



Section 48 – *The Saskatchewan Human Rights Code* Reasonable and Justifiable Measures

1. Purpose

This guide addresses the term “reasonable and justifiable measure” under the amended section 48 of *The Saskatchewan Human Rights Code (Code)*.

2. Background

Amendments to the *Code* came into effect in July 2011. The amendments include changes to section 48, historically referred to as the exemptions section. The previous section 48 set out an application and approval process. Organizations could undertake measures that would otherwise be discriminatory under the *Code*, if the Chief Commissioner found the measure to be “necessary and advisable” and granted an exemption.

As a result of recent changes to section 48, organizations no longer have to request approval from the Chief Commissioner. Organizations may now implement their own measures on a permissive basis, so long as those measures are “reasonable and justifiable” as outlined in section 48¹.

3. What is a reasonable and justifiable measure?

The *Code* recognizes the importance of dealing with historical disadvantage. Therefore, special programs or measures designed to assist marginalized groups are protected from discrimination complaints. Under the new section 48, organizations may develop reasonable and justifiable measures designed to prevent or reduce disadvantages that are suffered by any group based on one or more of the prohibited grounds² under the *Code*. The organization must ensure that the measure is likely to achieve or does achieve its object.

¹ Section 48 reads:

Reasonable and Justifiable Measure

48(1) Subject to subsection (2), it is not a contravention of this Act for a person to adopt or implement a reasonable and justifiable measure:

- (a) Designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals if those disadvantages would be or are based on or related to one or more prohibited grounds; and
- (b) That achieves or is reasonably likely to achieve that object.

(2) If a program has been approved or ordered pursuant to section 47, a measure mentioned in subsection (1) must comply with the terms and conditions of that program.

² The prohibited grounds include religion, creed, marital status, family status, sex, sexual orientation, disability, age, colour, ancestry, nationality, place of origin, race or perceived race, and receipt of public assistance.

4. Examples of measures historically approved by the Chief Commissioner as “necessary and advisable” exemptions

Many exemptions granted by the Chief Commissioner under the former application and approval process are also “reasonable and justifiable measures”. Examples include:

- A women’s abuse shelter preferentially hires women to work at the shelter. Abused women who use the services of the shelter suffer disadvantage. Statistics and the experience of the shelter indicate that the vast majority of the women utilizing the shelter have experienced abuse by a male. Having only women work at the shelter addresses the disadvantage faced by the women who have been abused because it promotes feelings of security for the women.
- A housing corporation preferentially rents its units to persons of Métis ancestry. The housing corporation indicates that all persons of Aboriginal ancestry experience disadvantage in renting housing and that there are a number of rental units designated for persons who are status Indians but fewer for persons of Métis ancestry. This housing corporation addresses the disadvantage experienced by persons of Métis ancestry when trying to rent a home.
- A scholarship fund preferentially provides scholarships to students of Aboriginal ancestry. The fund was created to address the historical barriers to education faced by persons of Aboriginal ancestry. A different scholarship provides scholarships on a preferential basis to female students entering trades courses. Females are under-represented in the trades and the scholarship fund is intended to help address this historical disadvantage.

The Commission has also approved special programs and measures under section 47 of the *Code*. This section remains within the current *Code* and provides additional assurance against a potential human rights complaint because the equity programs are officially approved by the Commission. For more information please review the Equity Site of the Commission’s website or call either of our two offices and ask to speak with an Equity Advisor.

5. Guidelines for reasonable and justifiable measures

Below are some suggestions that may help your organization plan and implement your reasonable and justifiable measure. This information may also help your organization to determine whether a measure you already have in place falls within section 48. Please note that some of the items may not apply to the measure your organization has in mind. This is a general guide for your consideration.

A. Consult with concerned parties and unions where applicable.

Consult with people or groups who might be affected by the proposed measure. This may include labour unions or employee associations, tenant associations, service users or community organizations.

Where there is disagreement or conflicting opinion about adopting a measure and your organization decides to proceed, you should carefully document your reasons for doing so. This information will be important if the measure is subsequently challenged in a grievance process or if a human rights complaint is made.

When the proposed measure conflicts with the employment rights of unionized members, the union members' rights should be impacted as minimally as possible.

B. Document your supporting rationale by outlining:

- The prohibited ground of the *Code* the measure relates to,
- The disadvantage the measure is intended to address,
- Reasons why the target audience is considered to experience disadvantage. Objective, substantiated evidence is more credible than subjective views or preferences,
- How and why the measure should help ease the disadvantage.

The rationale is the reason the measure is being created. The rationale is the basis for the design of the entire measure. Once the rationale is clearly outlined, the eligibility criteria and other components become easier to develop. An understandable rationale makes the measure easier for the people using it to follow, and most importantly, easy for the people who do not qualify for the measure to understand.

C. Substantiate the measure and rationale. This can be done through:

- Data confirming the disadvantage. Examples may include information from: Statistics Canada/the Census, research journals, health or trend monitors, independent studies from credible sources, etc.,
- A collection of qualitative or quantitative data conducted by your own organization,
- Information on the operation of your organization and any trends or patterns that confirm why you want to implement the measure,
- Information about similar measures that are being conducted elsewhere,
- Anything else that your organization thinks supports the measure.

If your organization decides to collect data to monitor your measure or to determine whether a measure is needed, anonymous and voluntary self-identification surveys are generally a good means to collect information. Organizations should choose the method that works best for them.

Privacy and dignity should always be kept in mind when collecting data. Organizations subject to freedom of information and privacy legislation will want to ensure the method they choose complies with the relevant laws.

Tell participants why data is being collected, how it will be used, for how long it will be kept and the benefits of taking part. Tell participants about the steps that will be taken to protect their information. Data collected for measures or programs is to be used only for those purposes and not shared with any external organizations unless participants are advised and agree to the sharing of their information.

D. Develop clear eligibility criteria.

The rationale for the program will guide who is eligible to take part. Criteria should relate to the purpose of the measure and not discriminate based on any other grounds in the *Code*. Criteria that are not clearly related to the purpose of the measure fall outside the anti-discrimination protection provided by section 48.

E. Make people aware of the measure or program. Tell people:

- That the measure or program exists,
- Who is eligible for the measure,
- Which *Code* protected area or areas the measure is for (i.e.) housing, public service, employment, etc.

F. Develop a plan to monitor or evaluate the measure. This can help:

- Assess its effectiveness,
- Identify opportunities for enhancement,
- Further 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,
- Determine whether or not the measure is required over the course of time.

6. Posting advertisements when relying on section 48

Discrimination in publications, forms, and advertisements are human rights violations under the *Code* in most situations. However, organizations that rely on section 48 to implement a measure may post a related advertisement or form that would otherwise be discriminatory. To reduce the risk of complaints, organizations that post advertisements or forms, in reliance on section 48, may want to:

- inform the public that a reasonable and justifiable measure exists,
- show that they have turned their minds to the requirements of the section 48 permissive clause, and

- consider adopting one of the following postings, or one similar³:

Example A: Organization X relies on section 48 of *The Saskatchewan Human Rights Code* for this measure.

Example B: This reasonable and justifiable measure has been implemented pursuant to section 48 of *The Saskatchewan Human Rights Code*.

Example C: Organization X relies on section 48 of *The Saskatchewan Human Rights Code* to give preference in employment for this position OR to give preference in the provision of these services.

7. Addressing questions and concerns about reasonable and justifiable measures

Reasonable and justifiable measures advance the objects of the *Code*. Despite this fact, objections or questions may arise about an organization's decision to implement a reasonable and justifiable measure. Common questions that arise in this context include:

- Isn't the measure a form of reverse discrimination?
- Aren't less qualified people getting employment, assistance or a preferential service?

Resistance to reasonable and justifiable measures is commonly based on the perception that the measures simply change who is being discriminated against. Systemic discrimination is often unnoticed by people who aren't from disadvantaged groups. Reasonable and justifiable measures address disadvantage faced by certain members of society as a result of historic actions. Special programs and measures are not reverse discrimination because they are used to promote equality or improve situations for *Code* protected groups who suffer disadvantage. Reasonable and justifiable measures and special programs respond to a proven need and real disadvantage.

Another question that arises about the new section 48 is:

- If our organization has an employment equity plan approved under section 47, can we also rely on section 48 to undertake reasonable and justifiable measures which have a purpose other than increasing the workforce representation of an equity group?

Yes. If the measures are designed to address disadvantages in services, housing, or education which are related to a prohibited ground of discrimination, the organization may rely on section 48 to address such disadvantages without Commission approval. Section 48 may be relied upon even if a result of the reasonable and justifiable measures is to increase the workforce representation of an equity group.

³ These are suggestions for consideration and are not prescriptive. Other postings may be decided upon for use by organizations that rely on section 48 to implement a reasonable and justifiable measure.

8. Conclusion

Measures taken to prevent or reduce disadvantage related to the prohibited grounds of discrimination are now allowed on a permissive basis. Document any steps your organization takes with respect to your measure. This information can be produced and used either internally or provided to the Commission if a complaint or question arises.

For more information please call one of our offices and ask to speak with the Intake Consultant:

Saskatoon 306-933-5952; or toll-free 1-800-667-9249