

New Brunswick Human Rights Commission

General Criteria for the Investigation of Complaints of HIV/AIDS Discrimination

Adopted March 10, 1997¹

1.0 DISCRIMINATION

The Commission will accept complaints that allege discrimination in the areas of employment, accommodation and the provision of services:

- (a) on the basis of physical disability where a person has, or is perceived to have, Human Immunodeficiency Virus (HIV) infection or Acquired Immunodeficiency Syndrome (AIDS);
- (b) as a result of an association with persons identified by a prohibited ground of discrimination. Those identified by a prohibited ground include:
 - a) people living with or perceived to be living with HIV/AIDS (protected against discrimination on the basis of disability or perceived disability), as well as
 - b) persons presumed to be at high risk of HIV infection and who are identified by another prohibited ground of discrimination, including race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation, sex, social condition and political belief or activity..

2.0 DUTY TO ACCOMMODATE

2.1 GENERAL

Employers and providers of accommodation or services are subject to a duty to accommodate persons with disabilities to the extent that is possible without causing undue hardship. Undue hardship must be "significant" and is determined by objective criteria, including a) costs, b) health and safety requirements, c) disruption to the public and d) business efficacy. An unfounded fear of transmission of HIV/AIDS does not constitute a *bona fide* justification for discrimination.

¹ They were updated in part on January 31, 2005; the update concerns only amendments to *the Human Rights Code* that added "social condition" and "political belief or activity" as new grounds of prohibited discrimination.

2.2 REASONABLE ACCOMMODATION IN EMPLOYMENT

Reasonable accommodation of persons living with HIV/AIDS would entail reassigning duties, or extending sick leave and other leave benefits, on the same basis as in the case of any other illness. The duty to accommodate would extend only to the point that the disability does not preclude the performance of an essential job requirement.

Therefore, if an HIV/AIDS infected person's present state of health (to be determined in each set of circumstances) makes it impossible for them to perform their job or receive a service, and all accommodation in terms of reassignment of duties and extension of leave benefits has been exhausted, then the duty to accommodate has been met.

2.3 REASONABLE ACCOMMODATION IN THE PROVISION OF SERVICES OR ACCOMMODATIONS

There would be very few instances where a person living with HIV/AIDS could legitimately be refused a service or accommodation. In all circumstances, service providers are expected to adopt universal precautions to reduce the risk of transmission of HIV. Only in very exceptional circumstances would these precautions not sufficiently reduce the risk of transmission of HIV/AIDS.

3.0 EXEMPTIONS

Exemptions to *Human Rights Act* provisions may be granted by the Commission to designate being HIV/AIDS infection free as a *bona fide* occupational qualification (BFOQ), or a bona fide qualification (BFQ) in the provision of a service or of accommodation. Applications for such exemptions will be considered where:

- (a) there is a real and significant risk of HIV/AIDS transmission which is not sufficiently reduced by the adoption of universal precautions or by the reassignment of duties. (This could only be established in the rare circumstances where it is an essential job requirement that an employee regularly perform invasive procedures, as in the case of a surgeon);
- (b) there is a real and significant and unavoidable risk to the safety of the HIV/AIDS infected individual or to public safety; or,
- (c) it is an essential job requirement that an employee travel to countries which bar entry to those infected with HIV/AIDS.

Neither employee nor employer preference will be considered in a BFOQ/BFQ determination by the Commission.

4.0 TESTING

Mandatory HIV antibody testing is permissible only where a BFOQ or BFQ applies or where required by a New Brunswick Human Rights Commission approved *bona fide* group or employee insurance plan.

5.0 PRIVACY

HIV/AIDS related medical information legitimately required for health protection and promotion purposes is to be accorded the highest degree of privacy and confidentiality.