

SECTION: Interpretation

Effective date: October 17, 2003

SUBJECT: SPECIAL PROGRAMS – s.11

Purpose:

This policy is intended to assist in the interpretation of the term “special programs” referred to in section 11 of *The Human Rights Code* (“*The Code*”). Where there is any conflict between this policy and *The Code*, *The Code* prevails.

Context :

The Human Rights Code recognizes the right of all individuals to be treated on the basis of their personal merits, and to be accorded equality of opportunity with all other individuals. However, it also acknowledges that past discrimination against certain groups based on the characteristics set out in s. 9(2) has resulted in serious disadvantage to members of those groups, and as a consequence it is important to provide for *affirmative action* programs and other special programs designed to overcome this historic disadvantage. It also recognizes that there are disadvantaged individuals and groups in our society who have special social and economic needs which may need to be addressed by special measures.

A special program (note: the term is a broad one, and includes what are commonly known as *affirmative action* plans) is any plan, arrangement, rule, policy, or legislative provision designed to prevent, eliminate, or reduce disadvantage that has been experienced, is experienced, or is likely to be experienced, by disadvantaged groups. These affirmative action and special program measures are protected by s. 11 of *The Code*, if certain criteria are met.

The Commission will apply the terms and criteria set out in Policy # I-4 “Defining Physical & Mental Disability”.

Special Programs Defined

The Commission adopts a purposive definition of the term “special programs” as used in *The Code* to include the following:

- (a) affirmative action or equity plans or programs designed as a response to the under-representation of target groups defined by the stated group characteristics of *The Code* at various levels within a particular work force, program, etc (i.e. not simply at entry). Such programs have both quantitative and qualitative

dimensions. Ideally, they should include strategies for the identification and elimination of systemic barriers to participation (or continued participation) by those groups; and special measures such as preferential hiring, training, and/or promotion opportunities to bring about more proportional representation of the target groups at all levels in that work force or program.

- (b) special programs which operate beyond the employment context. For example, special programs include specially designed housing units or facilities for persons with disabilities, education equity programs at all levels, seniors' programs, and so on.
- (c) programs designed to address specific needs of disadvantaged individuals or groups defined by the stated group characteristics in *The Code* in a manner which is immediate and direct, but is not necessarily intended to bring about systemic change.

Constituent Elements of a Special Program

Note: Section 11 operates as a defence to a complaint of discrimination if the statutory criteria are met. Although the Commission will no longer give prior approval to a special program, its staff is available to provide information and assistance on methods for creating and implementing such programs.

When considering a defence to a complaint under section 11(b) of *The Code*, the Commission will require a full description of the program. In order to be considered a special program within the meaning of s. 11, the program will be required to meet the following criteria:

1. The program objective must be the amelioration of conditions of disadvantaged individuals or groups (see definition above).
2. In order to determine whether the program “achieves or is reasonably likely to achieve that object” as required under s. 11(b)(ii), the Commission will look for the following elements:
 - (a) Identification of Target Group(s)
 - Each target group must be clearly defined, and it must be established that each group constitutes a disadvantaged class of persons both generally and in the particular factual context under review. Target group definitions will be specific to the particular program in the sense that eligibility for target group status will be clearly stated (e.g. self-declaration of ethnic or national origin, documented verification of source of income, etc.). Sufficient

supportive documentation must be included to demonstrate the disadvantaged status of the target group(s) in the particular context under review, unless the Commission has made a pre-determination on the basis of its own research. It must also explain how the proposed measures will relieve this hardship, economic disadvantage or discrimination, or how they will otherwise assist in achieving equality. In addition, it should indicate what (if any) review of practices, policies and procedures has been undertaken to determine how they may impact on disadvantaged groups; as well as describe any consultation process with the proposed target group(s).

- Care should be taken to ensure that the program does not unreasonably restrict eligibility, especially when the restrictions might be considered to be discriminatory under *The Code*. There should be a reasonable connection between any restrictions in eligibility and the purpose of the special program itself.
- While it is preferable to make such programs as broad as possible under the circumstances, this does not mean that special programs have to include all disadvantaged groups to avoid the risk of being viewed as discriminatory. A special program that is designed to relieve the disadvantage experienced by a particular group, and which, in fact, targets that particular group is not required to expand its eligibility criteria beyond that target group.

(b) Goals and Timetables

- Affirmative action plans should include goals and timetables for the attainment of a desired rate of participation and retention of the target group(s). They should be realistic, and must satisfy the Commission that equality of access and participation is the ultimate goal of the programs.
- Special measures which are designed to meet particular needs common to the membership of the target group(s) should specify measurable criteria for evaluation of the program outcomes and, where it appears that the need may fluctuate over time, may require a method and scheme for monitoring the degree of need.

(c) Method of Implementation

- The special program should demonstrate a well-designed

implementation plan which is likely to ensure the effective delivery of the program and the attainment of the stated objectives. The plan must also ensure that the program does not undermine the dignity or status of the target groups. For example, a program which superficially creates employment opportunities but contains certain conditions of employment which offend the dignity of participants would not meet this standard.

- Although as a general rule, questions relating to group characteristics set out in *The Code* are prohibited, reasonable data collection for the monitoring and evaluation of a special program may be permitted. Such collection must however be done with due regard to the privacy concerns of the affected individuals. Provision of such information should be on a voluntary basis.
- Data may also be collected if the information is used to demonstrate under-representation of particular groups or other forms of hardship or disadvantage. Data collection of this type can, for example, determine the racial profile of the work force in order to put into place a program.

APPROVED BY

“Janet Baldwin”
Chairperson

November 5, 2003
Date