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Canadian Human Rights Act Review
Treasury Board Secretariat Comments on Issue Paper

I The Role of the Canadian Human Rights Commission

(b) Guideline - Making Power (p. 6)

Recommended Option: None

Proposed Option: Allow the Commission to issue guidelines which are not binding on Tribunals

Reason:

Retaining the Commission's authority to issue guidelines is compatible with its role in human rights education, promotion, research and provision of technical advice which is an important area which might be strengthened. Guidelines however should be issued only for these purposes and should not interfere with the filing, investigation, conciliation and settlement of complaints under the Act.

Guidelines should not bind Tribunals as such practice limits the independence of these bodies and inhibits the examination of the merits of each case. The Secretariat does not agree that compliance with non-binding guidelines should be used as a defence (Option 4), as it raises the question of whether a respondent is not more vulnerable where the guidelines are not respected. Guidelines should serve only as general direction and should not affect the examination of the merits of a case, which is possible, if allowance to use compliance as a defence were permitted.

It is also important to note that presently the guidelines of the Commission bind both the Commission and a Canadian Human Rights Tribunal. Neither the proposal nor the background paper prepared by Justice deal, in any substantive way, with the juducial anomaly created by issuing binding guidelines unto a tribunal. In the Secretariat's view, this issue should be addressed by Justice because principles of natural justice are involved.

If a decision is made that guidelines are binding on employers, as the background paper suggests, then it should clearly be provided for in the amendments.

II Primacy and Relationship to other Laws (p. 8)

Recommended Option: #1 Do not amend the CHRA

Reason:

There should be a continuation of the present situation whereby superannuation or pension plans established by an Act of Parliament enacted before 1977 are exempted from the application of the CHRA (see s.48). The policy reasons which originally led to the exemption for the statutory pension plans are still valid. Furthermore, the proposals for joint employee-employer management of the pension plans provide further support for this position. To summarize the reasons for a continuance of the exemption from the provisions of the CHRA:

1. The exemption of these pension plans flows from their statutory nature. These statutes provide in a very detailed way for the various pension schemes and if they were subject to the application of the CHRA, the problem of dictating to future parliaments would arise. Furthermore, there would be the difficulty of amending these statutes in response to human rights complaints. Legislative opportunity is limited with respect to these plans, as evidenced by the fact that it has been ten years since our last major opportunity to make amendments to the PSSA. There is no reason to believe that this situation will change and in the meantime, the CHRC would be perceived as powerless. Given these circumstances, a monitoring role as is presently provided for under s.48(2) would seem more appropriate.

2. It is inappropriate for these statutory plans to be automatically amended by non-statutory provisions such as regulations made pursuant to the CHRA. Variations to a statute should not be effected by means of regulation.

3. The major statutory pension plans are based upon there being a balance between contributions and benefits. Changes made as a result of CHRA dictates could increase the cost of providing benefits. However, there is no power vested in the CHRC to order that contributions be increased to cover these increased costs. No remedy would be available to pay an aggrieved party as such costs could not be charged to the plan itself and it would be inappropriate to make them a charge against the CRF. If provision were made from the plan to pay such costs (e.g., payments to divorced spouses), it would upset the balance between contributions in and benefits out. If contributions were not increased, and there is no reason to think contributors would agree to such an increase, the cost of such increased benefits would necessitate cutting back on other benefits. (See discussion above re: mechanisms for remedies.)

4. The proposals currently under study to involve employees in the management of the plan have a bearing on the desirability and/or necessity of the CHRC being available as a recourse. That is to say, it is possible that there will be a plan management scheme that is specifically designed to take into account the interests of the very persons who would file complaints if the pension plans were subject to the CHRA, i.e., the plan members. Such a jointly managed scheme would require flexibility.

   If a decision is made to remove this exemption, it should only be done after careful study, keeping in mind that a scheme would have to be developed to provide how future pension statutes are to be policed and what remedies would be available if discrimination were to be found. Thus, Option 1 (p.9 of the Issues paper) is preferable in that the 3.48 exemption should be continued. If the exemption were removed, Option 3 would be preferable as it would provide a much broader base from which to defend any "discriminatory" practices which the pension statutes might be said to contain.

Option 1 is also chosen due to the Secretariat's concern with the significant impact that a primacy clause would have on our collective bargaining structure and our classification system which it supports. This arises due to the conflict between Section 11, as presently worded, and the PSSRA with respect to how wages can be determined.

III Process

(a) (i) Who Should Hear (p. 10)

Recommended Option: #2 Permanent Tribunal

Reason:

This option provides for expertise in human rights cases to be developed, greater consistency in decisions-rendered and could, over time, increase the efficiency of the hearing process.

(a) (ii) Appeals and Judicial Review (p. 12)

Recommended Option: #3 Provide for full appeals from decisions at the first level of adjudication

Reason:

While this option is somewhat vague, it is recommended on the premise that the "first level of adjudication" would be a hearing before a Tribunal (permanent) and that the full appeal would include a review of the decision in a broader manner than available currently under Section 28 of the Federal Court Act.

(b) Union Complaints (p. 14)

Recommended Option: None

Proposed Option: Amend the CHRA to indicate that unions may file complaints of discrimination on behalf of the members whom they represent, if requested to do so by the members

Reason:

This proposed option recognizes the important role employee organizations can play in the protection of human rights, while clearly limiting their role to their constituent interests. Option #2 which does not make this clear is unacceptable as it could allow unions to use the complaint process as an alternative to the collective bargaining or union-management consultative processes within oganizations. The proposed option also would prevent unions from seeking to expand their jurisdiction or rights for the union's own benefit as an organization where their membership is not immediately affected or would not directly benefit.

(c) Combining Investigation and Conciliation (p. 15)

Recommended Option: #1 Maintain the present system, and amend the CHRA to permit the Governor in Council to provide, ... time limits for investigations and conciliations

Reason:

The present two stage process protects the interests of both the respondent and complainant, and ensures confidentiality of information as appropriate. General timeframes for each stage would assist in reducing the amount of delay in the process, which is of concern to all parties.

It is not felt that combination of the two stages will ensure that allegations have been substantiated prior to a settlement being sought. Moreover, the perception of the CHRC as being complainant-biased could be strengthened if option 2 is adopted. The same concerns apply to option 3 where the same officer would be charged with the responsibility of both stages.

(d) Publicizing Complaints and Settlements

(i) Publicizing Complaints (p. 17)

Recommended Option: #2 ... preclude Commission from disclosing ... until a Tribunal is appointed ...

Reason:

This option is preferred as, while it does not prevent either the complainant or respondent from exercising their freedom of expression, it preserves the image of the Commission as neutral.

(ii) Publicizing Settlements (p. 18)

Recommended Option: None

Proposed Option: Amend the CHRA to require the Commission not to identify the parties to a settlement

Reason:

This option is preferred to protect individual complainants or respondents from unnecessary exposure to further public criticism. We do not feel however, that it should be applied where the parties can be identified as anonymous organizations, but only at the individual level.

(e) Legal Remedies - Affirmative Action
(i) Affirmative Action (p. 20)

Recommended Option: #1 Status Quo

Reason:

If option 2 was adopted to permit Tribunals to order in respect of past discrimination, the result would be administratively unwieldy and further delay progress in this area.

It is important to recognize that among the various types of discrimination, the order of special programs to rectify some kinds of past discriminatory practices can be carried out with minimal cost and little adverse effect on the general public; e.g., those which involve staffing and employment opportunities. With respect to other sorts of discrimination, however, e.g., equal pay, the ordering of a special plan to correct past practice can only be implemented at monumental cost to the Canadian public. In addition, an amendment of the kind being proposed here could have an adverse effect on an Employer's pro-active initiative to rectify equal pay difficulties. If such an amendment is considered, it must as a minimum include a statutory limit on retroactivity; e.g., adjustment retroactive to the date of the complaint.

(ii) Costs (p. 21)

Recommended Option: #1 Status Quo

Reason:

The present provisions meet our requirements, as this issue is restricted to legal costs.

IV Discrimination Issues

(a) Grounds of Discrimination
(i) Sexual Orientation (p. 23)

Recommended Option: #2 Separate Legislation

Reason:

The background paper on Sexual Orientation states that the government response in Toward Equality precludes the position that sexual orientation is likely to be considered by the courts to be encompassed within the protection offered by section 15 of the Charter, and concludes that "it is no longer possible, following Toward Equality, to take the position that sexual orientation should not be a prohibited ground of discrimination". It is important to note that the entire last paragraph of the government statement in Toward Equality should be referred to here:

> "The Government believes that one's sexual orientation is irrelevant to whether one can perform a job or use a service or facility. The Department of Justice is of the view that the courts will find that sexual orientation is encompassed by the guarantees in section 15 of the Charter. The Government will take whatever measures are necessary to ensure that sexual orientation is a prohibited ground of discrimination in relation to all areas of federal jurisdiction."

Federal jurisdiction, and in particular, the federal public service is the only area of concern in the Government response quoted above. It is the Secretariat's view that the subject is properly covered by section 15 of the Charter and that no further measures are necessary "to ensure that sexual orientation is a prohibited ground of discrimination in relation to all areas of federal jurisdiction". In areas of federal jurisdiction which are not specifically part of the federal public service, difficulties with respect to discriminatory practices involving issues of sexual orientation should be dealt with through amendments to legislation affecting those jurisdictions. The manner in which such amendments may be proposed and handled, the degree of attention which they may attract, etc., are surely the concern of the persons responsible for legislation in those areas. The concern expressed in the background paper, with public attention to the issue, in something as basically "public' as the passing of legislation, is not a persuasive reason for discarding the option of amending separate legislation.

The "particular" concern expressed in Toward Equality is with the possible exclusion of individuals "from employment opportunities for reasons that are irrelevant to their capacity and ability to do the job". This possibility would more properly be forestalled by amendment to the PSEA. Since a review of that legislation is already underway, this would be an opportune time to propose such an amendment. It might even be managed with minimal attention to the issue; for example, the definition of "merit" to be used as the basis for appointment could implicitly preclude discrimination on the basis of sexual orientation. If desired, a non-discrimination clause could be included in regulations pursuant to the Act.

(ii) Political Belief (p. 24)

Recommended Option: #1 Status quo

Reason:

There are several important points to be made in consideration of this subject which are not made in the background paper on the issue.

Firstly, our concern is with protecting the principle of the political neutrality of the public service. Two major considerations here are that the federal public service be able to provide services to the public in an impartial manner, and that the government of the day, in devising government policy, ought to be able to receive objective advice and support from employees of the federal public service.

While the Secretariat can support the PCO position that people appointed to government positions by the Governor-in-Council ought to be free of the demands for neutrality placed upon other public servants, and while we would support a two-fold structure of politically-oriented rights along the lines of the British or American models, the Secretariat would not extend political freedoms to the point where the political neutrality of the public service would be jeopardized.

The Secretariat would refer also to Mr. Manion's letter of 18/2/86 to Mr. George Post (copy attached) which emphasizes, among other points, the importance of protecting the Employer's "ability to discipline employees for any 'excessive' expression, even when it is not politically related". Of the "cases" the Secretariat has had involving inappropriate public criticism, the Employer's position in imposing discipline has been upheld in every one. The most recent and most conspicuous case was that of Neil Fraser in which the Supreme Court,in rendering its decision, implied the reasonable limits to be placed on freedom of expression. Whatever broadening of existing rights may occur, the Employer must retain both the ability to discipline and the ability to fashion a remedy applicable to the circumstances of the particular case, i.e., based on job content.

The Secretariat has major difficulties with the proposal to add political belief as a prohibited ground of discrimination under the CHRA, and the view taken in the Justice background paper for the following reasons:

1) the difficulty in defining political belief carries with it the concomitant difficulty of defining the distinction between political belief and political activity.

2) the Charter already contains provisions with respect to freedom of belief and freedom of association. This, in our view, is sufficient protection for this principle.

   The courts have frequently expressed the view that freedom of association includes the freedom to pursue the lawful objectives of such association. If political belief were added to the CHRA, where there is no "reasonable limits" qualifier, and if the same sort of judicial interpretation were to evolve, the results could be disastrous for the maintenance of political neutrality in the public service.

3) Of the four elements described in pages 9-10 of the background paper, #1 is already permitted by the provisions of section 32 of the PSEA, #4 is covered by the Charter, #3 is not an issue at all, and #2 is the element which is readily translatable into political activity. We find this analysis an inadequate treatment of the subject and would refer instead to the February '86 MC entitled Staffing and Political Participation in the Federal Public Service: Amendments to the Public Service Employment Act (copy attached).

4) The "instances of conflict" described on page 12 of the background paper should include a reference to conflict with the basic right of the Employer to impose discipline under the FAA and, of course, with section 32 of the PSEA.

5) Page 19 of the background paper, under the heading Rules and Protection for Public Servants, is conspicuously inaccurate in its description of the "legislative scheme" provided by the PSEA. In addition, the same paragraph in projecting a possible ban on discrimination on the basis of political belief in the CHRA, seems to ignore the clearly expressed view of the Supreme Court to the effect that "no values are absolute. All important values must be qualified, and balanced against other important, and often competing values. ... the value of freedom of speech must be qualified by the value of an impartial and effective public service."

In summary, the Secretariat supports option #1 (Issues Paper) insofar as the CHRA is concerned, and suggests that any amendment to the existing scheme of things should properly be for the consideration of the Public Service Commission in its review of the Public Service Employment Act.

(iii) Criminal Conviction Or Charge (p. 27)

Recommended Option: #1 Status quo

Reason:

There is an elemental conflict between the proposed addition of criminal conviction or charge as a prohibited ground of discrimination under the CHRA, and the Employer's responsibility to discipline under the FAA. Paragraph 4 on page 27 of the Issues Paper is the one which applies here. The Employer must be able to impose discipline for work-related misconduct, including those types of misconduct which involve criminal conviction or charge. This is a crucial principle in all areas of the federal public service, but especially in such areas as Correctional Services, the RCMP, Taxation, Customs, and all regulatory or law enforcement areas such as Agriculture/Meat Inspection, Fisheries & Oceans (Fisheries Officers), etc.

On criminal conviction or charge the proposal seems to indicate that the defence, of **bona fide** occupational requirement, would be open in cases where an employee is charged with an offence, but that this defence might not be available in cases where a criminal conviction is entered against an employee. In the Secretariat's view, there should be at least a defence of **bona fide** occupational requirement attached to criminal convictions.

iv) Source of Income (p. 29)

Recommended Option: #1 Status quo

Reason:

The Issues Paper suggests that, if source of income were to be added to the CHRA as prohibited grounds of discrimination, it could be defined to mean welfare, unemployment insurance benefits or other forms of social assistance. However, it now appears that pension payments would also be included as income subject to a discrimination clause. The Secretariat's concern centres around a recent decision by the Ministers of the Treasury Board to introduce an abatement formula for determining the salaries or rates under contract to be paid to former public servants in receipt of a federal pension; the purpose of the abatement was to take into consideration monies already received by the individuals from previous work with the federal government in the form of pensions, to ensure that the total received by the individual was not greater than either the former public servant's salary at the time of retirement, upgraded to current rates, or the job rate for performing the work under consideration, if it were performed by a federal public servant, whichever is the lesser. This action is being taken to address the general concern over "double dipping". To consider source of income as a form of discrimination, where pension payments are included, would likely invalidate the abatement formula approach. Unless the definition of source of income is limited to that suggested by the Department of Justice in the Issues Paper, the Secretariat would prefer the option (1), status quo.

(v) Perceived Disability (p. 30)

Recommended Option: #2 Add to CHRA

Reason:

While the CHRA prohibits discrimination on the basis of disability and Tribunals have held so far that disability includes perceived disability, no court has ruled that discrimination based on a perceived prohibited ground is definitely implied in the current CHRA. Thus, an amendment to the act which explicitly states that perceived disability is a prohibited ground of discrimination would remove whatever uncertainty is left on this issue and would provide employers, other regulatees and other uses of the CHRA with clear guidance in this area.

It would also be consistent with the policies of the CHRA and the government to explicitly state that discrimination based on a perceived disability is prohibited.

IV Discrimination Issues

(b) Mandatory Retirement (p. 32)

Recommended Option: Not applicable

The Secretariat's major concern here is that a prohibition against terminations by virtue of reaching a "normal age of retirement" should not affect what we perceive to be an essential requirement of pension plans, the concept of a "normal pensionable age". This age is the minimum age at which unreduced benefits become payable to those whose service qualifies them and the age against which actuarially reduced pensions and early retirements are measured. This concept is absolutely key to the design and funding of pension plans. (If the exemption were removed, it would be helpful to the defence of this essential concept if a "reasonable limits" type defence were included in the CHRA.)

The Secretariat also has concerns respecting Governor in Council appointees. Removing an age of retirement for those appointed at good behaviour could possibly create difficulties by way of compromising their independence if a term of office were substituted or if some other scheme of removal were instituted. As well, it is necessary to keep in mind the special concerns and operational requirements of the Canadian Forces and the RCMP with respect to age of retirement and "normal pensionable age".

Finally, it is the Secretariat's view that three specific exemptions in the CHRA regarding pension plans should be continued. Paragraph (d) of section 14 will continue to be necessary in view of the provisions in the newly reconstituted Pension Benefits Standards Act (Bill C-90). There is also a need to retain the provisions of sections 16 and 18 of the CHRA as it is essential to provide transitional provisions to protect legitimate expectations.

(c) Areas of Discrimination
(i) Contracts (p. 33)

Recommended Option: None

Proposed Option: Amend the CHRA to prohibit discrimination in the letting and cancellation of contracts for goods and services in excess of $200,000, for contractors with 100 or more employees

Reason:

In its report entitled "Equality Now", the Special parliamentary Committee on Visible Minorities in Canadian Society recommended the use of contract compliance measures to encourage equality in employment by contractors and subcontractors dealing with federal departments. Furthermore, the Canadian Employment & Immigration Commission has recently initiated its "Federal Contractors Program" to ensure employment equity plans are in effect by all successful bidders on government contracts for goods and services in excess of $200,000, where the contractor has 100 or more employees. This program will enhance the prohibition of discrimination, and place contractors' operations under the microscope of evaluation by CEIC. Any change to the CHRA to incorporate the prohibition of discrimination in the letting or cancelling of contracts should be within the context of this latest government initiative, that is, for contracts for goods and services meeting the dollar and employee threshholds, but excluding both construction contracts and contracts for real property at the present time. As a result, the option to be considered should be a new one which would state: "amend the CHRA to prohibit discrimination in the letting and cancellation of contracts for goods and services in excess of $200,000, for contractors with 100 or more employees." This would ensure consistency among the Government's various affirmative action thrusts.

(d) Scope of the Obligations of Non-Discrimination
(i) Systemic or Adverse Effect Discrimination (p. 34)

Recommended Option: #1 Status Quo

Reason:

The current provisions of the CHRA do prohibit systemic or adverse effect discrimination related to employment, or any policy or practice established or pursued by an employer, employee organization or organization of employers. As other systemic discrimination would be difficult to define and could serve only to complicate an already difficult task of interpretation, the Secretariat does not recommend its inclusion at this time.

(ii) Reasonable Accommodation
Independent Obligation or Part of Defences (p. 35)

Recommended Option: #2 Incorporation in the defences

Reason:

It ensures that an employer or purveyor is required to make reasonable accommodation only where it has denied an opportunity to someone. Option 1 is too general.

(ii) Standard of Accommodation (p. 35)

Recommended Option: None

Reason:

All of the options presented here fall far short of preserving the Secretariat's ability to respect the "operational requirements of the service". The concept of "undue hardship" is not a very appropriate standard to be applied in an organization which is service-oriented rather than profit-oriented. If a standard must be devised, we would favour wording which refers to operational requirements rather than undue hardship. If it is absolutely necessary to choose one of the options recommended in the Issues Paper, Option 3 would be favored as it provides the government with the greatest flexibility in dealing with cases.

(ii) Areas Where Accommodation is Required (p. 36)

Recommended Option: #2 Extend Obligation

Reason:

Option 2 is a logical extension of reasonable accommodation into areas other than employment, which is covered at present by the CHRA.

NEW: Review of the Provisions of Section 11

PROPOSAL: Section 11 be amended to clarify its intent and to facilitate active implementation by both the CHRC and employers.

PROBLEM WITH CURRENT WORDING:

Since the coming into force of Section 11, implementation has been impeded due to its lack of precision. To date, guidelines essential for implementation have yet to be promulgated, and the concepts expressed are not entrenched in law. The present wording does not indicate that the objective of this section is to redress underevaluation of traditional female work and to eliminate gender bias in compensation systems and practices. Nor does it state when "equal pay for work of equal value" has been achieved. In fact, the present wording permits chain reaction complaints as the definition of "wages" does not exclude equialization payments resulting from Section 11 settlements and neither individuals in receipt of equal wage adjustments are prevented from lodging further complaints, nor are other individuals prevented from complaining against those in receipt of adjustments. This, coupled with silence on retroactivity, results in continuing potential liability for the employer and formidable cost.

The amendments that are proposed in Appendix A would not only address these problems, but also result in a more practical law for ease of implementation.