SECRET

# DRAFT MEMORANDUM TO CABINET

## AMENDMENTS TO THE CHRA

## TREASURY BOARD SECRETARIAT FEEDBACK

September 23, 1986

SECRET

## COMMENTS ON THE BACKGROUND SECTION

1. Political Belief (item 80, page 49)

   It is strongly recommended that the last sentence in this paragraph be deleted. The suggestion that the Canadian Human Rights Commission be permitted to determine if a security clearance is a bona fide occupational requirement is not a viable alternative in the Secretariat's view.

2. Source of Income (item 91, page 53)

   If source of income is added as a prohibited ground of discrimination, the document indicates that it should be limited to social-type assistance. If there was no limitation, the "double dipping" abatement formula which now applies to former public servants in receipt of a pension who receive a government contract for services, would probably face a greater risk of a court challenge.

3. Contracts (item 98, page 55)

   This point concludes that there is no need to extend protection beyond personal service contracts. However, the "Federal Contractors Program" to be launched October 1, 1986 (see attached Circular Letter 1986-44) establishes employment equity guidelines for contractors with government contracts for goods and services of $200,000 or more and who employ 100 or more employees. Would it be possible, therefore, for a contractor to challenge the "Federal Contractor Program" under the amended Canadian Human Rights Act?

4. Reasonable Accommodation (items 103, 104, page 57)

   Legislation in this area should allow sufficient time to accommodate valid complaints, especially if these complaints involve physical changes to real property. The federal government owns or leases thousands of buildings and modifications could require a considerable amount of time.

## DETAILED RECOMMENDATIONS

2. Purpose Clause (page 73)

Recommendation is still under consideration within the Secretariat.

3. Primauté (page 73)

Le Secrétariat appuie cette recommandation qui ne donne pas à la LCDP primauté sur la Loi sur les langues officielles - de la même façon, d'ailleurs, que selon les amendements récemment approuvés par le cabinet cette dernière n'aura pas non plus la primauté sur la LCDP. Peut-être ce dernier point pourrait-il être précisé dans le document proprement-dit (p. 19, paragraph 19), qui en outre pourrait rapidement indiquer pourquoi (les deux législations trouvent leur fondement dans des droits enchâssés dans la Constitution).

19. Adjudication Process (page 77)

The proposal contained in this recommendation appears to be a new one, the effect of which would be to overly politicize an already highly political area. The Secretariat has no doubt that the discretion of the Minister of Justice in making recommendations to the appointing authority, i.e., the Governor-in-Council can be properly exercised without the extensive restraint on the authority of both that a legislative mechanism of the kind proposed here would impose. The creation of such an advisory council would also preclude proper impartiality of the Tribunal as discussed in the Justice Canada Issues paper of May 27, 1986. The emphasis should be on legal expertise, not political agendas.

20. Adjudication Process (page 77)

In recommendation 20(b), the words "for cause" should be deleted. This is an entirely inappropriate standard to apply to Governor-in-Council appointments. Wording of the current section 21(4) should be used here.

Recommendation 20(d) confuses the role of the Tribunal President with that of the Commission.

21.-22. Adjudication Process (page 79)

Recommendation 21 adds to the confusion between the role of the Tribunal and the role of the Commission. The rules, practices, and procedures referred to here should be initiated by the Commission, not the Tribunal itself. Recommendation 22 also usurps a role which properly belongs to the Commission.

26. Adjudication Process (page 79)

With respect to Recommendation 26, the Secretariat favours a more formal and legalistic approach, particularly when the further avenue of redress is to the Federal Court.

28. Grounds of Discrimination (page 79)

The Secretariat has opposed the addition of sexual orientation as a prohibited ground of discrimination. It has observed that (i) "it is a short step from recognition of sexual orientation as a prohibited ground of discrimination in the CHRA to enlarging the definition of 'family' with all the implications that such an enlarged definition would entail ... the subject is properly covered by section 15 of the Charter ... 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 P.S.E.A."

35. Reasonable Accommodation (page 81)

With respect to Recommendation 35(b), (c) and (d), the Secretariat has, in previous comments, highlighted its concern with preserving its ability to respect the operational requirements of the service. It has said, "the concept of 'undue hardship' is a completely inappropriate standard to be applied in an organization which is service-oriented, rather than profit-based. ... If a standard must be devised, it would favour wording which refers to operational requirements rather than undue hardship."

With respect to Recommendation 35(d), the concern is that regulations can be considered 'ultra vires'. The Secretarit would prefer clarification built into the Act itself.

37.-38. Affirmative Action (page 83)

The Secretariat objects to the ordering of special programs or plans in respect of past discrimination. We have said, "It is important to recognize that, among the various types of discrimination, the ordering 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."

42. Interim Orders (page 83)

The Secretariat is opposed to empowering the Tribunal to make interim orders such as injunctions. This type of order should be left to judicial authority. We note the generally-held view which Justice Canada and the Courts have expressed with respect to injunction orders sought in the area of strike activity - to the effect that an injunction order is an extreme remedy issued on the basis of very stringent and exacting requirements. Such a power, if improperly handled, could produce chaotic and very damaging results (e.g., in the equal pay area).

43. Equal Pay (page 83)

The Cabinet document recommends that the Governor-in-Council be given authority to make regulations including the definition of terms and the general application of section 11. This recommendation is one with which we agree as this approach should provide for meaningful consultation on the development of the regulations with the parties affected.

Although we welcome this approach, it should not be accepted as an alternative to rewording section 11 to expressly state that its purpose is to redress the historical undervaluation of traditional female occupations. The current Act does not indicate this purpose which could result in any regulations issued pursuant to the Act which limit entitlements only to women or predominantly female workers as being ultra-vires. Such an amendment is also seen as needed to encourage immediate progress in implementing equal pay, rather than awaiting regulations for this essential clarification of section 11's intent. In addition, we would like the Act to define when the provisions of section 11 will be deemed to be met.

We view both these further amendments as necessary in order that the regulations which will be issued later will focus on the correction of wage discrimination experienced by women; will prevent reverse discrimination charges and "ratcheting" of wage adjustments; and will define for employers when pay equity has been achieved, thus encouraging voluntary compliance.

Other

Although there is no reference made to the Publicizing of Complaints and Settlements in the Detailed Recommendations Section, the Secretariat wishes to reiterate its desire to see the CHRA amended to preclude the Commission from disclosing or confirming the facts concerning complaints or investigation until a decision has been rendered.