

## **Submission to Toronto Community Housing Corporation Regarding its Draft Accommodation/Accessibility Transfer Policy**

**June 13, 2018**

## **I. Introduction**

The HIV & AIDS Legal Clinic Ontario (HALCO), founded in 1995, is a community legal clinic serving the legal needs of low-income people in Ontario who are living with HIV. It is the only such organization in Canada. The clinic is governed by a board of directors, the majority of whom must be persons living with HIV. In addition to providing direct legal services, HALCO staff engage in public legal education, law reform, and community development initiatives.

In a meeting on May 18, 2018, HALCO provided comment to the Toronto Community Housing Corporation (TCHC) about its draft Accommodation/Accessibility transfer policy. HALCO provided comments specific to the draft<sup>1</sup> but also advocated for a comprehensive disability accommodation process that integrates the proposed Accommodation/Accessibility transfer policy into the existing Accessibility Program. The following submission lays out in further detail why a comprehensive accommodation program is required pursuant to the Ontario *Human Rights Code, 1990* (the “Code”) and how an effective program can be implemented in a way that meets TCHC’s substantive and procedural duties under the Code.

## **II. Ontario Human Rights Code Applies**

As TCHC reconsiders its Medical Priority transfer system in response to Ombudsman Toronto’s report entitled *An Investigation into Toronto Community Housing Corporation’s Medical and Safety at Risk Priority Transfer Process For Tenants* (the “Ombudsman Report”),<sup>2</sup> it is necessary to incorporate this one form of accommodation into a comprehensive system for responding to disability-related accommodation needs of tenants.

The Code is quasi-constitutional legislation, applicable to all housing providers including TCHC, and compliance is mandatory. In the context of tenants with disabilities, compliance with the Code means fulfilling the duty to acknowledge the broad definition of disability and to accommodate a tenant’s disability to the point of undue hardship, a legal duty which is paramount when balancing competing priorities. Though the Ombudsman Report suggested that a new “Crisis Transfer” category would apply to cases “where a household’s current unit is causing or contributing to a direct, immediate and acute risk to the health and/or safety of a member of that household”,<sup>3</sup> it is insufficient to approach disability-related accommodation or even medical-related transfer requests this narrowly.

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<sup>1</sup> See Appendix A, a chart detailing the comments specific to the draft Accommodation/Accessibility transfer policy.

<sup>2</sup> Ombudsman Toronto, “An Investigation into Toronto Community Housing Corporation’s Medical and Safety at Risk Priority Transfer Process For Tenants” (January 24, 2018), available online: <http://www.ombudsmantoronto.ca/Investigative-Work/Investigative-Reports/Reports-Folder/TCHC-Medical-Safety-at-Risk-Priority-Transfer-Pr.aspx?ext=.pdf>.

TCHC has the duty to accommodate tenants with disabilities under the Code *before* they reach a crisis situation in their unit.

Under the Code, any accommodation program must meet both procedural and substantive duties to accommodate tenants with disabilities.<sup>4</sup> The Ombudsman Report identified both procedural and substantive problems with TCHC's Medical and Safety at Risk priority transfer process, stating that "the current process is inconsistent and procedurally and substantively unfair."<sup>5</sup> The Ontario Human Rights Commission (OHRC) makes clear that "the procedure to assess an accommodation (the process) is as important as the substantive content of the accommodation (the accommodation provided)."<sup>6</sup> The OHRC further states:

*A failure in the procedural duty to accommodate can lead to a finding of a breach of the Code even if there was no substantive accommodation that could have been provided short of undue hardship. Failure to perform either component of the duty is a failure to carry out the duty to accommodate.*<sup>7</sup>

We urge TCHC to develop a coherent and Code-compliant procedure for addressing the disability-related needs of tenants. The proposed Accommodation/Accessibility transfer policy falls short, and we respectfully provide the following recommendations to assist TCHC in the creation of a policy that addresses procedural and substantive duties under the Code.

## **Recommendation #1**

**The existing Accessibility Program must be integrated with the newly created Accessibility/Accommodation transfer policy into one program requiring a single application.**

Currently, TCHC's segregated accommodation systems, which include (i) the Accessibility Program for in-unit accommodation, and (ii) the medical transfer process (i.e. the current Medical and Safety at Risk priority transfer category and the proposed Accommodation/Accessibility transfer policy), do not create a comprehensive or Code-compliant accommodation process.

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<sup>4</sup> Ontario Human Rights Commission, "Discrimination based on disability and the duty to accommodate: Information for housing providers", online: <http://www.ohrc.on.ca/en/discrimination-based-disability-and-duty-accommodate-information-housing-providers>.

<sup>5</sup> Ombudsman Report, at page 58.

<sup>6</sup> Ontario Human Rights Commission (OHRC), "Policy on ableism and discrimination based on disability", at Chapter 8, Duty to accommodate, online: <http://www.ohrc.on.ca/en/policy-ableism-and-discrimination-based-disability>.

<sup>7</sup> OHRC "Policy on ableism and discrimination based on disability", at Chapter 8, Duty to accommodate (See note 6 for url.)

Under the Code, requests for disability-related accommodation must trigger a process of active engagement with the tenant about various options for accommodation, ranging from an in-place modification to a transfer. The current process, which requires a tenant to apply separately for different kinds of accommodation, does not meet TCHC procedural or substantive duties to accommodate. The Ombudsman Report also highlights the operational pitfalls of TCHC's segregated accommodation programs. Their investigation found that in twelve cases, transfer applications were bounced between the transfer process and the Accessibility Program, with the result that those tenants did not receive the accommodations they needed from either program.<sup>8</sup>

An integrated Accessibility Program and Accommodation/Accessibility transfer system requiring a single application would address the Ombudsman's concerns and TCHC's Code obligations. Such a system must integrate accommodation as a responsive process that engages a spectrum of options. The integrated program should, for example, allow tenants to access accommodations in-unit or a transfer where in-unit accommodations would amount to undue hardship. As well, where necessary to meet the tenant's disability-related needs, the program should allow tenants to access interim in-unit accommodation between the time the request for transfer is approved and the time the tenant is transferred.

## **Recommendation #2**

### **All TCHC accommodation policies must be amended to clearly set out the obligations of TCHC and the tenant requesting accommodation.**

Currently, neither the Accessibility Program nor the Accommodation/Accessibility transfer policy set out an adequate procedural map for dealing with accommodation requests.

Accommodation under the Code requires all parties to actively engage in the accommodation process. The OHRC states:

*The accommodation process is a shared responsibility, and everyone involved must work cooperatively, share information, and work towards potential accommodation solutions.*<sup>9</sup>

The Ombudsman Report agrees that more detailed policies and procedures are needed to clarify the application and decision-making processes as well as duties of tenants and TCHC within those processes.<sup>10</sup> Many of the problems with the current accommodation

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<sup>8</sup> Ombudsman Report, at p. 36.

<sup>9</sup> OHRC, "A policy primer: Guide to developing human rights policies and procedures", online: <<http://www.ohrc.on.ca/en/policy-primer-guide-developing-human-rights-policies-and-procedures/7-accommodation-policy-and-procedure>>

<sup>10</sup> Ombudsman Report, at p. 62

system stem from a lack of clarity with respect to the roles of tenants and TCHC. This confusion can set unreasonable expectations on both sides.

The OHRC sets out the division of responsibilities between the tenant and housing provider as follows:

*The tenant in need of disability-related accommodation has a responsibility to:*

- make accommodation needs known to the best of their ability, preferably in writing, so that the person responsible for accommodation can make the requested accommodation;
- answer questions or provide information about relevant restrictions or limitations; including information from health care professionals;
- take part in discussions about possible accommodation solutions;
- co-operate with any experts whose assistance is required to manage the accommodation process or when information is needed;
- meet agreed-upon performance standards and requirements once accommodation is provided;
- work with the accommodation provider on an ongoing basis to manage the accommodation process.<sup>11</sup>

*The housing provider has a duty to:*

- accept an accommodation seeker's request for accommodation in good faith (even when the request does not use any specific formal language), unless there are legitimate reasons for acting otherwise;
- take an active role in making sure that alternative approaches and possible solutions are investigated;
- get expert opinion or advice where needed, and, in the case of a larger housing provider, bear the costs of any required information or assessment, up to the point of undue hardship;
- maximize an accommodation seeker's right to privacy and confidentiality, including only sharing information with people directly involved in the accommodation process;
- limit requests for information to those reasonably related to the nature of the need or limitation, and only to facilitate access to housing;
- deal with accommodation requests in a timely way;
- take immediate remedial action in situations where harassment is or may be taking place.<sup>12</sup>

A TCHC accommodation policy that clearly communicates tenant responsibilities and TCHC duties under the Code will set reasonable expectations for tenants, guide staff engaged in the accommodation process, and ensure that requests are dealt with fairly, consistently and in a Code-compliant manner, leading to the best outcomes for all involved.

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<sup>11</sup> OHRC, "Discrimination based on disability and the duty to accommodate: Information for housing providers". (See note 4 for url.)

<sup>12</sup> OHRC, "Discrimination based on disability and the duty to accommodate: Information for housing providers". (See note 4 for url.)

### **Recommendation #3**

**The current “Tenant Request for Accommodation Form” must be revised to cover a range of disabilities.**

TCHC’s current Accessibility Program does not comply with the procedural duty to provide accommodation under the Code as the Tenant Request for Accommodation Form (the “Form”) restricts the enquiry too narrowly to questions about mobility and physical disabilities.<sup>13</sup>

The Code defines “disability” broadly to include, for example, mental impairments and disorders, injuries, addiction, as well as any degree of physical infirmity or disability.<sup>14</sup> All types of disabilities must be accommodated under the Code. As the Form would be the gateway into the accommodation process for most tenants,<sup>15</sup> restricting the focus of the Form to mobility limitations will lead to procedural and substantive failures.

The Form must address the range of disabilities contemplated by the Code.

### **Recommendation #4**

**The accommodation program must provide a range of possible accommodations unconstrained by pre-determined options.**

Currently, TCHC offers tenants a limited number of pre-determined accommodation options.

Such limits cannot account for the limitations and restrictions arising from the broad range of disabilities covered under the Code.

The Ombudsman Report found many examples of rules that artificially limited options as well as evidence of insufficient exchange of information relevant to the accommodation process under the medical priority transfer system.<sup>16</sup> The Code requires staff engagement with tenants to explore all options appropriate to the tenants’ unique needs. Accommodation programs and policies that limit the provision and consideration of relevant information result in inadequate outcomes.

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<sup>13</sup> Toronto Community Housing Corporation (TCHC) Accessibility Program for tenants, information online: <https://www.torontohousing.ca/accessibility-program>. (“TCHC Accessibility Program”)

<sup>14</sup> See Code section 10 for the full definition of “disability.”

<sup>15</sup> Tenants experiencing barriers to using this Form may require an alternate way to engage in the accommodation process. There may also be situations where TCHC’s duty to accommodate may arise from constructive knowledge of a tenant’s disability and related accommodation needs.

<sup>16</sup> Ombudsman Report, at p.19-22, 32-33.

The accommodation process must allow for decisions to be made on a case-by-case basis unconstrained by pre-conceived options.

#### **Recommendation #5**

**Any responses to disability-related accommodation requests must include information about internal avenues of review or complaint, recourse to the Human Rights Tribunal of Ontario, and referrals to the Human Rights Legal Support Center and relevant specialty and local community legal clinics.**

Currently, when a tenant receives a negative response to their transfer application, the only recourse is to apply again.

A tenant requesting accommodation under the Code has procedural and substantive rights. If a tenant believes that their rights have been breached in either process or result, they have a right to apply to the Human Rights Tribunal of Ontario for a determination and remedy. The Ombudsman Report also identified that the existing guidelines lack information about appeals, internal reviews or complaints relating to the Transfer Review Committee (TRC), the body that makes decisions about priority transfer requests.<sup>17</sup>

A failure to include information about review, complaint or enforcement routes when decisions are communicated is unfair and may not be Code-complaint.

#### **Recommendation #6**

**Staff involved in processing or deciding accommodation requests must be provided with clear guidance and appropriate human rights training.**

Currently, staff are not versed in accommodation requirements under the Code. Staff responsible for assisting tenants do not have adequate policy guidance or human rights training. It is unclear whether members of the TRC are trained to apply the Code in decision-making.

The Ombudsman Report found that there was a poor understanding among staff of the transfer application criteria and inadequate assistance for tenants in preparing applications.<sup>18</sup> For example, while site staff have the responsibility to help tenants with location choices to ensure that the chosen locations are consistent with their needs, the Ombudsman Report found that staff did not do so.<sup>19</sup> The Ombudsman Report recommends training for staff to ensure consistent and comprehensive staff engagement with tenants throughout the process.<sup>20</sup>

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<sup>17</sup> Ombudsman Report, at p. 52.

<sup>18</sup> Ombudsman Report, at p. 18-22, 28-29.

<sup>19</sup> Ombudsman Report, at p. 20.

<sup>20</sup> Ombudsman Report, at p. 28, 62.

The Ombudsman Report also found that TRC members who make decisions about medical transfer applications lack training and rules of procedure.<sup>21</sup> Further, the Ombudsman Report made recommendations to ensure fairness and consistency of decision-making.<sup>22</sup>

Guidelines and rules for decision-makers are critical tools to ensure consistent and fair decisions. However, training is essential for any staff involved in processing or decision-making to ensure that the entire accommodation process is fair and Code-compliant.

### **III. Conclusion**

Thank-you for the opportunity to comment on the draft Accommodation/Accessibility transfer policy. We urge you to create an accommodation system, including policies, guidelines and forms, that will “identify and remove barriers faced by people with disabilities”<sup>23</sup> and “ensure that residents with disabilities can live in units, buildings and communities that accommodate their needs.”<sup>24</sup> We look forward to changes that will be compliant with the Code and address problems identified by the Ombudsman Report.

### **IV. Summary of Recommendations**

1. The existing Accessibility Program must be integrated with the newly created Accessibility/Accommodation transfer policy into one program requiring a single application.
2. All TCHC accommodation policies must be amended to clearly set out the obligations of TCHC and the tenant requesting accommodation.
3. The current “Tenant Request for Accommodation Form” must be revised to cover a range of disabilities.
4. The accommodation program must provide a range of possible accommodations unconstrained by pre-determined options.
5. Any responses to disability-related accommodation requests must include information about internal avenues of review or complaint, recourse to the Human Rights Tribunal of Ontario, and, referrals to the Human Rights Legal Support Center and relevant specialty and local community legal clinics.
6. Staff involved in processing or deciding accommodation requests must be provided with clear guidance and appropriate human rights training.

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<sup>21</sup> Ombudsman Report, at p. 29.

<sup>22</sup> Ombudsman Report, at p. 63.

<sup>23</sup> TCHC Accessibility Policy at page 1.

<sup>24</sup> TCHC Accessibility Policy at page 6.



**Appendix A – HIV & AIDS Legal Clinic Ontario (HALCO)**  
**Comments re TCHC Draft Accommodation/Accessibility Transfer Policy**

Draft - feature	Comment	Suggestion
TCHC will work with household to accommodate them place where <u>possible and practicable</u> .	Duty to provide <u>reasonable</u> accommodation whether in place or by transfer, <u>to the point of undue hardship</u> . High threshold (financial or safety).	Set out obligations for TCHC: <ul style="list-style-type: none"> <li>• Accept requests (in good faith)</li> <li>• Get expert advice</li> <li>• Investigate possible and alternative accommodation solutions</li> <li>• Bear the cost</li> <li>• Implement in timely way</li> </ul>
Requires participation and cooperation of household ... to find reasonable accommodation that meets the household's <i>bona fide</i> needs.	Duty to assume that requests for accommodation are made in good faith, but have a right to request medical documentation of relevant restrictions and limitations.	Set out obligations for household <ul style="list-style-type: none"> <li>• Make a request</li> <li>• Provide information about and documentation re limitations/restrictions</li> <li>• Discussion of solutions</li> </ul>
If accommodation cannot be achieved in place, then may be added to the Accessibility/Accommodation Transfer category.	If no reasonable accommodation can be made in place (to the point of undue hardship), duty to explore possibility of transfer as accommodation if tenant wishes, as part of the accommodation process. Tenant should not have to begin anew with an application.	An Accommodation /Accessibility transfer should be incorporated into Accommodation Request process/policy. <ul style="list-style-type: none"> <li>• Transfer should be offered as one of the options in a discussion about reasonable accommodation.</li> <li>• Transfer application date should be the date that an accommodation request is made.</li> </ul>
Request must related to a <i>Human Rights Code</i> ground.	As per Code.	None.

Medical opinion from a qualified medical practitioner stating functional restrictions and needs, and that the functional restrictions prevent ADLs.	Code requires that tenant provide information about and documentation re relevant limitations/restrictions.	(As above) Set out obligations for household <ul style="list-style-type: none"> <li>Information about and documentation re limitations/restrictions</li> </ul>
Medical opinion from a qualified medical practitioner stating whether restrictions are transient or permanent, estimated time for recovery.	Code does not define disability in terms of prognosis.	Not relevant to the issue of whether the tenant has a disability, only to the type accommodation that is appropriate.
Medical opinion from a qualified medical practitioner stating whether impairment will be cured or substantially improved by a move to another unit and why improvement is expected, i.e. what differences expected in other unit.	TCHC has a duty to investigate possible and alternative accommodation solutions, including duty to provide information about other units/buildings so that tenant can assess whether a proposed re-location would be reasonable accommodation, supported by additional documentation if requested.	TCHC will work with the tenant to identify other units and provide information to help determine whether a transfer to the unit would be an alternative reasonable accommodation.
Medical opinion from a qualified medical practitioner stating whether current unit is causing or contributing to the impairment, and how.	Code requires tenant to provide documentation about re limitations/restrictions.	None.
Medical opinion from a qualified medical practitioner stating that the household member has participated in any recommended treatment or rehab or accessibility aids that would allow them to perform ADLs in unit but has not been or will not be successful.	Code does not require tenant to participate in rehab, use aids or treatment. Such a requirement would be a violation of the Code.	Not applicable here, should be removed.
Medical opinion from a qualified medical practitioner stating that nothing short of move to another unit will result in ability to perform ADLs.	Code does not require proof that no other alternative (i.e. the only reasonable accommodation) is possible before accommodation by transfer can be requested/considered.	Medical opinion that transfer out of the current unit would be a helpful accommodation option.

Must provide consent for TCHC to community with medical practitioner about (among other things) ...	Code requires that information requests are least intrusive; no requirement to provide any consent for TCHC to communicate directly with doctor.	Not applicable here, should be removed.
If the issue is psychological, opinion must come from a psychiatrist or clinical psychologist.	Code does not limit medical evidence in such a way.	Documentation from a licensed health care practitioner that has information about relevant limitations/restrictions should be acceptable, e.g. ODSP or Accessibility Program schedule.
If the issue is optical impairment, opinion must come from a ophthalmologist or optometrist.	Code does not limit medical evidence in such a way.	Documentation from a licensed health care practitioner that has information about relevant limitations/restrictions should be acceptable, e.g. ODSP or Accessibility Program schedule.
TCHC does not require diagnosis.	As per Code.	None.