Minister of National Defence

CANADA

Ministre de la Défense nationale

5 January, 1986

The Honourable John C. Crosbie
Minister of Justice and
Attorney General of Canada
House of Commons
Room 418 North
Centre Block
Ottawa, Ontario
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Dear

Comments on the draft submissions to Cabinet concerning the response to Equality for All were requested by your Deputy Minister in a letter received by my Department on December 31, 1985.

I am responding to you personally because of my concerns about the serious implications of some of the proposals in these draft papers. In particular, certain recommendations that would have major national consequences have not been adequately addressed in either the draft Memorandum to Cabinet or the draft consolidated response. My overall impression is that Cabinet would be asked to approve implementation of recommendations which have complex and far-reaching ramifications, without these having been given the careful and detailed examination that their importance warrants. I am therefore of the opinion that a more appropriate approach would be one similar to Option 2 in the draft Memorandum to Cabinet: acknowledging the recommendations of the Equality Rights Sub-Committee, but withholding any commitment to recommendations other than those for which the consequences are clearly not in doubt.

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Should you not agree to this approach, I would want my observations to be considered in the preparation of the final submission to Cabinet. I will address those of greatest national importance in this letter. Specific comments on the draft Memorandum to Cabinet, to the extent possible in the short time available, are contained in the attached Annex A; Annex B covers the draft of the proposed responses to the recommendations of the Equality Rights Sub-Committee.

My primary concern has to do with the proposed amendments to the Canadian Human Rights Act (CHRA). There is no conceptual framework against which to evaluate the wisdom of making these changes. It appears as though there has not been an attempt to view the CHRA and the Charter of Rights and Freedoms (the Charter) as two components of an overall system which should address rights and freedoms issues in a complementary way. Although the additional overlap that would result from these changes is acknowledged in the draft Memorandum to Cabinet, there is no comprehensive assessment of the consequences to either, or to their combined effectiveness.

The Charter, as part of the Constitution, must be the ultimate standard of human rights, as acknowledged in the draft paper. Also, its wording indicates an intent to address the balance of individual rights against the collective rights of society. In that sense, it appears to be well suited to examine the justifiability of limits on individual rights that may result from government policies that are vital to legitimate national objectives. Similarly, Charter examinations are conducted by courts of law, which seem to be the most appropriate bodies for addressing issues of national importance. As a basic principle, then, it would seem that the structure to address rights and freedoms issues should ensure that there is always recourse for policies vital to the interests of Canada to be reviewed under the Constitution of Canada.

The CHRA, on the other hand, focusses on the particular circumstances of an individual vis-à-vis the requirements of a specific occupation. The emphasis is on the balance between the individual's rights and the bona fide requirements of the occupation, rather than

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collective rights and legitimate national objectives. Examinations under the CHRA are not conducted by courts of law, but by administrators or appointed tribunals. Thus issues of national importance should not be subject to examination solely under the CHRA.

The existing overlap, in the absence of any delineation of jurisdiction, does not satisfy these objectives. Also, with only the complainant having the choice of proceeding under either the Charter or the CHRA, the respondent can be denied consideration of an important national issue under the Constitution. Thus a decision can be rendered in which individual rights are not balanced against those of society as a whole. This is an undesirable situation which any changes to either the Charter or the CHRA should seek to redress.

The proposed amendments to the CHRA would have exactly the opposite effect. The areas of overlap would be increased without any compensating improvement in the jurisdictional duplication and imbalance. The CHRA would then be vulnerable to use in a manner that would further detract from the Charter, and the CHRA could tend more to supplant than complement the Charter. As well, the proposed primacy clause could result in the Canadian Human Rights Commission (CHRC) and Human Rights Tribunals having the power to consider the validity of federal laws. This would be a fundamental and probably unique change in the government of free and democratic societies, in which heretofore only courts of law or legislatures themselves have had that power.

The drafts acknowledge that the proposed CHRA amendments would pose a dilemma for policies vital to national objectives that might be upheld under the Charter but not under the CHRA. The solution offered this Department is to exempt the Canadian Forces from the amendments to the CHRA in those cases. Our concerns with this approach were conveyed to you in a letter dated December 17, 1985 from my colleague, the Associate Minister of National Defence. In short, the main concern is that an exemption could itself be the subject of a Charter challenge which, if upheld, would result in policies important to national objectives being subject to adverse rulings under the CHRA, without the substance of their justification ever having been considered by a court of law under the broader focus of the Charter.

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I find it disturbing that many serious and far-reaching aspects of proposed recommendations have either not been mentioned or have been discussed only cursorily in these draft papers. The conceptual reservations were raised in letters to your Department at the official level; their limited treatment in the draft documents does little to allay the expressed concerns. The possible risks of the exception concept, expressed to you personally, are not mentioned in the drafts. Despite the serious nature of the consequences of the primacy amendment, there is no discussion of the implications or desirability of bodies other than Parliament or courts of law being empowered to consider the validity of federal laws.

Another concern is the uncertain basis on which some recommendations are supported. The proposal to add sexual orientation to the proscribed grounds of discrimination in the CHRA is based on an opinion that it would be considered as one of the grounds given protection under the equality rights guarantees of the Charter. Also, the rationale for amending the CHRA is partly based on the opinion that the Charter's jurisdiction may not extend to the federally-regulated private sector. Considering the adverse consequences of these amendments to the CHRA, which would be exacerbated if the opinions were not borne out by courts of law, it would appear that a more cautious response is warranted.

Overall, the draft papers appear to overemphasize the importance of the Government agreeing to the majority of the recommendations in Equality for All. Because of the short time available, and the complex and far-reaching nature of many of the issues, this has resulted in more stress being put on the case for implementation than on what might be very good reasons for not doing so had there been time to consider them in the depth they warrant. Similarly, the pursuit of isolated goals in the absence of any conceptual framework appears to have resulted in proposals which could be detrimental to the overall structure for addressing rights and freedoms issues.

I believe it would be prudent to take an approach more consistent with the time available and the gravity of the more difficult issues. Certainly there are many recommendations in Equality for All that appear to be straightforward and about which

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there is no uncertainty or controversy, and these should receive the Government's support for implementation in the response. In the case of the more complex issues, where important considerations are based on assumptions or there is inter-departmental disagreement, I suggest that caution be exercised in indicating even support in principle until it can be demonstrated that a workable means has been found to achieve the objective with a reasonable balance between individual and collective rights. In particular, I recommend that a clear concept be developed of how the Charter and CHRA should function as complementary components of an overall system before any amendments to the CHRA are considered. By so doing, we could ensure that changes would enhance rather than detract from the interrelationship between these two acts that are the foundations of rights and freedoms in Canada.

Sincerely,

Erik Nielsen