

COMMENTS ON THE GOVERNMENT POLICY PAPER

***PARCE QUE NOS VALEURS, ON Y CROIT
ORIENTATIONS GOUVERNEMENTALES EN MATIÈRE D'ENCADREMENT
DES DEMANDES D'ACCOMMODEMENT RELIGIEUX, D'AFFIRMATION DES VALEURS
DE LA SOCIÉTÉ QUÉBÉCOISE AINSI QUE DU CARACTÈRE LAÏQUE
DES INSTITUTIONS DE L'ÉTAT***

PLEASE NOTE:

This document is a translation of *Commentaires sur le document gouvernemental Parce que nos valeurs, on y croit. Orientations gouvernementales en matière d'encadrement des demandes d'accommodement religieux, d'affirmation des valeurs de la société québécoise ainsi que du caractère laïque des institutions de l'État*, adopted at the 600th meeting of the Commission, held on October 16, 2013 under resolution COM-600-3.1.1

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TABLE OF CONTENTS

1	THE CHARTER OF HUMAN RIGHTS AND FREEDOMS
1.1	The origins and purpose of the <i>Charter of Human Rights and Freedoms</i>
1.2	The Charter and the non-hierarchy of human rights and freedoms
1.3	Conflict of values and conflicts of rights
2	SECULARISM AND STATE NEUTRALITY AS GUARANTEES OF FREEDOM OF RELIGION AND THE RIGHT TO EQUALITY
2.1	The secular nature of the state
2.2	The government is already bound by a duty of neutrality stemming from freedom of religion
2.3	An inappropriate addition to the Québec <i>Charter of Human Rights and Freedoms</i>
3	THE WEARING OF RELIGIOUS SYMBOLS.....
3.1	Prohibition of the wearing of “conspicuous” religious symbols by government employees: an infringement of the rights protected by the <i>Charter of Human Rights and Freedoms</i>
3.2	An unjustified infringement of rights and freedoms.....
3.3	Prohibitions that contradict the obligations pertaining to the equal access to employment programs
3.4	Requirements of invoking the notwithstanding clause
4	REASONABLE ACCOMMODATION
4.1	Reasonable accommodation: a well-defined and detailed concept
4.2	Formalizing reasonable accommodation.....
4.3	Modifying the existing limits to reasonable accommodation
	CONCLUSION

INTRODUCTION

On September 10, 2013, the Minister responsible for Democratic Institutions and Active Citizenship, Bernard Drainville, released the government policy paper entitled *Parce que nos valeurs, on y croit*.

The Commission des droits de la personne et des droits de la jeunesse (hereafter “the Commission”) recognizes that this is a policy paper akin to a statement of values and not a series of measures that would create rights and duties. Moreover, the Commission will provide a detailed review of any measure — legislative, regulatory or other — that may stem from this proposal. However, given the importance of the issues raised in this policy paper in regards to the protection of rights and freedoms under the *Charter of Human Rights and Freedoms*, the Commission has decided to comment on the government policy paper. On the one hand, the comments are based on work the Commission has been doing for a number of years in the field of the right to equality and freedom of religion and, on the other, they are based on its expertise in the processing of complaints related to discrimination and of requests for reasonable accommodation.

The Commission’s mission is to promote and uphold the principles stated in the Charter using all appropriate means. It considers it necessary, therefore, to reiterate the fundamental importance of the rights and freedoms guaranteed by the Charter, including the right to equality for all. It also wishes to express its concerns with the policy paper’s proposals, and among other issues, their possible impact on these rights and freedoms.

The Commission’s comments are multifaceted and touch upon several proposals put forward in the government paper. First of all, the Commission wishes to underline that (1) several important points need to be taken into account when considering amendments to the *Charter of Human Rights and Freedoms* and (2) the concept of secularism must be interpreted in a way that guarantees freedom of religion and the right to equality. The Commission also intends to show that if these proposals were adopted, (3) the measures aimed at prohibiting public sector employees from wearing religious symbols and (4) the proposed amendments with respect to reasonable accommodation would violate the Québec Charter.

1 THE CHARTER OF HUMAN RIGHTS AND FREEDOMS

The first proposal involves entrenching “the religious neutrality of the state and the secular nature of public institutions in the *Charter of Human Rights and Freedoms*. The Charter would also include a framework of rules to oversee accommodation requests.” Three important points need to be taken into account when amendments to the *Charter of Human Rights and Freedoms* are being considered: (1) the origins and purpose of the Charter, (2) its general structure, and (3) the distinction between conflicts of rights and conflicts of values.

1.1 The origins and purpose of the Charter of Human Rights and Freedoms

The *Charter of Human Rights and Freedoms* was adopted unanimously by the Québec National Assembly in 1975. It draws widely from international human rights law. The *Universal Declaration of Human Rights*, as well as the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights*, among others, had a strong influence on both the Charter and its content. Canada and Québec have in fact ratified all three documents. Underpinning these documents, however, is an intention to “promote social organization leading to substantive equality between all human persons in society, and which includes, therefore, the protection of minorities.” [Our translation]

Interpreting the rights protected under the Québec Charter must be accomplished in light of these instruments and in accordance with international human rights standards. Therefore, Québec should not enact laws in contradiction with international commitments which it has adhered to.

Similarly, the Charter’s preamble helps to explain its purpose and scope. Within the context of the current debate, three paragraphs of the preamble to the Charter are particularly relevant in defining the scope of the rights and freedoms it covers. They state that “all human beings are equal in worth and dignity, and are entitled to equal protection of the law,” that “respect for the dignity of human beings, equality of women and men, and recognition of their rights and freedoms constitute the foundation of justice, liberty and peace,” and that “the rights and freedoms of the human person are inseparable from the rights and freedoms of others and from the common well-being.” Furthermore, the final paragraph states that the Charter’s purpose is

“to solemnly declare the fundamental human rights and freedoms [...], so that they may be guaranteed by the collective will and better protected against any violation.”

1.2 The Charter and the non-hierarchy of human rights and freedoms

The *Charter of Human Rights and Freedoms* recognizes the rights and freedoms of all women and men, equally for all. In accordance with international law, it is a coherent set of universal, indivisible, interdependent and interrelated rights and freedoms. The Charter's authors were careful not to create a hierarchy of rights and freedoms and it must be interpreted in such a way as to ensure effective recognition of these rights and freedoms. All these rights have the same status in law and they must be exercised in a manner respectful of the other rights. All rights must be interpreted in relation to each other and no right is more important than the others.

The courts have developed ways of respecting each person's rights even in situations where there may be a conflict between these rights. They take the actual circumstances of each situation into account so that solutions can be found which are respectful of everyone's rights and which are consistent with the principles outlined in the Charter.

Arbitrating cases in which rights conflict should never be synonymous with disregarding rights and freedoms protected under the Charter. This approach would be contrary to the Charter. Therefore, any conflict of rights that might occur between freedom of religion and the right to equality or even between the grounds of “sex” and “religion” must be settled while taking into account the interdependence of human rights. Every situation must be examined and a balance found between the rights in question. Every effort towards conciliation must be made when these rights come in conflict with each other. The Charter already includes the necessary mechanisms for finding the correct balance between the exercise of religious freedom and the principle of equality between women and men.

1.3 Conflicts of values and conflicts of rights

The origins of the *Charter of Human Rights and Freedoms*, its purpose, and the fact that it is a coherent set of rights with each having the same weight, must be taken into account when

seeking to modify the Charter. Yet at least three elements seem not to have been considered in the government's policy paper.

First, a distinction must be made between conflicts of *values* and conflicts of *rights* since only conflicts of rights are protected under the *Charter of Human Rights and Freedoms*. A clash of values, will not necessarily translate into an infringement of rights and freedoms. Furthermore, hypothetical tensions or those based on principle, do not systematically become actual rights conflicts. A conflict of rights occurs only when in the exercise of a right and in specific circumstances, rights collide with each other. The question that needs to be asked is: does the exercise of a right by one person infringe a different right exercised by another person in a specific, actual context? Only actual rights can confront each other. The scope of a right cannot, therefore, be restricted solely based on the idea that its exercise may offend some people's values, even values held by the majority. This would risk undermining the Charter's very essence and the rights and freedoms it seeks to protect.

Second, equality between women and men is not only a "common *value* of Québec society" or a "principle," as the government paper suggests. It is more than this, it is a right guaranteed under the *Charter of Human Rights and Freedoms* since 1975. By referring to a value or a principle instead than to a right could weaken the content of the right to equality between women and men. Thus, it is exactly what the Québec Charter calls upon society to do : to achieve substantive equality.

To move towards achieving substantive equality, it is first necessary to recognize that equal treatment for everyone, or formal equality, does not necessarily lead to substantive equality. The right to substantive equality involves examining the real impact of the proposed measures on the people concerned and not simply discussing generalities, which results in losing sight of a number of discriminatory outcomes. It should be noted that the concrete exercise of rights defines the right to equality guaranteed in the Charter. Given the government's proposal, how can we ensure, for example, that the right of women who wear religious symbols to equal access to work is respected? Would the government's proposal not end up increasing the marginalization of women who already face major discriminatory barriers in the workplace because of the stigmas associated with their religion or their ethnic origin?

Admittedly, there is no denying that we have a long way to go to achieve true equality between women and men. To achieve this, it is not enough to produce more and more declarations of principles or statements of values. Rather, the aim should be to ensure the effective realization of the rights already recognized by the Charter, particularly by strengthening economic and social rights.

Finally, the third point is that we need to be very cautious when considering any amendments to the *Charter of Human Rights and Freedoms*. We must not forget that, because of the fundamental nature of the rights and freedoms it protects, the Charter has a quasi-constitutional status, which means that “it prevails over ordinary legislation.” [Our translation]

Therefore, every proposed modification to the Charter must be reviewed with the greatest attention. Such caution must be exercised because it is essential to measure all the consequences that a modification can have on the protection of fundamental rights and freedoms. To use a familiar analogy, “We can think of these rights as links in a chain. Every link is just as important as the others because it is the combination and the interdependence of all these rights that ensure the chain remains strong and balanced.” [Our translation] Thus, modifying a part of the Charter without taking into account its internal coherence jeopardizes the balance of the rights and freedoms it guarantees and, consequently, could limit, without justification, the exercise of other rights and freedoms.

2 SECULARISM AND STATE NEUTRALITY AS GUARANTEES OF FREEDOM OF RELIGION AND THE RIGHT TO EQUALITY

In addition to general concerns regarding the *Charter of Human Rights and Freedoms*’ structure, the Commission also has doubts as to the relevance of entrenching “the values of Québec society and the secular nature of public institutions” in the Charter. On the one hand, one may legitimately question the usefulness of such an addition to the Charter given that the Québec state is already bound by the duty of neutrality. On the other, it would appear that here again the concepts of values and rights have been confused.

2.1 The secular nature of the state

The government policy paper presents the secular nature of government institutions as one of the common values of Québec society. It sets out the “principles of religious neutrality, the separation of religions and the state, and the secular nature of its institutions” [Our translation], without specifying the distinctions to be made between them.

Secularism is not a value, but rather an attribute or characteristic of the state. Defined for the first time in 1877 in the *Dictionnaire du Littré* secularism is “the neutrality of the state towards all religions and its tolerance of all forms of worship.” [Our translation] The definition then evolved to include the separation of Church and state. As defined, the principle of secularism calls for a government that is neutral towards and tolerant of all religions, whatever they may be; a government that must strive to protect freedom of religion and the right to equality. It is a political arrangement that, in the context of rights and freedoms, employs two means – the separation of Church and state, and government neutrality – in order to ensure the effective enjoyment of two human rights, freedom of conscience and religion, and the right to equality.

Thus, even if it is true that there is no explicit rule of law concerning secularism, all the elements of actual legal secularism are to be found in Québec. The principle of state secularism is not, as stated in the government paper, “uncertain in its implementation” [Our translation] due to it not being a part of law. On the contrary, its scope is a direct result of the rights and freedoms guaranteed under the Charter, a quasi-constitutional statute that has precedence over other laws. A quick examination reveals that all elements of state secularism are included in the protections tied to freedom of religion.

The principles underlying the protection of human rights and freedoms provide a clear framework for the expression of secularism. The ultimate legal purpose of secularism is thus the protection of freedom of conscience and religion and the right to equality. As a result, any attempt to entrench secularism in a legal framework must therefore have the effect of respecting the fundamental rights and freedoms of all persons. To use secularism only to refer to the neutrality of the state or to the principle of the separation of Church and state masks the very purpose of secularism by repudiating freedom of religion and the implementation of the right to equality.

2.2 The government is already bound by a duty of neutrality stemming from freedom of religion

As such, it should simply be noted that the fundamental right to religious freedom, protected under Sections 3 and 10 of the *Charter of Human Rights and Freedoms* is defined as the right to entertain such religious beliefs as a person chooses. It includes “the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest belief by worship and practice.” Thus, “if a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free.”

The very aim of the protection guaranteed by freedom of religion is therefore to prevent the state from imposing a particular religious belief on its citizens. In its institutional structures, norms and practices, the state may not promote or disadvantage a religion. Neither may it compel anyone to have, or not to have, certain beliefs; or to adopt, or not to adopt, certain religious practices.

Moreover, the courts define freedom of religion based on an individual criterion, the criterion of the sincerity of a person's belief. This raises important considerations in situating the state's duty of neutrality. The criterion of the sincerity of a person's belief compels the state to respect the practices of the smallest religious minorities as much as the religious obligations established or shared by a greater number of believers. On the other hand, in relying on such subjective criterion, the state must refrain from acting as the arbitrator or interpreter of religious dogma. Thus, this criterion clearly sets the state's duty of religious neutrality and the separation of Church and state, not as an end, but as two means implemented to ensure the protection of rights and freedoms.

It should be noted however that the legal obligation of religious neutrality applies solely to the state, its institutions and functions. Save for some exceptions, it does not apply to individuals, whether they be public sector employees or representatives or users of public services. It is for this reason, for example, that the Commission has considered that the reading of a prayer at a municipal council meeting contravenes the duty of religious neutrality, but that a public sector

employee or user of public services does not contravene this duty by wearing a religious symbol.

This model of secularism guarantees the respect of the right to equality and free exercise of freedom of religion.

Thus, the Commission questions the usefulness and pertinence of including “the religious neutrality of the state and the secular nature of public institutions in the *Charter of Human Rights and Freedoms*,” as proposed in the government policy paper. Moreover, the Commission considers that such an addition could create significant inconsistencies in the law. In fact, the government’s proposal would effectively invert the equation at the very basis of secularism: instead of considering the state neutrality and the principle of the separation of Church and state as means to ensure human rights and freedoms, they would become purposes in themselves. To do so would mean violating rights and freedoms in the name of secularism, when secularism is supposed to protect them.

2.3 An inappropriate addition to the Québec *Charter of Human Rights and Freedoms*

If, in spite of everything, the Québec government is determined to legally affirm the norm of religious neutrality by which the state is already bound, the *Charter of Human Rights and Freedoms* is not the appropriate place to do so.

It should be kept in mind that the Charter represents a coherent whole, with its own internal balance. There is therefore cause for concern regarding the possible legal repercussions of a change in its equilibrium. As the principle of neutrality stems from the right to freedom of religion protected under the Charter, one might ask how the addition of this reference to the “values of neutrality and secularism” might modify the interpretation of the rights protected under the Charter.

This also raises the question of where, in the Charter, such values should be included. In making such an addition, it would be necessary to take into consideration not only the overall scheme of the Charter, but its very structure. However, these “values of neutrality and

secularism” constitute neither a fundamental freedom or right nor a modality of equal rights. They do not constitute political rights or legal rights, and even less so economic or social rights.

Are these concepts to be introduced into the Charter’s preamble or Chapter V (regarding special and interpretative provisions)? The Commission is concerned by the fact that the inclusion in the Charter’s preamble of values associated with neutrality could be interpreted in such a way as to limit the scope of the rights and freedoms it protects. The proposed modification, where applicable, would no doubt have important consequences for the individuals who benefit from these protections. The same is true of the special and interpretative provisions. As the neutrality of the state has already been taken into account in the practical implementation of freedom of religion and of the right to equality without discrimination based on religion, would the addition of an interpretive provision along these lines really have any legal impact? If so, would the addition decrease the scope of already guaranteed rights and freedoms?

These questions are further justified by the fact that the government policy paper proposes to use these “values of neutrality and secularism” to limit freedom of religion, when such a restriction would undoubtedly be judged contrary to the Charter.

3 THE WEARING OF RELIGIOUS SYMBOLS

The government’s third proposal suggests the prohibition of the wearing of “conspicuous” religious symbols by public sector employees when performing their duties. The goal pursued by the government is that public sector employees project, even personify, a neutral image. The Commission is of the opinion that such a measure would infringe on the rights protected by the *Charter of Human Rights and Freedoms* and that this infringement would be unjustified under the law. As a result, the government would have to invoke the notwithstanding clause, an exercise which must meet strict conditions as to substance and form.

3.1 Prohibition of the wearing of “conspicuous” religious symbols by government employees: an infringement of the rights protected by the *Charter of Human Rights and Freedoms*

As we have seen above, the right to express one’s religious beliefs, in particular by wearing

religious symbols, is directly protected by the freedom of religion guaranteed by the *Charter of Human Rights and Freedoms*. The Charter clearly prohibits any distinction or exclusion based on a prohibited ground of discrimination, such as religion, and that would have the effect of undermining a right that it guarantees. Among these rights, there is, in particular, the right to exercise one's freedom of religion, including the freedom to express one's beliefs and the right to equal access to employment. As such, the proposed prohibition puts forward precisely the sort of distinction that would have the effect of excluding individuals from a significant number of jobs, based on the wearing of a religious symbol and inferred perceptions of that symbol. Consequently, the proposed prohibition of "conspicuous" religious symbols would infringe directly not only upon the right to exercise one's freedom of religion, but also upon the freedom of speech and the right to equal access to employment. In fact, the proposed prohibition stems not only from a misconception regarding freedom of religion as protected by the Charter and by the principles of international human rights law, but it also misinterprets the neutrality requirement that must be observed by the state.

It should be noted that the religious neutrality requirement applies primarily to government institutions, as well as to its standards and practices. However, public sector employees are not subject to this requirement, other than by an impartiality requirement in the execution of their duties, by obligations concerning the duty of reserve possessed by certain individuals, as well as by a ban on proselytizing. According to jurisprudence, proselytizing refers to the teaching and dissemination of beliefs. However, the government policy paper defines this notion by integrating elements that are foreign to it. As such, the wearing of so-called "conspicuous" or "visible" religious symbols by public sector employees is described as a form of "passive" or "silent proselytizing" that would be intrinsically "incompatible with the neutrality of the state, the effective functioning of its institutions and their secular character." [Our translation]

It is unreasonable to presume the partiality of a public sector worker by the simple fact that he or she wears a religious symbol. This extension of the definition of proselytizing to the wearing of "conspicuous" religious symbols, "irrespective of the person's conduct," [Our translation] significantly misrepresents the approach developed in regard to the protection of freedom of religion and opens the way to a restriction that would be contrary to the Charter.

3.2 An unjustified infringement of rights and freedoms

Under Section 9.1 of the *Charter of Human Rights and Freedoms*, the law can set limits to the exercise of rights and freedoms. If this limit infringes a fundamental freedom, the state must, however, be able to justify it, otherwise it will be judged incompatible with the *Charter of Human Rights and Freedoms*. Courts have established the appropriate approach needed for such a justification. As such, the state must first demonstrate, with supporting evidence, (1) that the pursued goal is urgent and real; (2) that the measure in question is rationally linked to the pursued goal; (3) that the means used are proportional to the goal and (4) that the beneficial effects of the measure outweigh the negative effects. The Commission considers that the proposed prohibition fails this test.

In the first place, the pursued goal does not appear to be urgent and real, for a number of reasons. First, encouraging public sector employees to project “a neutral image,” even personify such an image, strikes us as a misapplication of the neutrality requirement, as it is defined.

Next, in the Québec context, it would be difficult to qualify the pursued goal as urgent to the point of infringing the Charter. Which problem is this solution aiming to solve? How can one justify the urgency of the goal while noting the absence of any case in which the wearing of religious symbols by public sector employees would have compromised the religious neutrality of the Québec state? In support of this argument, it should be emphasized that data gathered during Commission investigations and from its Advisory service regarding reasonable accommodation, does not report a single situation in which the wearing of religious symbols by a public sector worker would have threatened the principle of religious neutrality. Furthermore, no other information to this effect has been brought to the attention of the Commission, be it in the context of its research, education-cooperation or communications activities or in its management of equal access to employment programs. The desire to prevent hypothetical situations is not likely to convince people of the necessity of a prohibition that infringes human rights and freedoms. In fact, the more serious the prejudicial effect, the greater the significance of the goal pursued by the standard or the legislative measure needs to be.

The absence of urgent and real goals is in itself sufficient to rule out the government's argument. Nevertheless, we should take a closer look at the rational (2) and proportional (3)

character of the proposed option as well as the balance between the beneficial and negative effects that it could bring about.

First, the connection between the goal pursued by the government and the option proposed in order to attain this goal seems to be more intuitive than rational. Instead of rationally supporting the connections between goal and option by studying the facts, the government's proposal gives precedence to potential impressions and perceptions. It is more appropriate to keep in mind that the appearance of a public sector worker is not an adequate indicator of his or her ability to act in an impartial manner. The fact that a public sector worker wears a religious symbol is not sufficient to allow one to conclude that the service provided will be affected by the employee's beliefs or that he or she will subject the client to a practice or standard that would be contrary to the client's freedom of conscience: "Nor does this allow one to conclude that the neutrality of the public institution is called into question, since the service being offered remains neutral." [Our translation]

As well, the neutral appearance of public sector employees does not belong to a range of options likely to infringe as little as possible the free exercise of freedom of religion. One needs only be reminded that the proposed measure takes aim at all "conspicuous" religious symbols, for all jobs. Nor does the clause allowing to opt-out appear to sufficiently limit the impact of this prohibition.

Finally, it would, at the very least, be difficult to demonstrate that the beneficial effects of this prohibition outweigh the negative effects. This obstacle to the free exercise of freedom of religion is more than insignificant or negligible. It undermines employment access for individuals whose system of religious values includes clothing requirements that would be considered "conspicuous." Incidentally, the Commission wishes to call into question the idea according to which the prohibition "of displaying religious beliefs during working hours would not lead to the denial of beliefs." [Our translation] The use of this argument would trivialize the infringement that would occur. It should be noted that freedom of religion is based on an individual's genuine belief and not on the perception one might have of that belief. This criterion protects against interference by the state or by the majority in an area that concerns the conscience of each and every individual.

In practice, the persons concerned find themselves faced with a choice that is contrary to the right to substantive equality: either to contravene their religion, or else to leave their job. Furthermore, the prohibition may have a disproportionate impact on certain segments of the population, in particular women, racialized minorities, members of religious minorities and immigrants.

If the prohibition of the wearing of religious symbols cannot be justified under Section 9.1 of the Québec Charter, this provision would have to be found invalid.

3.3 Prohibitions that contradict the obligations pertaining to the equal access to employment programs

The Commission also has the mandate to oversee the implementation of equal access to employment programs, it strikes us as important to point out that the *Act Respecting Equal Access to Employment in Public Bodies* institutes a particular context for equal access to employment within public bodies. The aim of this Act is to remedy the situation of individuals who belong to the five groups that experience employment discrimination, in other words “women,” “handicapped persons,” “Aboriginal peoples” and persons who are members of “visible minorities” and “ethnic minorities”.

Among the public bodies affected by the proposal prohibiting the wearing of “conspicuous” religious symbols, close to 500 are also affected by this Act. These organizations, which together represent close to 600,000 employees, have had to establish an equal access to employment program in order to remedy employment discrimination that more often strikes women and members of visible and ethnic minorities. However, while the individuals who belong to these groups already face significant obstacles in the job market, the proposed measures will, in all likelihood, have a negative impact on the effective implementation of equal access to employment for such individuals.

The enforcing of requirements that contradict the objectives of the *Act Respecting Equal Access to Employment* would place those organizations that are subject to it in a very difficult situation. In fact, the proposed measures would constitute a significant obstacle to attaining the set representation goals. Moreover, this would lead to a significant imbalance among the organizations subject to this Act and those that would only be subject to the rules proposed in

the policy paper.

3.4 Requirements of invoking the notwithstanding clause

Beyond the option presented by Section 9.1 of the *Charter of Human Rights and Freedoms* of limiting, under certain circumstances, the implementation of guaranteed rights and freedoms, Section 52 of the same Charter states that the rights and liberties protected by Section 1 to 38 shall prevail over any other law. As such, Sections 3 to 10 of the Charter, which guarantee freedom of religion and the right to equality, would have precedence over an act that prohibits the wearing of religious symbols by public sector employees.

This same Section 52 of the Charter recognizes that the legislator can use legislation to derogate from these articles only if explicitly stating that it is doing so.

However, as the Commission has recently pointed out, even if the legislator were to decide to purposely derogate from the Charter, such a decision “is a serious action that should only be undertaken with the greatest caution.” [Our translation] Inspired by international human rights instruments, the Commission added that “only exceptional circumstances can justify an exemption clause and that this must always be limited to the extent strictly required by the exigencies of a situation.” [Our translation] Therefore, before invoking the specific derogation, important requirements must be taken into account, in terms of both substance and procedure. It is important not to trivialize such an option.

Furthermore, it should be emphasized that even if the legislator were to purposely derogate from the Québec Charter, the proposed measures would nonetheless be contrary to the Canadian *Charter of Rights and Freedoms*, unless the notwithstanding clause inscribed in the Canadian Charter were to be invoked. These measures would also contravene obligations under international agreements to which Québec has adhered regarding human rights and freedoms.

4 REASONABLE ACCOMMODATION

The government policy paper also focuses on the concept of reasonable accommodation. On one hand, the first policy proposal aims "to define the concepts of accommodation and undue hardship in the *Charter of Human Rights and Freedoms*, so as to establish a framework for requests for religious accommodation and promote equality between women and men." [Our translation] On the other hand, the fifth policy proposal intends "to set out guidelines for requests for religious accommodation and include a requirement that ministries, agencies and institutions develop implementation policies," [Our translation] particularly "in order to manage requests for leave based on religious reasons." [Our translation]

4.1 Reasonable accommodation: a well-defined and detailed concept

There is no legal void in terms of reasonable accommodation. Indeed, the last thirty years of jurisprudence has often reiterated the definition linked to the concept, which is clearly derived from the right to equality:

"[The duty to accommodate] consists of taking reasonable steps to come to an agreement with the [plaintiff], unless doing so would cause undue hardship. In other words, it is taking those reasonable steps to come to an agreement which does not unduly interfere with the operation of the employer's business and does not entail excessive costs." [Our translation]

The concept of reasonable accommodation is itself an evolving construct that must be applied to specific situations in very different contexts, as well as to all grounds on which discrimination is prohibited: "race," colour, gender, pregnancy, sexual orientation, civil status, age, religion, political convictions, language, ethnic or national origin, social condition, disability or the use of any means to palliate a disability. That said, the definition of the duty to accommodate has remained unchanged for the last thirty years. Only the criteria for assessing undue hardship were clarified over time, depending on the circumstances of each case. Reasonable accommodation is now practiced in a variety of settings, including employment, services and housing. Its implementation has helped pregnant women, people with disabilities and others avoid discriminatory situations. This means that a person who experiences discrimination may make a request for reasonable accommodation. The service provider or employer named in the request is compelled to seek a reasonable compromise with the person making the request.

The concept of undue hardship governs accommodation requests in order to limit the requests as to what is “reasonable.” It is also important to remember that precautionary measures must be taken when using undue hardship criterion. First, this exercise should be done using an individual approach tailored to the circumstances of each case. It cannot rely solely on ready-made solutions or automatic responses. Secondly, the criterion must be applied in a flexible way and in line with common sense. They should never be used as an excuse not to accommodate. In the same vein, a minor hardship or disagreement is not sufficient to limit accommodation. The same goes for perceptions or unfounded fears. Fear of setting a precedent and presumed customer preferences are not considered sufficient inconveniences to deny an accommodation.

Jurisprudence has broadly defined and spelled-out guidelines to determine what constitutes undue hardship. Undue hardship occurs when a request for accommodation produces one of the following consequences: (1) prohibitive costs, (2) a significant interference with an organization’s work, or (3) a real infringement on the rights of others. As a result, it is clear that a request for accommodation resulting in a violation of the right to equality would be dismissed, regardless of the grounds of discrimination in question.

The Commission therefore questions the need to define and formalize a legal duty in the Charter when that obligation is already defined and widely applied.

4.2 Formalizing reasonable accommodation

The government policy paper sets out an accommodation framework using the concepts of “shared values” and “core community values.” In fact, the wording used in the document gives rise to confusion between the concepts of reasonable accommodation and “religious accommodation.” Some parts of the document outline reasonable accommodation in a broad sense, while others deal with “religious accommodations.” The proposed measures are problematic in both cases.

Given the government’s goal of defining undue hardship and the concept of reasonable accommodation as applicable to all grounds of discrimination, the first thing we wish to

emphasize is that the intended formalization should be consistent with the courts' interpretation. A definition that moves away from this interpretation may not only cause distortions and numerous application problems, but may also be considered contrary to the Canadian *Charter of Rights and Freedoms* and therefore unconstitutional. It must be remembered that the concepts of reasonable accommodation and undue hardship have been defined by case law and defined under both the *Charter of Human Rights and Freedoms* and the Canadian Charter.

The proposal put forward to clarify concepts of reasonable accommodation and undue hardship on the basis of "shared values" and "core community values" does not seem consistent with the current legal framework. Moreover, these concepts are vague and are likely to have significant adverse effects in the actual exercising of rights and freedoms. The risk of human rights violations is thereby increased for accommodation requests based on prohibited grounds of discrimination. Contrary to the objective stated in the policy paper, introducing these components is most likely to foster uncertainty in decision making related to accommodation issues, whereas there are guidelines already in place.

Secondly, in addition to being over-simplified, the "religious accommodation" concept is used in a way that leaves this formalization open to distortion. It must be remembered that the concept of reasonable accommodation addresses thirteen grounds of discrimination that are prohibited under the Charter. Using a new term such as "religious accommodation" may create some confusion, especially by limiting reasonable accommodation solely to ground of "religion." As it is proposed, such a separate treatment for reasonable accommodation based on religious grounds entails a risk for all grounds on which discrimination is prohibited. Changing the definition of the notion of reasonable accommodation could diminish the scope of protection provided in the name of the right to equality among others.

In addition, the wording used may foster a perception that exercising freedom of religion requires additional safeguards because it implies an intrinsic
Requiring selected government departments, agencies and institutions to adopt a policy for managing reasonable accommodation requests would also have the same effect. This would bring about a proliferation of interpretations, thereby multiplying uncertainties and costs. In addition, it would create significant contradictions, which could infringe the rights and freedoms of many people.

4.3 Modifying the existing limits to reasonable accommodation

The Commission questions the intention of amending the guidelines currently governing requests for reasonable accommodation by defining the concept of undue hardship, as outlined in the government policy paper.

The first of the proposed changes would initially seek to “promote equality between women and men” and to make this principle the first stipulation for granting accommodation requests. Yet the *Charter of Human Rights and Freedoms* already protects against discrimination based on sex and has guaranteed the right to equality between men and women since 1975. The duty to accommodate in discriminatory situations flows from this quasi-constitutional rule. As with any other application that would violate the right to equality based on one or more of the grounds on which discrimination is prohibited, a request for accommodation that would violate the rights of one or more women must be denied. Furthermore, Section 50.1 was written into the Charter in 2008 and reiterates that “the rights and freedoms enshrined in this Charter are guaranteed equally to men and women.” It is therefore legitimate to question the usefulness and relevance of drawing attention to the principle of equality between women and men as a condition for any accommodation.

The Commission has even more serious fears that a change, such as the one proposed, will likely threaten the Charter’s internal coherence. The introduction of a principle should not result in diminishing or contradicting the right to equality already provided for, not once, but three times in the *Charter of Human Rights and Freedoms*. On one hand, the requirement that an “accommodation can only be made if it first complies with the principle of equality between women and men” may limit the right to equality on the basis of an apparent conflict of rights – not a real one – or even a conflict of values. On the other hand, highlighting this criterion and putting it to the test in this first phase risks creating a hierarchy of rights. However, as was outlined in the first section of our comments, this hierarchy of rights is hardly desirable and contrary to the Charter. Introducing a predominant undue hardship standard would overshadow the task of balancing rights, which must be the focal point in assessing any reasonable accommodation request.

The government policy paper also proposes to amend the guidelines that define undue hardship, stating that a request for accommodation involving a public institution could not compromise its religious neutrality, its secular nature and the separation of Church and state. However, the Commission seriously questions the relevance of such an amendment, since it is clear that any request for accommodation that could compromise the state's religious neutrality would be denied under the law as it stands. For example, the courts would not grant a party's request for a trial's proceedings and outcome to be determined by religious law.

The Commission would also be concerned by the addition of such a guideline as it offers few indications of the degree of openness and acknowledgement of religious diversity that must be demonstrated by public institutions either toward their employees or their clientele. The state's religious neutrality as well as the separation of Church and state are to be understood as means to guarantee freedom of conscience and religion, and to ensure substantive equality for all. If they are interpreted restrictively, the fundamental rights and freedoms of public sector employees, as well as those of people using public institutions, are at risk. Unlike the government's stated objective, to limit reasonable accommodation based on religious grounds by barring it from public institutions without substantial grounds would be contrary to the jurisprudence that has been established over the past decades, and contrary to the secularism of the state. In fact, when a predominant secular criterion is established for public institutions, it creates an imbalance between factors to be evaluated when assessing accommodation requests. This would impose criteria that would in fact force the state not to abide by its duty of religious neutrality.

The Commission is therefore concerned about the consequences that such changes to accommodation requests guidelines and in the definition of undue hardship could bring about. Aside from the fact that the current guidelines have also been defined in the context of the Canadian *Charter of Rights and Freedoms*, the proposed changes could be deemed unconstitutional, unless the Canadian Charter's notwithstanding clause were to be invoked.

CONCLUSION

It is not the Commission's role to comment on the suitability or legitimacy of the proposed measures. As an authority on the *Charter of Human Rights and Freedoms*, its mandate is to comment on the conformity of proposals pertaining to rights and freedoms guaranteed in the Charter to ensure that the latter is promoted and upheld. A charter of rights and freedoms is designed to afford particular protection for everyone's fundamental rights including members of minority or disadvantaged groups, in order to improve society and protect the rights of its members.

The government policy paper's proposals are far from being consistent with the spirit and the letter of the *Charter of Human Rights and Freedoms*. Rather, they represent a break with the quasi-constitutional text adopted unanimously by the National Assembly in the mid 1970s. In fact, this proposal is the most radical modification to the Charter since its adoption.

According to the Commission's analysis, a law that would prohibit the wearing of religious symbols by public sector employees would clearly violate the Charter. These provisions would not withstand a court challenge based on current jurisprudence and could therefore only take effect and be valid if the notwithstanding clause was used. Invoking such a clause calls for strict compliance with procedural and substantive requirements.

Further, our analysis has also demonstrated that the concept of secularism as proposed by the government clearly does not qualify as a tool for protecting human rights and freedoms, as is the *Charter of Human Rights and Freedoms*. If the concept of secularism is indeed legitimate in its own right, then it must be set in legal terms that are independent of the Charter. The Charter must continue to translate the concept of secularism within the duty of religious neutrality to which the Québec state is already bound in order to guarantee fundamental freedoms and the right to equality.

The Commission wishes to reiterate the importance of maintaining the right to equality for all, in relation to the government proposals pertaining to equality between women and men.

Experience has shown however, that simply stating this right is not sufficient to achieve substantive equality between men and women. Instead, it is important to focus on the effective realization of the rights already recognized by the *Charter of Human Rights and Freedoms*.

Finally, the Commission has demonstrated that the proposal to formalize reasonable accommodation solely based on religion comes with its own set of conceptual challenges. Formalizing all reasonable accommodations, if possible, would be no less problematic if it deviates from the current rules defined by case law. In the first place, limiting the scope of the duty to accommodate in religious matters would contravene the rules and principles as they currently apply. Secondly, there is a real risk that in defining the concepts of reasonable accommodation and undue hardship, by moving away from the state of the law, that the scope of accommodations granted based on other prohibited grounds for discrimination, would be restricted, especially for people with disabilities. In addition, the proliferation of different reasonable accommodation policies in the public and parapublic sectors could result in conflicting situations and infringe the rights and freedom of those employees.

Considering that the *Charter of Human Rights and Freedoms* itself includes mechanisms to respond appropriately to the current situation with regard to religious symbols and accommodation, implementing the policy paper's proposals could lead to greater uncertainty, particularly at the expense of the rights of the people concerned and at the expense of the objective of strengthening legal certainty within organizations.

Finally, the Commission's reiterates that it has made its comments on the government's policy paper – a statement of values – and that it will examine in detail all legislative or other measures that could stem from this proposal.