

SECURITY CLEARANCES

Recommendations

12. We recommend that the federal government security clearance guidelines covering employees and contractors not discriminate on the basis of sexual orientation.

82. We recommend that the Canadian Human Rights Act be amended to include political belief and criminal conviction or criminal charges as prohibited grounds of discrimination, subject to the usual defences of bona fide occupational requirement and bona fide justification, as applicable.

Response

Sexual orientation, political belief and criminal convictions per se are not presently grounds for denial of a security clearance; rather, the criteria applied are loyalty to Canada and reliability. Thus, the Ministry supports these recommendations, subject to the adoption of the amendments listed below, which would ensure that the Security Intelligence Review Committee had jurisdiction in first instance to deal with complaints arising from denial of security clearances.

- (a) amendment to the Canadian Human Rights Act (s.14) to the effect that, for the purposes of positions involving national security, a security clearance shall be a bona fide occupational requirement;

- (b) enactment of a definition of "security clearance" in statute (preferably the CSIS Act); and

- (c) amendment of s.36.1 (2) of the Canadian Human Rights Act so that the permissive "may" (line 9) is changed to "shall". This would provide for the mandatory referral, in the first instance, to the Security Intelligence Review Committee of complaints arising from a security clearance.

Rationale

Enacting what amounts to a "class" bona fide occupational requirement ("bfor") for positions requiring a security clearance on grounds of national security, is supportable by reference to s.1 of The Charter "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The rights of a minority of persons requiring a security clearance would potentially be restricted, while extending greater rights to the majority of persons subject to the Canadian Human Rights Act.

The essence of the security clearance process is a determination of an individual's loyalty to Canada and reliability. An inability to exclude from a position requiring a security clearance as a condition of employment an individual whose loyalty is open to doubt on reasonable grounds because of his political beliefs, or whose reliability is in question because of one or more criminal convictions or criminal charges for serious offences, would seriously jeopardize national security. While the sexual orientation per se of an individual is not alone sufficient grounds for disentitlement under existing and proposed guidelines, a security clearance may be denied where an individual's sexual orientation (or more accurately an individual's pattern of sexual behaviour following from that orientation) makes an individual's reliability and loyalty doubtful because of susceptibility to inducement, pressure, or blackmail. Complaints relating to denial of a security clearance with respect to sexual orientation or behaviour in conjunction with other aspects of character are expected to continue to arise in future.

Rather than relying on the need to demonstrate a bona fide occupational requirement (BFOR) in each particular set of circumstances requiring a security clearance, a class test bona fide occupational requirement is preferred. In weighing the competing interests of the rights of the individual and those of the state, in the area of protecting the bona fide national security secrets of the state, the interests of the state should remain paramount.

The purpose of defining a "security clearance" in statute (for the first time), and specifying that a security clearance shall be a bona fide occupational requirement in the Canadian Human Rights Act (CHRA) itself, is twofold: first, this would establish in law a standard for a security clearance thereby reinforcing measures to restrict the use and to control the misuse of the security clearance process; secondly, it would enable the Canadian Human Rights Commission, on receiving a complaint, to verify that a "security clearance" was, in fact, a bona fide job requirement for a particular position.

5. Once the Canadian Human Rights Commission had verified the requirement for a security clearance, the complaint should in the first instance be channelled to the Security Intelligence Review Committee provided that a Minister is prepared to serve written notice to the CHRC in accordance with s.36.1 CHRA. The SIRC was specifically established by Parliament to hear complaints with reference to security clearances. They do so under established procedures and practices, using experienced personnel and under disclosure provisions structured to cope with sensitive oral and written national security evidence.

Under s.49 of the CSIS Act, the SIRC is obliged to consult the CHRC, if the complaint raises issues relating to the CHRC's mandate. Once SIRC has reported on a security clearance complaint, both to the complainant and the employer, nothing prevents a complainant from seeking redress from the CHRC or the courts.