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Solicitor General Canada
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Ottawa, K1A 0P8
March 18, 1981

CONFIDENTIAL

Mr. G.S. Smith
Associate Secretary
to the Cabinet
Privy Council Office
Room 328 - Langevin Block
Ottawa, Ontario
K1A 0A3

Dear Mr. Smith:

I am writing to you as the Chairman of the Security Advisory Committee (SAC) to point out some of the potential consequences for security policy which the Committee considers would follow from the enactment of the proposals to amend the Canadian Human Rights Act (Act) that were circulated recently by the Department of Justice. The proposed amendments would extend the prohibited grounds of discrimination in the federal sector, for employment and the delivery of goods and services, to include: political opinion, belief or creed; sexual orientation; criminal and penal conviction; handicap, (both mental and physical).

Without in any way wishing to detract from the goal of protecting Canadians from unreasonable discrimination, I feel it is important to maintain in balance the equally important requirement that every state establish certain standards for security screening, to protect national interests. The state's need to ensure that officials with access to its secrets are, and continue to be, individuals of unquestioned reliability, loyalty and integrity, is one that I believe must remain unqualified even in the face of competing government objectives in the field of social policy.

The proposed legislative amendments will have a direct and adverse impact on the implementation of almost any security screening policy, whether it is the present Cabinet Directive 35, or that suggested under the Security Policy Under Review (SPUR) proposals. For a table illustrating their effect on the current screening policy, see Appendix A, attached.

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For example, it would be unacceptable on security grounds for officials who require a security clearance to hold, or be closely associated with others who hold, political beliefs inimical to the basic democratic system of this country and its institutions. While membership in an organization such as the Revolutionary Workers League is not illegal in Canada, to give the right of employment in sensitive positions in the Government to members of a group advocating the overthrow of the Government by unconstitutional means, would not only be illogical, but contrary to basic personnel security principles.

In the case of sexual orientation, it is the consequences of certain heterosexual and homosexual activities that are of concern in security screening rather than the activities themselves, which are not per se a bar to obtaining a security clearance in the Public Service at large. Notwithstanding increased public tolerance of such behaviour, individuals with such preferences, particularly if they are not overt, are liable through coercion, influence or pressure to act in ways which are contrary to the best interests of security. Problems have been encountered notably when officials have been sent abroad, due both to other countries' legal attitudes to homosexuality or adultery, and the practice of hostile intelligence services in targetting individuals with these propensities.

A criminal record is not per se a bar to a security clearance, depending on: the nature of the offence; the time that has elapsed; and the behaviour of the individual in the interim. However, due to the need to ensure the honesty, reliability and integrity of those with a security clearance, this must remain an area where the department concerned should retain the right to deny a clearance when, in its judgement, there exists sufficient doubt concerning the reliability of the individual concerned.

Finally, the proposition that a previous history of alcohol or drug dependence should be included in the definition of the "mental" part of handicap would raise very real screening problems. Apart from the question whether anyone can be "cured" of such a

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dependence, the right to make a judgement concerning the reliability of an alcoholic or addict should remain with the employing department. I therefore believe it is preferable to exclude alcohol and drug dependence from the definition of mental handicap. I should perhaps point out in this context that security screening for a previous history of mental instability or emotional disturbance (also to be included in the definition of mental handicap), has already proven to be a difficult enough problem for departments, since it has required the exercise of very delicate judgements on a case by case basis.

For the kind of reasons outlined above, I feel that it is essential to consider a "class" or "block" exemption for all positions in the Public Service requiring a security clearance from the application of these amendments. The existing exemption in the Act, s. 14(a), requires that an employer must show "a bona fide occupational requirement" in order to exclude an individual from a position on any of the prohibited grounds of discrimination. The lack of redefinition of s. 14(a) and the necessarily subjective nature of its application, forces an impossible burden on security authorities who are faced with complex judgements in security screening. These weaknesses make it imperative to consider a comprehensive national security exemption for the Act.

In considering the nature and extent of such a national security exemption, it may be useful to remind ministers of some additional factors which support such a move. First, under the revised security clearance system proposed by the SPUR group, significantly fewer positions in the Public Service would require a full security clearance than at present, meaning that fewer positions would need to be exempted under the Act. On the other hand, the need for security clearances in the private sector will continue to exist, since a number of firms and individuals who perform sensitive contracts for the Government of Canada, and allied governments, will require such a clearance as a condition of being awarded such classified contracts. Consequently it follows that this group would also require to be exempted under the Act.

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In addition, ministers should be reminded that the problem of security clearances is not solely a national one, but has an extra-Canadian dimension, in that both for the Public Service and for the private sector, there are existing bilateral and multilateral security agreements, for example with the U.S.A. and with NATO. Such agreements are based on certain mutually agreed standards and requirements for different levels of security clearance between the parties concerned. If Canada should unilaterally change her own requirements as a result of amending its Human Rights Act, without at the same time exempting all those positions requiring a security clearance, then the continued operation of existing agreements may well become problematical, with unpredictable consequences for a wide range of existing Canadian capabilities and programs, notably, but by no means exclusively, in the security and intelligence field.

Any definition of what is meant by "national security" in terms of exempting positions in both the Public Service and the private sector, is likely to prove both difficult and controversial if it is to be included in the Act. Consequently, I would prefer to indicate in the Act a recognition of some other existing definition of national security, whether it were to be contained in another act, or a cabinet directive. Such a definition would include, and in effect also constitute, the criteria for a security clearance. Thus in this model an exemption on national security grounds would be extended, by definition, to those positions in both the Public Service and private sector which required a security clearance as a "bona fide occupational requirement."

One of the problems identified in the SPUR proposals is that there is no existing Act or administrative procedure which meets all the necessary requirements for appeals on security clearances, by either the employer, the employee, or the prospective employee. If these amendments are passed, a new situation will be created in which complaints or appeals concerning security screening decisions will be made under the Act, raising the important question of not only who deals with them, but also the primacy of such

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legislation over a cabinet directive or administrative procedure. Given that these types of appeals can be anticipated, there would appear to be both a need and an opportunity to create an independent review body to handle these matters, with perhaps a clear jurisdictional frontier between it and the CHRC.

There are at least two ways of establishing such a body. On the one hand, if the McDonald Commission recommends new security legislation, Ministers may wish to consider if such a new statute is not the appropriate place to set out both the criteria for security screening and to enact an independent appeal mechanism. On the other hand an argument can be made to place such a mechanism within the Act so long as appropriate security safeguards are put in place, in order not to fragment unduly any appeals which, while relating to security, may include other Human Rights issues.

As you also know, the SPUR document contains a proposal for a second category of clearance, a "reliability clearance", in order to reduce the number of positions requiring a security clearance. Its purpose is to clear people who handle sensitive and valuable government assets which, while not defined as of "national interest", are still defined as being of "public interest." Individuals filling such positions need as one of the requirements of their jobs the trust and confidence of the public, and it is possible that under the s. 14(a) exemption departments will be able to convince the CHRC, that for any of the proposed amendments which relate to "reliability", satisfactory standards can be maintained by showing that they are required for "bona fide occupational" reasons. For example, a criminal record for fraud, or a drug habit, would not be compatible with duties requiring the handling of money or drugs.

In the case of political opinion, belief or creed, even assuming an exemption is made for all positions requiring a security clearance, there will still be many sensitive positions in the public service which such an amendment would now statutorily open to those who hold extreme political views, subject only to any action possible under s. 14(a). Therefore, although

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this is more properly a management than a security consideration, Ministers should perhaps be asked to take a second look at any legislative proposal that might prevent a department like Indian and Northern Affairs, or departments dealing in important federal-provincial issues, from excluding or dismissing a member of a militant native group, or a separatist, from a sensitive position.

In both the Justice paper discussing the proposed amendments and the subsequent interdepartmental meetings of officials, considerable emphasis was placed on the desirability of amending the Act in order that Canada might be seen to be in compliance with certain international conventions. Two points should be made in the context of this argument. First, that no one could show that Canada was in fact in violation of any of its international commitments in this field, but that from the perspective of justifying our Human Rights record, these type of amendments were thought to make such a task easier. Second, that the major international conventions concerned would appear to contain explicit and ample scope for the type of national security exemption to the Act that I have suggested.

I should add that the proposed amendments caused some members of the SAC to raise several valid and important points which, while connected to security policy, in my view fall within the area of the management and administration of the public service as a whole. They included such concerns as the problems caused by sexual orientation, (e.g. homosexuality), in ships, schools and isolated posts and the consequences of overt (as well as covert) types of sexual orientation displayed by members of the Public Service and the federal private sector. These are clearly matters which merit further attention and should be taken into account in any fuller discussion of these proposals.

Having regard to the foregoing, I would recommend that Justice be requested to wait for the publication of any recommendations from McDonald before completing that part of the Discussion Paper dealing with national security. I then believe that the SAC should

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review the draft prior to its being submitted to the Minister of Justice for signature, in order to ensure that all the consequences for national security have been identified and laid out for ministerial consideration.

In conclusion, I would like to include a personal note. I believe in the principle of requiring a security clearance for government employees or private contractors who are contracting for services in sensitive government areas. In practice, however, we have not adequately come to grips with the hardship or infringement which the adoption of such a principle could create in some rare and isolated cases. I would therefore focus on three recommendations.

First, all those requiring such security clearance must be given advance notice as a pre-condition of employment or contracting that "security clearance" is a basic requirement. Advance notification is only equitable.

Secondly, if an individual is to be denied employment, promotion or whatever, then there must be a right of review by an independent review authority. The Ronda Lee case, before the Supreme Court, speaks volumes for the inadequacies of the present system which may preclude such redress. The new Australian Security Act expends considerable effort on this problem. There has to be a Security Review Appeal Board granting basic rights of appeal and rights to an individual so affected. It parallels the proposed Access to Information Act's granting of a right of appeal and eliminating s.42(2) of the Federal Court Act.

Thirdly, such a process is inextricably linked to overall security policy and the McDonald recommendations. It should be considered in that context.

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I hope this is helpful. If any further elaboration is required, the SAC will be of every assistance.

Yours sincerely,

J. Michael Shoemaker
Senior Assistant Deputy Minister
Police and Security Branch
and
Chairman
Security Advisory Committee

Attach.