definition of discrimination contained in section 9 of *The Human Rights Code* ("The Code"). Where there is any conflict between this policy and *The Code*, *The Code* prevails.

---

**Context:**

The Commission recognizes that the concepts of 'equality' and 'discrimination' are often difficult to explain which sometimes makes definition difficult, and makes the particular context under consideration particularly important. The Commission also adopts the approaches to these concepts that have been articulated by the Supreme Court of Canada from time to time in its interpretation of equality rights under section 15 of the *Canadian Charter of Rights and Freedoms* ("Charter").

Discrimination occurs when:

1. A distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, as described in section 9 of *The Code* has the effect of
  - (a) imposing burdens, obligations, or disadvantages on an individual or group not imposed upon others, or
  - (b) withholding or limiting access to opportunities, benefits, and advantages available to other members of society, and
2. the imposition of the burden or withholding of the benefit occurs in a manner which
  - (a) reflects the stereotypical application of presumed group or personal characteristics, or
  - (b) has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of our society.

It is necessary to take a purposive and contextual approach to the analysis of a discrimination complaint, bearing in mind the broad purposes of *The Code* as reflected in its preamble, and in the interpretative approach to human rights reflected in Canadian jurisprudence generally.

In particular, the Commission recognizes that human rights law generally operates to effect substantive equality, rather than simply, formal equality. This means that when analyzing complaints of discrimination, the Commission will take into account the full context of a person's allegation of discrimination to determine whether the person was exposed to prejudice, disadvantage and stereotyping in his or her unique circumstances, on the basis of a protected characteristic.

This analysis is contrasted with the approach that focuses on formal equality, which requires an assessment of how one person was treated as compared to someone like that person, in a similar circumstances, to determine whether the person has been discriminated against. This approach is commonly referred to as "treating likes alike" or a comparator analysis and can minimize, trivialize or ignore the discriminatory treatment of a person or group on the basis of their protected characteristic(s), by focusing on the fact that others with that protected characteristic are similarly treated. Comparisons may still be made in a substantive equality analysis since equality inherently lends itself to making comparisons to others' treatment, but the analysis is framed by considering the discriminatory effects or experience of inequality, prejudice or stereotyping on a person.

These concepts are summarized and affirmed by the Supreme Court of Canada in *Moore v. British Columbia (Education)*, 2012 SCC 61, and *Withler v. Canada (Attorney General)*, 2011 SCC 12. See, for example, *Withler* at paragraph 43:

"The central and sustained thrust of the Court's s. 15(1) jurisprudence has been the need for a substantive contextual approach and a corresponding repudiation of a formalistic "treat likes alike" approach. [...] When the Court has made comparisons with a similarly situated group, those comparisons have generally been accompanied by insistence that a valid s. 15(1) analysis must consider the full context of the claimant group's situation and the actual impact of the law on that situation."

APPROVED BY:

"Yvonne Peters"

\_\_\_\_\_  
Chairperson

September 2, 2015

\_\_\_\_\_  
Date