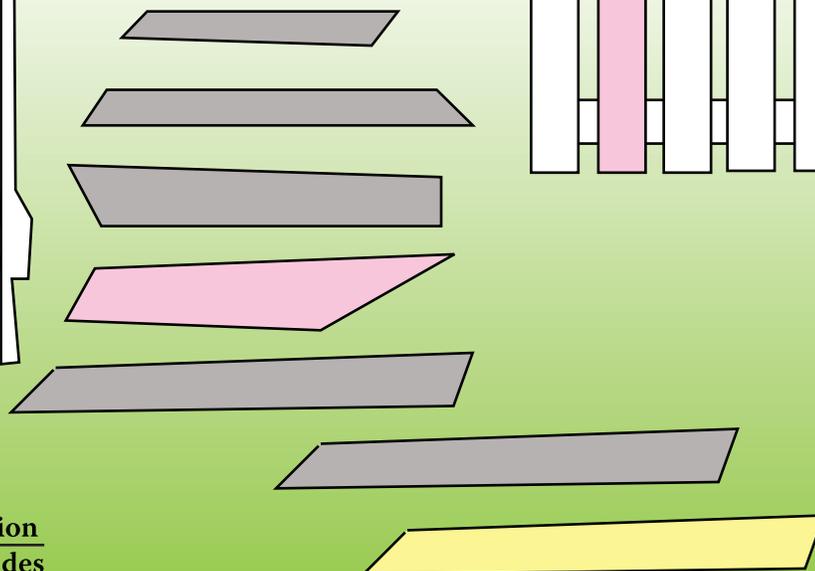
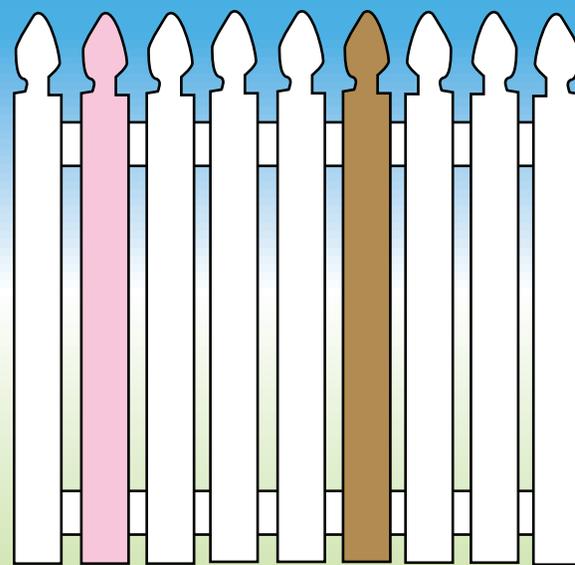
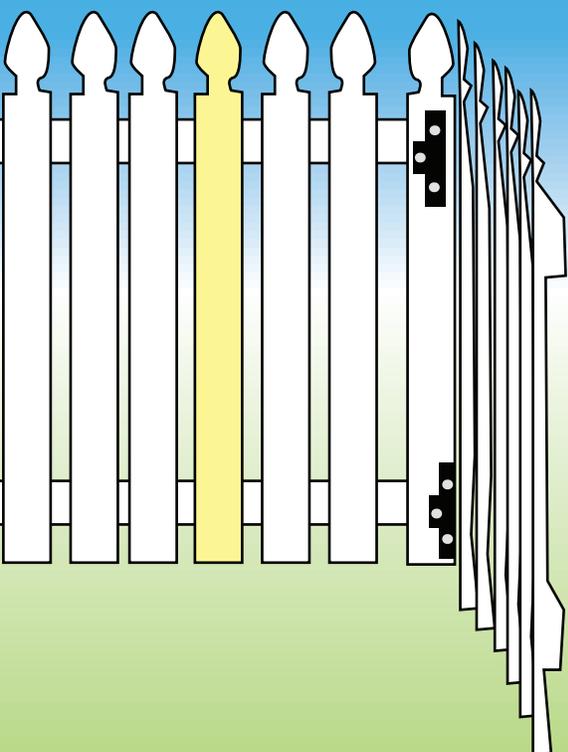




SPECIAL programs and the Ontario Human Rights Code

A
self-help
guide



Ontario
Human Rights Commission
Commission ontarienne des
droits de la personne

Contents

What are special programs?	2
What the <i>Code</i> says	3
Why are special programs protected?	3
Protecting affirmative action	4
Promoting substantive equality.....	4
Special programs and the duty to accommodate	5
Special programs and other exceptions in the <i>Code</i>	6
Guidelines for developing special programs	7
Consultation	7
Developing a rationale for the program	7
Data collection.....	8
Eligibility criteria.....	9
Evaluating a special program	11
Addressing concerns about special programs	11
Special Program Guidelines Checklist	14
Section 14 of the <i>Code</i>	16
Purpose of OHRC Policies.....	18

What are special programs?

The purpose of the Ontario *Human Rights Code* is to create a climate of understanding and mutual respect for the dignity and worth of each person, so that each person feels a part of the community and feels able to contribute to the community. It gives everyone the right to equal treatment in employment, housing, goods, services and facilities, contracts, and membership in unions, trade or occupational associations or self-governing professions based on *Code* grounds. Everyone is entitled to equal treatment in these areas based on their:

- Race, colour or ethnic background
- Religious beliefs or practices
- Ancestry
- Place of origin
- Citizenship
- Sex (including pregnancy and gender identity)
- Family status
- Marital status, including those with a same-sex partner
- Disability
- Sexual orientation
- Age
- Receipt of public assistance (in housing) and record of offences (in employment)

All organizations are required to prohibit unfair treatment based on *Code* grounds and must remove barriers that cause discrimination and stop it when it occurs. Organizations can also choose to develop “special programs” to help disadvantaged groups improve their situation. The *Code* and the Canadian *Charter of Rights and Freedoms*¹ both recognize the importance of dealing with historical disadvantage by protecting special programs to assist marginalized groups. The Supreme Court of Canada has also said special programs should be protected.² The *Code* allows for programs designed to help people who experience hardship, economic disadvantage, inequality or discrimination, and protects these from attack by people who do not experience the same disadvantage. This guide describes the use of special programs, clarifies when they are allowed, and identifies how they could be designed. The OHRC encourages the development and use of special programs as effective ways to meet particular needs, help reduce discrimination, and correct historical disadvantage.

¹ Section 15(2) of the *Canadian Charter of Rights and Freedoms* outlines the protection of affirmative action programs, to prevent them from being attacked by people who are excluded from the programs’ purpose.

² Most recently, in *R. v. Kapp*, (2008) 2 S.C.R. 483, the Court ruled that a commercial fishing license provided to three Aboriginal bands to allow fishing on one extra day of the year was not discrimination under the *Charter and Rights of Freedoms* because its object was to ameliorate the conditions of a disadvantaged group under section 15(2) of the *Charter*.

Organizations do not need permission from the OHRC to develop or designate a special program. This means that special programs can be put in place without delay.

What the Code says

Under Section 14 of the *Code*, it is not discrimination to put in place a program if it is designed to:

- Relieve hardship or economic disadvantage
- Help disadvantaged people achieve, or try to achieve, equal opportunity or
- Help eliminate discrimination

A program must satisfy at least one of these points to be a special program under the *Code*. There are many types of programs that might qualify. For example:

- A housing co-op keeps a set number of spaces for women who are leaving abusive relationships
- The government funds a job program for persons under 25 to combat youth unemployment, because a Statistics Canada study shows that youth under 25 face higher rates of unemployment than other groups
- A government-funded community legal clinic offers its services only to people with disabilities, to help them fight some of the systemic barriers they face.

The OHRC, Human Rights Tribunal of Ontario (HRTO) and the courts can determine which programs are allowed as special programs under the *Code*.

Why are special programs protected?

In the case of the *Ontario Human Rights Commission v. Ontario (Roberts)*, the Ontario Court of Appeal said that section 14 of the *Code* has two purposes:

1. Protecting **affirmative action programs** from challenge by people who do not experience disadvantage.
2. Promoting **substantive equality** to address disadvantage and discrimination in all its forms.

Protecting affirmative action

At one time, "equality" meant that everyone should receive the same or similar treatment. This is often referred to as "formal equality." The problem is that "formal equality" ignores historical and ongoing barriers, doesn't allow for special needs, and can even continue inequality for certain groups.

The first purpose of section 14 is to make sure that special programs, properly designed to help a disadvantaged group, cannot be challenged by people who do not face the same disadvantage. In legal terms, section 14 protects special programs from challenges based upon "formal equality" principles.

Example: A corporation sets up a scholarship fund to provide financial help to people with disabilities entering post-secondary education. The corporation's rationale is that people with disabilities have been traditionally under-represented in higher education and face greater financial barriers than other groups because of costs related to their disabilities. This program makes a distinction based on disability that would be prohibited under section 1 of the *Code*. But the purpose of section 14 to protect "affirmative action" type programs works to prevent people who do not have disabilities from successfully claiming that their human rights have been violated because they are outside the disadvantaged group that the scholarship is designed to help.

Example: A community rape crisis centre only provides services to women and transgender women (people who have changed their gender identity from male to female) based on studies and statistics that show that women are more likely to experience sexual assault than men.

In both of these examples, the organizations could use section 14 as a legal defence if their program was challenged.

Promoting substantive equality

The second purpose of section 14 is to promote substantive equality.

"Substantive equality" means understanding and meeting the needs of disadvantaged persons or groups using historical, legal and social contexts. It takes into account discriminatory barriers in their many forms, not all of which are obvious or intended. For example, discrimination may be built into an organization's behaviour, practices and policies. That can lead to a genuine disadvantage for some people based on a *Code* ground. This is called *systemic* or *institutional discrimination*. Organizations and institutions have an obligation to be aware of these forms of discrimination. When systemic discrimination is found to exist, an organization must change its practices.

Developing and protecting good special programs is an additional way that organizations can address systemic discrimination and promote substantive equality by allowing some disadvantaged groups to benefit in a targeted way.

In the *Roberts* case, the Ontario Court of Appeal said: "...Substantive equality requires a positive action to ameliorate the condition of soundly disadvantaged groups."

Example: A police service recognizes that it does not look like the racially diverse community it serves. Most of its higher ranking officers are from non-racialized groups. If people from racialized groups (communities facing racism) join the service, they are less likely to be promoted and more likely to quit early on. The service relies on recruits to find more experienced officers to mentor them, which helps them in moving up in the ranks. However, people from racialized groups have trouble finding mentors. The service creates a special program to help officers from racialized groups take part in formal mentorship opportunities.

The Court also cautioned that:

"Special programs aimed at assisting a disadvantaged individual or group should be designed so that restrictions within the program are rationally connected to the program. Otherwise, the provider of the program will be promoting the very inequality and unfairness it seeks to alleviate."

Example: A government program gives financial help to people with visual disabilities so they can buy equipment to help them. However, only people under age 30 can apply. This exclusion could be challenged. The government would have to justify why an age limit is relevant.

Special programs and the duty to accommodate

Employers, service providers and landlords all have a duty to accommodate the needs of individuals because of disability, creed, family status and other grounds, to the point of "undue hardship."

In some cases, what may appear to be a special program is in fact part of the duty to accommodate under the *Code*. Such programs should not be considered special programs.

Example: A transit provider sets up a para-transit bus service so people with disabilities, who face barriers on the conventional system, have access to public transit service already available to people without disabilities. This makes the para-transit system part of the duty to accommodate rather than a special program.

Special programs and other exceptions in the *Code*

In addition to section 14, some other sections in the *Code* allow preference to be given to specific groups if certain criteria are met. The special interest organization (section 18), special employment (section 24) and the age 65-and-over provisions (section 15) all lay out special exceptions or defences to the right to be free from discrimination under Part I of the *Code*. However, these differ from section 14 in the following ways.

Section 14 applies where a program is the issue and a need can be demonstrated. Section 18 deals with membership in an organization. Section 24 applies only to preferential employment, where identifying with a *Code* ground is a genuine qualification for the job. The age 65-and-over (section 15) provision of the *Code* allows preference to be given to people in that age group without a reason.

Sometimes, different parts of the *Code* may apply to the same organization, but in different ways:

Example 1: A social recreation centre that offers workout facilities, a pool, daycare service, reading library and a café restricts its membership and services to women and transgender women (someone who has changed their gender identity from male to female). This would likely be protected under section 18 of the *Code* as a “special interest organization” or possibly under section 20(3) as a “recreational club.”

Example 2: The women’s centre gives preferential treatment to its members aged 65 and over by providing them with discounted membership rates. It can do this under section 15 of the *Code*.

Example 3: The women’s centre also provides life-skills and counselling programs exclusively to its members who are refugees to Canada and have experienced trauma and abuse. Using research to show that this group is much more disadvantaged than others, it justifies this service restriction as a “special program” under section 14 of the *Code*.

Example 4: The centre restricts hiring qualified counsellors for its life-skills and counselling programs to women. It can do this under the “special employment” (section 24) provisions of the *Code*.

Guidelines for developing special programs

A good plan for a special program should be developed through consultation and identify a rationale, supporting data, eligibility criteria and an evaluation method. With these in place, a program may be less likely to face legal challenges by people who think it is discriminatory under Part 1 of the *Code*, and can be better defended as a “special program” if necessary.

Landlords, service providers and other organizations may start their own special programs. No special or advance approval by the OHRC is needed.

Consultation

Always consult the people who might be affected by the proposed special program. Include individuals and groups targeted by the program, labour unions or employee associations, tenant associations, service users or community organizations. Here are things to keep in mind when making a plan.

Developing a rationale for the program

The rationale for a special program is simply the reason it is being created. The rationale serves as a principle upon which to design the rest of the program. This makes it easier to develop the eligibility criteria and make a meaningful evaluation of the program once it has been started. A clear rationale also makes the program easier to understand for the people using it.

A good rationale will:

- Identify who will benefit from the program
- Provide reasons why the target audience is considered to be experiencing hardship, economic disadvantage, inequality or discrimination. Evidence should be objective not subjective, and should not be based on personal impressions. Remember, there must be a real problem and evidence to show that the problem exists. Often, there is readily available research such as Census data that can help define the problem. Sometimes, data collection might be necessary
- Explain how and why the program should help relieve the hardship, economic disadvantage, inequality or discrimination, including benefits, goals, timetables and expected results
- Show the expected time period for the program.

Example: After studies showed that people of South Asian origin with low-income have trouble getting access to the justice system, the government creates and funds a legal clinic to give free legal advice and representation to this group. A possible rationale behind the program is to help make it easier for this group to get legal representation in response to their disadvantage in the justice system.

A clear rationale can help an organization set goals for the program and criteria to evaluate the progress of the program to know when the goals have been met (see the section, *Evaluating a Special Program*).

Data collection

As a rule, using questions relating to prohibited grounds as criteria for offering employment, services, housing, contracts or membership in vocational associations is discrimination under Part 1 of the *Code*. However, the *Code* allows collecting data to monitor, evaluate and address systemic or other forms of discrimination.

Collecting qualitative or quantitative data is a good way to see if a special program is needed. Data can be collected to see if certain groups are under-represented or if other forms of hardship, inequality or disadvantage exist.

Example: Before expanding and hiring new staff, an employer conducts a work survey to see whether its workers reflect the community it serves. Employees are asked to identify themselves by sex, race, disability, creed, etc. and to submit the information anonymously. Based on the results, the company makes efforts to recruit more women into management positions.

An organization may want to periodically collect data to measure the results of special programs, and help an organization decide whether to expand the program, disqualify people who no longer need it or discontinue the program when the equity goals have been met.

Example: An organization sets up a four-year special program to offer housing to homeless people with mental health disabilities and addictions. Data was collected during the course of the program and at the end to see if the residents experienced greater quality of life, employment or volunteer prospects and improved physical and mental health. Based on the results, the organization changes its goals by continuing the program and offering additional supports to its older male clients.

An organization might also collect data to examine if its employment and service practices are equitable, or to deal with a problem known in the organization or in the sector. Data collection for these purposes can help organizations to identify and eliminate possible *Code* infringements.

Example: A school board is aware of research in other jurisdictions showing the negative impact of “safe school” discipline policies on racialized students and students with disabilities. Parents of some students from these groups have raised concerns with the school board about their children being disciplined inappropriately. The school board wants

to find out if this is a systemic problem. It designs a data collection program to record the race and disability of students along with the nature of the infraction and the form of discipline, to see if any discriminatory treatment exists.

The *Code* does not say how to collect data. However, there are some good methods to identify groups within, or served by, an organization:

- Self-identification surveys
- Use of a trained employee or external expert to record data through observation
- Use of an external consultant or expert to collect the data.

Anonymous and voluntary self-identification surveys are usually a good way to collect information, but organizations should choose the method that works best for them.

Privacy and dignity should always be a concern when collecting data. Organizations subject to freedom of information and privacy legislation should make sure that the method they choose complies with the relevant laws.³ Organizations should collect data in a way that respects dignity and privacy and should develop internal policies on privacy. Assuring anonymity may be needed to address privacy and confidentiality concerns. Service providers, employers, landlords and other responsible bodies should consult with affected communities about the need for data collection and appropriate methodology.

Participants must always be told why data is being collected, how it will be used, the benefits of taking part and the privacy and confidentiality steps that will be taken to protect their information. Data collected for special programs must be used for special program purposes only.

For more detailed information, please see the OHRC's publication *COUNT ME IN! Collecting human rights-based data*, available on the OHRC's website at www.ohrc.on.ca.

Eligibility criteria

The rationale for the program will guide who will be eligible to take part. As noted earlier, special programs must have criteria that only relate to the purpose of the program and they cannot discriminate based on other grounds in the *Code*.

Very narrow criteria severely limit who can take advantage of the program. This might defeat the rationale behind the program by excluding people it was meant

³ Applicable privacy laws include Ontario's Provincial Freedom of Information and Protection of Privacy Act and Municipal Freedom of Information and Protection of Privacy Act or the federal Personal Information Protection and Electronic Documents Act. More information is available from the Office of the Information and Privacy Commissioner.

to help. On the other hand, criteria that are too broad might result in providing benefits to people who don't need them.

Example: Studies show that people of South Asian origin with low income have trouble gaining access to the justice system. The government funds a legal clinic to provide free legal advice and representation to this group.

Criteria too broad: In deciding who could use their services, the legal clinic could help anyone of South Asian origin. However, this would be over-inclusive, because it would allow people with medium and high incomes to benefit. This would partially defeat the rationale behind the program, which is to help people of South Asian origin with *low income*.

Criteria too narrow or not related to the purpose: The legal clinic could offer services only to people whose income is below a certain level, who identify as South Asian, and who belong to a certain creed. These criteria would be too narrow, since the program is designed to help all South Asian people with low income and allowing people of only one religion to qualify would leave out other South Asian people with low income. The program could also be challenged under the *Code* as discriminatory against people based on creed.

People are protected from discrimination when they take part in a special program, just as they are when receiving a service that is not a special program. Rules or restrictions placed on people participating in the special program must not disadvantage people based on *Code* grounds.

Special programs often have limited resources. The temptation may be to restrict eligibility to put less strain on these resources. But financial limitations alone will not remove the obligation to justify the connection between eligibility and the reason for the program. Resources must be allocated in a way that furthers the purpose of the program and is in line with the intent of the *Code*.

Above all, the eligibility criteria should flow naturally from the rationale based on its supporting evidence. Criteria that are not clearly related to the purpose of the program will likely infringe Part 1 of the *Code*.

Also, even though the goal of a special program is to help people from *Code*-protected groups, it is important to note that taking part in a special program is not compulsory.

Finally, people should be told that a special program exists, the restrictions or limits on who is eligible, and whether the program is for services, a job or for housing.

Example: Advertisements for a government job program for youth under age 25 clearly explain to potential applicants and the public that

the employment is part of a special program designed to help disadvantaged youth.

Evaluating a special program

Monitoring a special program is important because it can help to:

- Evaluate its effectiveness
- Identify opportunities for improvement and growth
- Facilitate accountability within the organization
- Justify requests for more funding
- Communicate program results to the organization and its clients
- Get the support of key decision-makers and stakeholders.

Assessing how well a program is working and how it is helping may also require data collection, described earlier.

Example: A community mental health organization and a bank set up a special program for people with severe mental health disabilities who receive social assistance. The program helps them to open a no-fee bank account. The program rationale shows that some people with mental health disabilities face financial and other barriers to opening up regular bank accounts, which contribute to social isolation.

The goal of the special program is to help people with mental health disabilities by improving banking access. The organizations set criteria to meet this goal by targeting to reach a minimum number of participants. They also plan to ask participants if they feel more financially secure and have more personal control over their financial affairs.

The organizations use qualitative and quantitative data to evaluate the program. They find that participants increased their income, were able to buy more groceries, could better manage paying their bills and felt they “belonged” in their community. Based on this information, the organizations decide that the program has met its goal and consider expanding it to different regions.

Addressing concerns about special programs

A special program is in line with the values of the *Code*, if it meets the criteria described above. However, some questions and concerns may arise about an organization’s decision to set up a special program. One question that an organization may encounter is, “*Will the special program lead to “reverse discrimination” where less qualified people are employed or assisted?*”

It is common to see resistance to special programs based on the perception they just change who is being discriminated against. Special programs must respond to a proven need and real disadvantage. Systemic discrimination is often hidden; people from historically disadvantaged groups (for example, people from racialized groups, women, and people with disabilities) are often unable to get the same opportunities as others. Special programs help level the playing field.

Organizations should set out the purpose and goals of a special program and identify how processes such as hiring and promotion will be made clear and will be based on merit. Organizations may need to invite questions and get feedback from people inside and outside the organization to encourage support.

Example: A school board has collected data and found that very few of its teachers have First Nations, Métis or Inuit heritage, as compared to its student body. It creates an employment equity program, aimed at building a large pool of candidates of teachers with Aboriginal ancestry it can hire into available positions. In designing the program, it consults with many different groups, including unions, teacher's colleges, parents, staff and people in the local Aboriginal and non-Aboriginal communities. It sets clear short and long-term goals to bring up representation. It provides regular updates on the progress of the program through school board meetings and its annual report.

Another question an organization may encounter is, *“Can a special program be designed for some people within a Code-protected group, and not others?”*

Yes. Special programs should be designed to meet the specific and pressing needs of particular groups. It may be that a program is especially needed in a certain context. An organization has the right to choose which special program will work best, depending on the needs of the individuals it is trying to serve. This may mean designing a program for just *some* of the people within an already marginalized *Code*-protected group.

Example: A community centre serving people who are lesbian, gay, bisexual and transgender (LGBT) wants to set up a support group for bisexual people and people questioning their sexuality to talk about issues of biphobia (the irrational fear of people who are bisexual). The community centre is responding to concerns from its bisexual clients that they feel invisible and face stereotypes within both the heterosexual and LGBT communities.

As noted earlier, restrictions on who is eligible for the program must be supported by the evidence and the rationale. Special programs cannot leave out people from a group who may benefit from the program without reason.

An organization can overcome objections to special programs by following the elements of this guide: developing a good rationale, providing evidence of a problem, setting requirements that do not unnecessarily exclude individuals, and checking how well the program is working. Organizations should clearly communicate the rationale, explain the benefits, and provide updates on the progress being made.

Special program guidelines checklist

The information above is intended to help you understand special programs and some of the criteria required for a program to qualify under section 14 of the *Code*. It is important to know this information before planning and starting a special program. If in doubt, seek legal advice. Below is a checklist to help you.

Program rationale

- The target group or groups intended to benefit under the program are defined
- The problem experienced by the target group is defined
- The defined problem is related to hardship, economic disadvantage, discrimination or achieving equal opportunity for the target group
- There is evidence of the problem
- Goals have been identified for the program
- The benefits provided by the program are designed to help fix the defined problem and meet the goals
- The program has been designed to help disadvantaged groups beyond the organization's duty to accommodate people under the *Code*
- The proposed length of the program has been identified, if appropriate

Data collection

- A method for accessing existing data or collecting new data needed for determining the rationale for the program, and ongoing monitoring and evaluation, has been created
- Any data collection needed has been done, taking into account anonymity and confidentiality concerns
- The way data is collected complies with the relevant privacy requirements of the organization and relevant legislation

Eligibility requirements

- Specific eligibility criteria for people who can benefit from the program have been defined
- Each eligibility requirement, especially those based on prohibited grounds, relates directly to the rationale of the program
- The eligibility criteria are not too broad (do not include groups not intended to benefit)
- The eligibility requirements are not too narrow (do not prevent persons the program was intended to benefit from qualifying)
- Criteria are directly related to the rationale of the program, regardless of any cost limitations

- The program does not discriminate against its participants either intentionally or unintentionally
- A way of advertising the eligibility criteria to relevant stakeholders has been set up

Evaluating the program

- A way of measuring the effectiveness of the program has been designed
- Any data needed to evaluate the program goals have been defined
- Ways of modifying the program in response to the results of the data collected have been considered
- The length of the program has been defined or criteria that would signify the program has run its course have been specified

Planning and consultation

- Relevant stakeholders and the community affected have been identified and consulted and their views have been included in the design of the program
- A plan for implementing the program based on the guidelines has been created
- Any ongoing human resource strategies for managing the program, such as staff training, have been laid out
- Where appropriate, a plan has been developed to communicate to targeted groups, other employees, clients, and the public about the goals and the implementation of the program and address any concerns

Section 14 of the Code

Special programs

14. (1) A right under Part I is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I. R.S.O. 1990, c. H.19, s. 14 (1).

Application to Commission

(2) A person may apply to the Commission for a designation of a program as a special program for the purposes of subsection (1). 2006, c. 30, s. 1.

Designation by Commission

(3) Upon receipt of an application, the Commission may,

- (a) designate the program as a special program if, in its opinion, the program meets the requirements of subsection (1); or
- (b) designate the program as a special program on the condition that the program make such modifications as are specified in the designation in order to meet the requirements of subsection (1). 2006, c. 30, s. 1.

Inquiries initiated by Commission

(4) The Commission may, on its own initiative, inquire into one or more programs to determine whether the programs are special programs for the purposes of subsection (1). 2006, c. 30, s. 1.

End of inquiry

(5) At the conclusion of an inquiry under subsection (4), the Commission may designate as a special program any of the programs under inquiry if, in its opinion, the programs meet the requirements of subsection (1). 2006, c. 30, s. 1.

Expiry of designation

(6) A designation under subsection (3) or (5) expires five years after the day it is issued or at such earlier time as may be specified by the Commission. 2006, c. 30, s. 1.

Renewal of designation

(7) If an application for renewal of a designation of a program as a special program is made to the Commission before its expiry under subsection (6), the Commission may,

- (a) renew the designation if, in its opinion, the program continues to meet the requirements of subsection (1); or

- (b) renew the designation on the condition that the program make such modifications as are specified in the designation in order to meet the requirements of subsection (1). 2006, c. 30, s. 1.

Effect of designation, etc.

(8) In a proceeding,

- (a) evidence that a program has been designated as a special program under this section is proof, in the absence of evidence to the contrary, that the program is a special program for the purposes of subsection (1); and
- (b) evidence that the Commission has considered and refused to designate a program as a special program under this section is proof, in the absence of evidence to the contrary, that the program is not a special program for the purposes of subsection (1). 2006, c. 30, s. 1.

Crown programs

(9) Subsections (2) to (8) do not apply to a program implemented by the Crown or an agency of the Crown. 2006, c. 30, s. 1.

Tribunal finding

(10) For the purposes of a proceeding before the Tribunal, the Tribunal may make a finding that a program meets the requirements of a special program under subsection (1), even though the program has not been designated as a special program by the Commission under this section, subject to clause (8) (b). 2006, c. 30, s. 1.

Purpose of OHRC Policies

Section 30 of the Ontario *Human Rights Code* (*Code*) authorizes the Ontario Human Rights Commission (OHRC) to prepare, approve and publish human rights policies to provide guidance on interpreting provisions of the *Code*.⁴ The OHRC's policies and guidelines set standards for how individuals, employers, service providers and policy-makers should act to ensure compliance with the *Code*. They are important because they represent the OHRC's interpretation of the *Code* at the time of publication.⁵ Also, they advance a progressive understanding of the rights set out in the *Code*.

Section 45.5 of the *Code* states that the Human Rights Tribunal of Ontario (the Tribunal) may consider policies approved by the OHRC in a human rights proceeding before the Tribunal. Where a party or an intervenor in a proceeding requests it, the Tribunal *shall* consider an OHRC policy. Where an OHRC policy is relevant to the subject-matter of a human rights application, parties and intervenors are encouraged to bring the policy to the Tribunal's attention for consideration.

Section 45.6 of the *Code* states that if a final decision or order of the Tribunal is not consistent with an OHRC policy, in a case where the OHRC was either a party or an intervenor, the OHRC may apply to the Tribunal to have the Tribunal state a case to the Divisional Court to address this inconsistency.

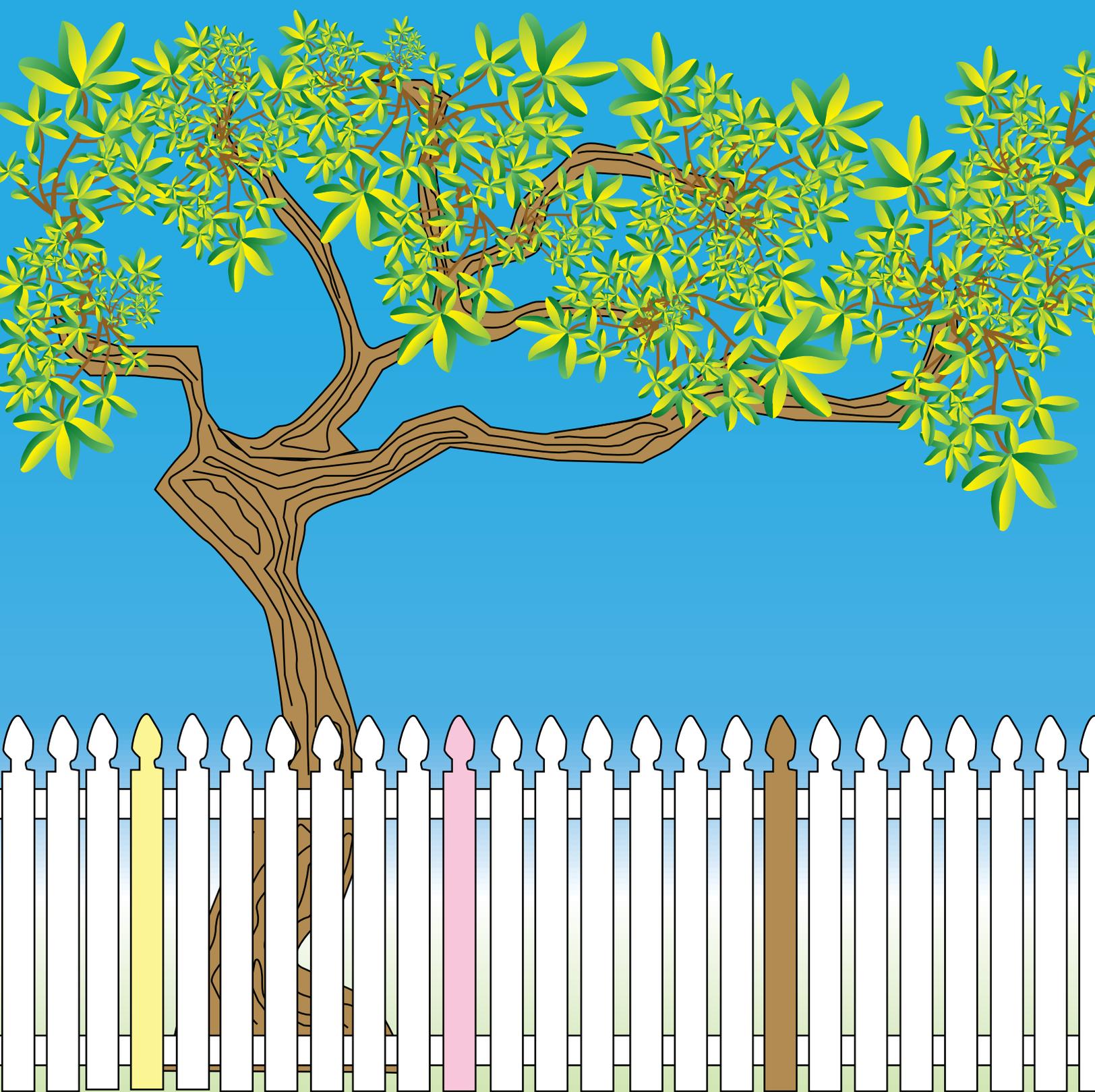
OHRC policies are subject to decisions of the Superior Courts interpreting the *Code*. OHRC policies have been given great deference by the courts and Tribunal,⁶ applied to the facts of the case before the court or Tribunal, and quoted in the decisions of these bodies.⁷

⁴ The OHRC's power under section 30 of the *Code* to develop policies is part of its broader responsibility under section 29 to promote, protect and advance respect for human rights in Ontario, to protect the public interest, and to eliminate discriminatory practices.

⁵ Note that case law developments, legislative amendments, and/or changes in the OHRC's own policy positions that took place after a document's publication date will not be reflected in that document. For more information, please contact the Ontario Human Rights Commission.

⁶ In *Quesnel v. London Educational Health Centre* (1995), 28 C.H.R.R. D/474 at para. 53 (Ont. Bd. Inq.), the tribunal applied the United States Supreme Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (4th Cir. 1971) to conclude that OHRC policy statements should be given "great deference" if they are consistent with *Code* values and are formed in a way that is consistent with the legislative history of the *Code* itself. This latter requirement was interpreted to mean that they were formed through a process of public consultation.

⁷ Recently, the Ontario Superior Court of Justice quoted at length excerpts from the OHRC's published policy work in the area of mandatory retirement and stated that the OHRC's efforts led to a "sea change" in the attitude to mandatory retirement in Ontario. The OHRC's policy work on mandatory retirement heightened public awareness of this issue and was at least partially responsible for the Ontario government's decision to pass legislation amending the *Code* to prohibit age discrimination in employment after age 65, subject to limited exceptions. This amendment, which became effective December 2006, made mandatory retirement policies illegal for most employers in Ontario: *Assn. of Justices of the Peace of Ontario v. Ontario (Attorney General)* (2008), 92 O.R. (3d) 16 at para. 45. See also *Eagleson Co-Operative Homes, Inc. v. Théberge*, [2006] O.J. No. 4584 (Sup.Ct. (Div.Ct.)) in which the Court applied the OHRC's *Policy and Guidelines on Disability and the Duty to Accommodate*, available at: www.ohrc.on.ca/en/resources/Policies/PolicyDisAccom2



ISBN: 978-1-4435-4497-9

This policy was approved by the Commission: March 2010

Also available on the internet: www.ohrc.on.ca

Available in other accessible formats on request

Disponible en français