

New Brunswick Human Rights Commission Guideline on Special Programmes Adopted June 3, 2004

Please note: This policy statement embodies the New Brunswick Human Rights Commission's interpretation of the provisions of the New Brunswick *Human Rights Code* relating to special programmes. It is subject to decisions by Boards of Inquiry and the courts, and should be read in conjunction with those decisions and with the specific language of the *Code*. If there is any conflict between these guidelines and the *Code*, the *Code* prevails. Any questions regarding this policy should be directed to the Commission's staff. Additionally, this policy is not a substitute for legal advice; any person considering a special programme should seek legal guidance.

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1.0 Summary

The objective of this guideline is to publish the criteria for special programmes. Employers, service providers and owners that fall under provincial jurisdiction can use these criteria to determine if the special programme they are implementing qualifies for the purposes of the New Brunswick *Human Rights Code*.

Special programmes are programmes designed to prevent, eliminate or reduce disadvantage that is experienced, or likely to be experienced by a disadvantaged group. They are sometimes called affirmative action or employment equity plans.

It is not necessary to seek the Human Rights Commission's approval in order to implement a special programme. Such approvals will only be granted in exceptional cases.

Section 13 of the *Code* allows the Commission to approve special programmes. This protects the employer, service provider or owner from the possibility of a reverse discrimination complaint.

Persons who believe that they were discriminated against by a special programme may file a complaint. In such cases, the employer, service provider or owner may claim as a defence that the complaint is about a valid special programme, whether or not the programme had been approved under section 13.

The Commission will consider this defence, as well as applications for special programme approvals under section 13 of the *Code*, in light of this guideline, relevant legislation and case law.

The case law currently indicates that the following principles or criteria must apply in order for a special programme to be valid:

- Freedom from discrimination is the rule
- A special programme must advance equality
- A special programme must address genuine disadvantage
- A special programme must be tailored to meet the actual needs of the disadvantaged group
- The impact of the special programme on third parties must be considered
- Special programmes must be proportional to the degree of under-representation or disadvantage
- Special programmes are temporary

The Commission recommends that organizations wishing to adopt special programmes adopt the following procedures:

- Statistical analysis
- Review of policies, practices and procedures
- Measurable goals
- Regular monitoring and evaluation

2.0 Introduction

The role of the New Brunswick Human Rights Commission is to enforce the New Brunswick *Human Rights Act*, otherwise known as the *Human Rights Code*. One method used by the Commission in order to enforce these principles is to produce guidelines that reflect its interpretation of the *Code*.

The Commission interprets the *Code* in light of the case law relating to human rights legislation and the *Canadian Charter of Human Rights and Freedoms*, in particular section 15 of the *Charter*. The Commission is also guided by international human rights case law and New Brunswick's obligations under international human rights treaties that have been ratified by Canada.

This guideline is largely based on the *Policy on Special Programs*¹ adopted by the Canadian Human Rights Commission. The Commission would like to acknowledge the human rights commissions from various jurisdictions across Canada for the opportunity to study and draw from their policies and documents on special programmes.

¹ http://www.chrc-ccdp.ca/legislation_policies/special_programs-en.asp

Please note that this guideline does not apply to activities that fall under federal jurisdiction², such as:

- Interprovincial and international services such as: railways; highway transport; telephone, telegraph, and cable systems; pipelines; canals; ferries, tunnels, and bridges; shipping and shipping services;
- Radio and television broadcasting, including cablevision;
- Air transport, aircraft operations, and aerodromes;
- Banks;
- Protection and preservation of fisheries as a natural resource;
- Grain elevators; flour and seed mills, feed warehouses and grain-seed cleaning plants; uranium mining and processing.

3.0 Rationale for special programmes

The aim of the *Human Rights Code* is to create a climate of tolerance, harmony and mutual respect for the dignity and worth of each individual so that each individual feels able to contribute to the community and feels a part of the community.

This requires that society recognize and restrict unreasonable discrimination against individuals. It also requires recognition that past policies, practices and systems have directly and indirectly discriminated against certain groups. Frequently, the disadvantage and inequality are longstanding, and have resulted from unintentional and systemic discrimination as well as intentional discrimination.

Neither passive non-discrimination nor the investigation and conciliation of individual complaints effectively addresses this type of discrimination. In response to this reality, human rights legislation recognizes the need for special programmes.

4.0 What are special programmes?

A special programme is any plan, arrangement, rule, policy or legislative provision designed to prevent, eliminate or reduce disadvantage that is experienced, or likely to be experienced, by disadvantaged groups.

Various documents refer to this concept differently. The terms "affirmative action" and "employment equity" are often used; "education equity" is also used. Section 13 of the *Code* refers to "a programme to be undertaken by any person designed to promote the welfare of any class of persons."

For ease of reference, they are all referred to as "special programmes" in this guideline. Special programmes may deal with any of the activities mentioned in the *Code*.

A "designated group" or "target group" is a disadvantaged group that is the focus of a special programme. In Canada, visible minorities, Aboriginal people, women, and persons with physical

² For a fuller explanation, see http://www.hrsdc.gc.ca/en/lp/spila/cli/eslc/02Division_of_Legislative_Powers.shtml

and mental disabilities are the most common designated groups, but special programmes may designate any disadvantaged group.

There are a variety of measures that can advance the equality of disadvantaged groups that are not special programmes. They include equal opportunity programmes and reasonable accommodation.

4.1 Equal opportunity programmes

There are various positive management and hiring practices, which, although they may benefit members of a disadvantaged group, also have a beneficial effect on other employees. While such measures may be initiated to benefit a particular group or groups in overcoming barriers, they are open to all.

Examples

An example would be a policy allowing for flexible work hours. Such policies are of direct benefit to parents raising children and to people with disabilities. At the same time these policies also benefit other employees who wish to work non-standard hours.

Other examples of measures of this type would be the adoption of barrier-free design criteria for the construction of all offices and facilities. While barrier-free design obviously has immense benefits for people with disabilities seeking to enter the workforce, it has also been shown to make workplaces more user-friendly for all employees and clients.

4.2 Reasonable accommodation

Employers, service providers and owners may also institute measures to ameliorate disadvantages suffered by individuals. While measures aimed at individuals may bear some similarity to special programmes, especially in their objective to ensure substantive equality is achieved, these measures are more properly considered forms of accommodation. Accommodation short of undue hardship is required by the *Code*.

4.3 How special programmes differ

Special programmes differ from these other types of measures in that they are designed to ameliorate or prevent disadvantage by allowing for unique programmes, policies or practices that apply to, and benefit, only those in one or more of the specified disadvantaged groups.

Examples

- special transportation systems for those physically unable to utilize existing transit;
- housing programmes for those groups facing restricted opportunities for appropriate accommodations, e.g. persons using wheelchairs;
- special counselling or training services for groups facing a common disadvantage, e.g. immigrants, youth, women seeking non-traditional employment;
- directed recruitment initiatives to ensure that Aboriginal people will be recruited at a rate higher than their general representation in the pool of prospective employees

5.0 The Law

The New Brunswick *Human Rights Code* prohibits discrimination and harassment based on several personal characteristics in employment, housing, public services, associations and publicity when the activities fall under provincial jurisdiction. It overrides other provincial laws, unless they expressly say otherwise, as well as policies, contracts and collective agreements.

Special programmes are a feature of human rights protection both in international law and in the Constitution and human rights legislation in Canada.

Examples

The *Convention on the Elimination of All Forms of Discrimination against Women* authorizes temporary "special measures aimed at accelerating de facto equality between men and women" (Article 4).

Section 15 of the *Canadian Charter of Rights and Freedoms* permits "any law, programme or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups ..."

Section 13 of the New Brunswick *Human Rights Code* allows the Human Rights Commission to approve special programmes:

13(1) On the application of any person, or on its own initiative, the Commission may approve a programme to be undertaken by any person designed to promote the welfare of any class of persons.

13(2) At any time before or after approving a programme, the Commission may

- (a) make inquiries concerning the programme,
- (b) vary the programme,
- (c) impose conditions on the programme, or
- (d) withdraw approval of the programme,

as the Commission thinks fit.

13(3) Anything done in accordance with a programme approved pursuant to this section is not a violation of the provisions of this Act.

Section 13 is permissive, rather than mandatory. The effect of an approval under section 13 is to protect the employer, service provider or owner from the possibility of a reverse discrimination complaint.

6.0 Circumstances when a special programme may be initiated

The Human Rights Commission encourages employers, service providers and owners to adopt effective and fair special programmes when necessary to overcome the discrimination faced by disadvantaged groups.

However, organizations that fall under provincial jurisdiction in New Brunswick are not required by law to adopt special programmes, except when they are a condition of settlement of a human rights complaint or when they are ordered by a Human Rights Board of Inquiry.

Nevertheless, some businesses falling under provincial jurisdiction may need to implement employment equity programmes in order to qualify for major contracts with the federal government. This is called contract compliance.³

Special programmes may be initiated by any organization of its own accord. **It is not necessary to seek the Commission's approval under section 13**, since that section is permissive and not mandatory. Accordingly, applications under section 13 will be exceptional.

Usually, a special programme will be considered by the Commission only when a complaint is filed against an employer, service provider or owner who claims as a defence that the complaint is about a valid special programme. If the Commission agrees, it will dismiss the complaint, and, if the special programme had not already been approved, it may approve it.

The Commission will consider the validity of a special programme defence, as well as applications for special programme approvals under section 13 of the *Code*, in light of this guideline, relevant legislation and the case law.

7.0 Principles or criteria applying to special programmes

When considering whether to approve a special programme under section 13, or to dismiss a complaint where the respondent claims that the matter complained of is justified because it is a component of a special programme, the Human Rights Commission will consider the criteria set by human rights tribunals and the courts from time to time to the extent that they may apply to New Brunswick's legislation. At the time this guideline was adopted, the criteria that will be considered by the Commission may be summarised as follows:

7.1 Freedom from discrimination is the rule.

Courts have frequently found that limitations to the principle of freedom from discrimination must be viewed as exceptions, and also that all exceptions to human rights must be narrowly interpreted. In this context, the courts' subsequent recognition of special programmes not as an exception to freedom from discrimination but as an embodiment of the egalitarian principle takes on special relevance. Based on this case law and on constitutional principles, the Commission interprets section 13 as permissive and not mandatory, and recognizes also that employers and service providers may devise special programmes without its approval. However, it will insist, when reviewing special programmes in the context of a defence to a human rights complaint, that the equality rights of disadvantaged groups and non-disadvantaged groups are not unreasonably compromised.

7.2 A special programme must advance equality

Inherent in the notion of a special programme is the idea that in the pursuit of equality it may be necessary to treat individuals or groups differently in order to establish "substantive equality."

³ For more information, see:

<http://www.hrsdc.gc.ca/asp/gateway.asp?hr=en/lp/lo/lsw/we/programs/index-we.shtml&hs=wzp>

Special programmes must be designed and administered to ensure that this objective is always paramount.

7.3 A special programme must address genuine disadvantage

Special programmes are intended to help target groups overcome systemic barriers to equality of opportunity. Due to their remedial nature, the courts have treated special programmes with considerable deference regarding their impact on non-disadvantaged segments of the public.

Nevertheless, these programmes should be designed in a manner that considers undue exclusionary effects on people who are not members of the target groups.

The organization responsible for the programme must establish that the target group experiences disadvantage and that the proposed special programme will advance the achievement of equality for that group.

For example, a special programme may be warranted within organizations where the equitable representation of disabled people is lacking and where people with disabilities do not have access to the same employment and advancement opportunities as non-disadvantaged workers.

Evidence of disadvantage should be objective and, where possible, quantifiable.

Special programmes should not unreasonably restrict those who will benefit, especially when the restrictions might be considered discriminatory under the *Code*. However, they do not have to include all disadvantaged groups. There should be a rational connection between any restrictions on eligibility and the purpose of the special programme. Where resources are scarce, they should be allocated in a manner that reduces or eliminates disadvantage and is rationally connected to the purpose of the programme.

7.4 A special programme must be tailored to meet the actual needs of the disadvantaged group

A determining factor in establishing that the programme will advance equality is whether the programme meets the actual needs of the disadvantaged group for which it is intended. There must be a demonstrable connection between the programme and its intended goals.

For example, if a programme is aimed at improving employment prospects for visible minority professionals, there must be clear evidence that the programme in fact achieves this goal.

7.5 The impact of the special programme on third parties must be considered

Special programmes may have some impact on non-designated group members, and steps should be taken to ensure that such impacts interfere as little as possible with the opportunity of third parties, consistent with the overall need for and objectives of the special programme.

7.6 Special programmes must be proportional to the degree of under-representation or disadvantage

Greater and more entrenched disadvantage may necessitate more comprehensive and far-reaching special programmes. For example, within workforces where there is history of exclu-

sion (e.g., women in the non-traditional occupations) it may be possible to justify special programmes that are more restrictive.

Factors to be considered include the degree of disadvantage, the size of the organization, the scope of the measure, the type of industry, and alternatives available to third parties.

7.7 Special programmes are temporary

By definition, special programmes are designed and initiated in order to remedy or prevent disadvantages being suffered by groups for a reason related to one of the proscribed grounds of discrimination. A special programme can therefore only be justified for as long as the disadvantage persists. Sponsors of special programmes should reassess the need for the programme periodically, and wind programmes down as soon as they are no longer necessary.

8.0 Suggested procedures for special programmes

The following elements are presented as an aid to organizations implementing a special programme. The Human Rights Commission will consider the elements in conjunction with the programme's compliance with the general principles to determine whether the programme is likely to prevent disadvantage. These procedures do not override requirements set out in a tribunal or court order if that is the basis for the special programme.

Employers and service providers should carefully document the process they follow in planning and implementing special programmes.

8.1 Statistical analysis

Since special programmes must be designed to respond to a need, it is imperative that employers and service providers quantify the nature of the problem. The type and extent of the analysis required will depend upon the situation at hand.

Each target group should be clearly defined, and it should be established that each one constitutes a disadvantaged class both generally and in the particular context of the programme.

A more sophisticated analysis may not be necessary in the case of an employer, for example, whose workforce virtually excludes target group members. In other cases, readily available data sources, including, for example, socio-economic indicators produced by Statistics Canada, may be sufficient to document the nature and degree of the disadvantage. Such data might be used to support a programme geared specifically to support women who are single parents, for example. In some cases, depending upon the sophistication and scope of the potential programme, tailor-made research data may be required.

8.2.0 Review of policies, practices and procedures

A review of policies, practices and procedures should be undertaken to determine how they affect disadvantaged groups. Where it is clear that a system or practice has had a significant exclusionary impact over time, the proponents of a programme will have a more persuasive case for a special programme. Unnecessary height and weight restrictions are classic examples of policies that exclude women and certain groups from employment.

The special programme must be designed to ameliorate real disadvantages. It is usually advisable to consult with associations or individuals knowledgeable about the special needs of a particular group (e.g. people with disabilities). In addition, where applicable, consultation with those likely to be directly affected by the programme should be considered.

In determining whether a measure is a "special programme," consideration must be given to its rationality, effectiveness and fairness. In designing a special programme, the measurement of its goals and its exclusionary effects should be considered.

8.2.1 Measurable goals

A special programme should be capable of objective definition; that is, it should be based on measurable goals. The objectives of the programme should be defined by a plan that indicates the activities to be undertaken to achieve the objective, and the time frame in which results are expected.

8.3 Regular monitoring and evaluation

Regular monitoring and evaluation to assess efficacy and progress and determine whether adjustments are necessary is critical.

Subsection 3(4) of the *Code* prohibits oral and written inquiries directed at job applicants concerning any of the grounds listed in the *Code*. However, this data may be collected if the information is used for monitoring or evaluation of a special programme, provided the inquiry is stated to be optional and voluntary.

The monitoring and evaluation process will determine the continued need for the programme. Special programmes should be considered to be temporary in nature. They are only required until such time as the issues they address are substantially resolved. As with other factors, the period of the programme may be related to the severity of the disadvantage. As the disadvantage decreases, the need to continue the programme will diminish. Given the availability of other remedial programmes, it may be possible to terminate special programmes after the original disadvantage has been substantially but not completely eliminated.

9.0 Further information

For further information, please check the website of the Human Rights Commission at www.gnb.ca/hrc-cdp/e or contact the Commission at:

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