

SECRETMEMORANDUM TO CABINETBackground

1. The guarantee of equality rights in section 15 of the Charter came into force on April 17, 1985, three years after the Proclamation of the Charter. As part of the review of federal statutes, regulations and policies for consistency with the Charter, the Minister of Justice tabled a Discussion Paper on Equality Issues in Federal Law in Parliament in January 1985.
2. This Discussion Paper was referred to a Sub-Committee of the Standing Committee on Justice and Legal Affairs. After public hearings and extensive consultations the Sub-Committee reported to Parliament on October 25, 1985 setting out 85 recommendations. Under the rules of the House of Commons, the Government must table a response to the recommendations by February 21, 1986.

Option 1

3. To prepare a comprehensive response, indicating in some detail where the Government has already acted, where the Government plans to act, areas where further consideration is needed and recommendations which the Government cannot agree to.

Advantages

- (a) This gives the Government a better opportunity to rebut criticism that it has been slow in changing federal laws and policies to ensure consistency with the Charter;
- (b) This permits a more positive response in areas which the recommendations are very general and wide-ranging.

Disadvantages

- (a) The Government is required to make decisions on difficult issues in a short period of time.


Option 2

4. To prepare a very brief response to the recommendations indicating that the Government is considering the recommendations.

Advantages

- (a) The Government has more time to study difficult issues.

Disadvantages

- (a) The Government would be accused of not doing enough to implement the equality rights in section 15;
- (b) 

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ConsiderationsThe Canadian Human Rights Act

5. The Recommendations in the Equality for All Report raise difficult questions about the interrelationship between the Charter and the Canadian Human Rights Act. An expansion of the grounds of discrimination under the Act will mean that employers will be precluded from justifying distinctions under the Charter because the individual has the choice of seeking a remedy, either under the Canadian Human Rights Act or under the Charter. The Act does not contain a general provision like section 1 of the Charter which permits reasonable limits on rights. The Act does provide for defences of bona fide justification and bona fide occupational requirements, but these may not be as broad as permissible limits under the Charter. In addition, some departments are concerned about an expansion of the role of the Canadian Human Rights Commission.
6. Many of the recommendations of the Equality for All Report have been under consideration by the Government and the Canadian Human Rights Commission for some time. There is already a major review of the Canadian Human Rights Act under way by the Department of Justice. In addition to considering the issues raised in the Equality for All Report, this review will also be taking into account the concerns raised by the Nielsen Task Forces review of the operations of the Canadian Human Rights Commission.
7. The response indicates agreement in principle with Recommendation 10 that the Canadian Human Rights Act be amended to add sexual orientation as a prohibited ground of discrimination.

[REDACTED]

While there is controversy over the provision of protection against discrimination on the basis of sexual orientation, there is some evidence that a majority of Canadians would support such protection. A Toronto Star survey in 1977 indicated that 52% of respondents supported this protection and 68% of respondents in a 1979 survey for the Canadian Human Rights Commission agreed that professional qualifications should take preference over sexual orientation in hiring practices. However, by offering such protection the Government would not be condoning homosexuality, but would be ensuring that persons are not excluded from employment opportunities for reasons which are irrelevant to their capacity and ability to do their job or from other opportunities for similarly irrelevant reasons.

8. The RCMP and DND have serious concerns about their ability to integrate homosexuals and lesbians. They believe that discipline and morale problems, with a resulting decrease in the efficiency of the Canadian Forces and the Police, will occur if this recommendation is accepted. The concerns of DND and the RCMP can be accommodated by specifically exempting these organizations from the prohibition against discrimination on the basis of sexual orientation (see

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response to Recommendation 11). In this way legitimate concerns about security, efficiency, discipline and morale can be addressed. DND is concerned that they will be subjected to criticism for seeking exclusion from this provision of the Canadian Human Rights Act.

9. The consequence of agreeing to Recommendation 79, that the Canadian Human Rights Act be amended to provide a primacy or override clause, would be that the Canadian Human Rights Commission and Human Rights Tribunals would be involved in considering the validity of federal laws.

10. The arguments against putting a primacy clause in the Canadian Human Rights Act are similar to those outlined in paragraph 6.

11. The advantages of giving primacy to human rights legislation are:

(a) The government would in general be subject to the same standards as the private sector, which usually cannot defend its actions on the basis that they are authorized by legislation. Legitimate distinctions in federal legislation could be protected by ensuring that they constitute a "clear legislative pronouncement" that the human rights legislation is overridden.

(b) Procedures for complaints of discrimination in respect of legislation are more accessible under the Canadian Human Rights Act. While under the Charter an aggrieved person must sue in the regular way, under human rights legislation the Human Rights Commission investigates and usually provides counsel.

12. Recommendation 80 proposes that the Canadian Human Rights Act be amended so that employers are required to make reasonable accommodation for needs peculiar to employees protected from discrimination by the Act. In the Canadian National Railway v. Bhinder and the Canadian Human Rights Commission the Supreme Court of Canada held that the existence of the bona fide occupational requirement defence in section 14(a) of the Canadian Human Rights Act negated any obligation to make reasonable accommodation. However, the Supreme Court held in O'Malley v. Simpsons-Sears that under the Ontario Human Rights Code (prior to being amended in 1981), which did not expressly provide for a bona fide occupational requirement defence, an employer has an obligation to take reasonable steps to accommodate at least those special needs arising out of a persons's religion or creed, where it would not cause undue hardship to the employer. In agreeing to Recommendation 80, the Government proposes to incorporate the concept of reasonable accommodation in the Canadian Human Rights Act and make it applicable not only to employment, but to other areas covered in the Act, such as provision of goods and services,

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and accommodation. The need of disabled persons, for instance, to obtain reasonable accommodations in the area of facilities is probably just as pressing as those in employment.

13. As pointed out by the Sub-Committee, in creating an obligation of reasonable accommodation, it would not be fair to impose an unlimited burden to make accommodations. While the Sub-Committee suggested that "undue hardship" should be the test of the burden that may be imposed, the meaning of this phrase is not certain and would appear to warrant further consideration. In the United States the case-law indicates that it is an undue hardship if the employer has to bear more than a de minimis cost in accommodating the employee.
14. If the concept of reasonable accommodation is to be added to the Canadian Human Rights Act, it would be preferable to integrate it into the bona fide occupational requirement and bona fide justification defences. Since these defences only come into play when a prima facie case of discrimination is made out, this would ensure that an employer or purveyor is required to make reasonable accommodation only where she has denied an opportunity to someone or has otherwise differentiated adversely.

The provisions on bona fide occupational requirement would be amended to provide that if the employee or potential employee could have met an otherwise bona fide occupational requirement if the employer had made a reasonable accommodation, without causing undue hardship to the employer, then it is discrimination not to make that accommodation. A similar amendment would be made in respect of bona fide justification which applies to the areas other than employment that are covered by the Canadian Human Rights Act. [REDACTED]

[REDACTED]

15. Since the government has taken the position that section 15 of the Charter applies to systemic discrimination, it may be desirable on policy grounds to amend the Canadian Human Rights Act to define the scope of systemic discrimination. [REDACTED]
- [REDACTED]

16. DND is opposed to Recommendations 79, 80, and 81 dealing with primacy for the Canadian Human Rights Act, reasonable accommodation and systemic discrimination. In their view the process of balancing the rights of the individual against the rights of society that is necessary in cases involving complaints of systemic discrimination and reasonable accommodation should be carried out by courts rather than the Human Rights Commission or Human Rights Tribunals.

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Maternity and Parental Benefits

17. The recommendations in this Part involve fundamental changes to the provision of maternity and parental benefits under the Unemployment Insurance Act. If accepted the recommendations would also probably involve substantial expenditure. Since the Unemployment Insurance Act is being reviewed by a Commission of Inquiry, which is to report by March 31, 1986, it would be premature at this time for the Government to respond to the recommendations.
18. The response will indicate some progress on the issue of consistency of maternity benefits within the Public Service, but it is impossible to reach a final decision until the Forget Commission completes its investigation.

Mandatory Retirement

19. Presently under the Canadian Human Rights Act, it is not a discriminatory practice to terminate the employment of an individual because that individual has reached the normal age of retirement for employees working in similar positions (section 14(c)). The Act has a similar exception for a trade union or other employee organization that terminates an individual's membership in the organization because he or she has reached the normal age of retirement (section 9(2)). As a consequence, it has not constituted discrimination to retire an individual at a particular age even if the facts show that there is no justification other than that such age of retirement is a widespread and systematic practice.
20. In the federal public sector the mandatory retirement age is 65 pursuant to the Public Service Superannuation Regulations. Different age or service limitations apply to members of the Royal Canadian Mounted Police, members of the Canadian Armed Forces, members of various federal boards, commissions and tribunals. The retirement age for Justices of the provincial Superior Courts and for senators is fixed, by the Constitution, at age 75. In the federal private sector, the age of retirement is not provided by law but is instead enforced through employer's personnel policy, employment contract, pension or superannuation plan or collective agreement.

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- [REDACTED]
22. The implementation of the Committee's recommendation to abolish mandatory retirement in the federal public sector (recommendation 7) will require that each department, that is responsible for the administration of legislation or regulation setting a mandatory age of retirement, review the relevant statutory instruments and decide whether reference to mandatory retirement at a given age should be deleted or whether it could be defended as being a case of bona fide occupational requirement or whether there is any other valid justification for maintaining an age of retirement. Consideration will also have to be given to the normal age of retirement of judges. The Committee has not given any indication as to what categories of the public service could continue to be subject to a mandatory retirement age. In this regard the Treasury Board has already agreed to abolish mandatory retirement in the public service (response to Recommendation 7).
23. The implementation of the Committee's recommendation that the Canadian Human Rights Act be amended so that the concept of a normal age of retirement for the purposes of terminating membership in an employee's organization or for termination of employment be removed (Recommendation 6) will have an important impact on the private sector. It would no longer be possible to use the "industry standard" in order to justify a mandatory retirement practice. However an employer would continue to be entitled, in appropriate circumstances, to raise the defence that an employment limitation tied to age is a bona fide occupational requirement. Since abolition of mandatory retirement has an impact on the labour relations of the private sector it would seem desirable for the Department of Labour to consult with the private sector on different means that would facilitate the implementation of a flexible retirement policy. (Recommendation 9)
24. Another issue raised by the abolition of mandatory retirement is performance reviews. A commonly held view is that removal of mandatory retirement would necessitate the implementation of stringent and effective performance review measures and that sufficient time should be devoted to development of these measures given their importance in a flexible retirement program. Within the Federal Public Service, performance measurement is a way of life and should prove readily adaptable to any removal of the mandatory retirement age. However, since performance reviews could take on a higher profile if the mandatory retirement age is removed, particularly in the case of older workers released on grounds of incompetence, the Government will have to ensure that the current system is effective and provides a proper assessment of the individual's capacity to work and that the necessary statutory changes are made to allow release for failure to meet a standard of performance. In the private sector, opposition to ending mandatory retirement has been largely based on a concern that without an age ceiling people could continue working indefinitely. In order to avoid "carrying" older workers who were not producing, employers might feel the need to institute rigorous performance testing which could

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result in increased dismissals, not only for older workers. To date, evidence from the U.S. and from Quebec suggests that raising or eliminating the retirement age has not had a significant effect on the age at which most people retire. As a result, there has been no evidence of changes in performance review resulting in increased dismissals of employees.

25. There are, of course, several potentially important implications for pensions involved in eliminating a mandatory retirement age. Indeed, the presence of a mandatory retirement age is normally directly linked to the benefit plans available to employees: pension plans, profit sharing plans, long term disability plans, etc. For the most part, the pension plans generally provide for the commencement of benefits payable at a specific age, virtually always taken to be synonymous with retirement or cessation of employment, while some or all of the other benefit plans, most notably long term disability plans, provide for the discontinuance of coverage to the employee. The abolition of mandatory retirement will require that pension plans be revised not only to insure the implementation of a flexible retirement policy, but also to make sure that there is sufficient incentive to retire. Indeed one of the major concerns of abolishing mandatory retirement is that older workers may block career development opportunities for younger employees.
26. While the response indicates that the Government is prepared to remove the legal provisions requiring mandatory retirement (i.e., Public Service Superannuation Regulations) and to amend the Canadian Human Rights Act to abolish the defence of "normal age of retirement" there may still be instances where mandatory retirement can be justified. In some instances such as the Canadian Forces and the judiciary, a legislative provision may have to be enacted to permit mandatory requirements

Sexual Orientation

27. Considerations involved in the response to add sexual orientation as a prohibited ground of discrimination under the Canadian Human Rights Act (Recommendation 10) have been outlined in the comments under the Canadian Human Rights Act.

Marital or Family Status

28. Recommendations 15, 16 and 17 propose that benefits and obligations in federal laws and policies for married people (especially in the Income Tax Act), be extended to people in common law relationships. The response indicates that while the Government will continue recognition of common law spouses where this already occurs (i.e., pension schemes, group insurance plans, etc.) it will not extend other benefits or obligations.

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29. The reasons for this position is that a number of people enter into common law relationships because they do not wish to have the obligations which attach to those who are legally married. Recent changes to the Divorce Act will mean that there are now fewer impediments to marriage and therefore fewer people will be living in common law relationships because they cannot marry.

30.

[REDACTED] All provincial human rights laws prohibit discrimination based on marital status and some define marital status to include common law relationships. The response may also appear inconsistent on policy grounds because common law spouses are already recognized in federal laws such as the Canada Pension Plan Act and the Old Age Security Act.

31. The response to Recommendation 17 indicates that where common law relationships are recognized in federal laws and policies there will be an attempt to standardize the definition of a common law relationship. There are a number of practical problems to be overcome before this can be achieved and it is not clear yet that a single consistent definition of common law relationships would be appropriate in all cases. There may be different requirements needed for the purpose of assessing a relationship for a pension scheme or employee benefits. The recommended requirement that there be a public representation that the parties are spouses may also pose problems. There needs to be further study on the question of a common definition.

Equality Issues in Pensions

32. The recommendations concerning pensions relate to the Canada Pension Plan, the spouses allowance of the Old Age Security Program, the Public Service Superannuation Plans and the Pension Benefit's Standards Act. The responses indicate that as part of the considerations for reform of the CPP the Government of Canada will make the recommended changes if the requisite consent of the provinces is attained. In addition the responses indicate the government is examining the possibility of Homemaker Pensions as part of the review.
33. Recommendation 25 stated that the Spouses Allowance program under OAS should be replaced with an equivalent benefit that is available without reference to marital status. The response indicates that the Government is aware that there are needy individuals within the age group 60-64 who are not covered by the program. However, the program was recently extended to cover needy widows and widowers. To extend the benefit to all needy individuals within this age group would cost approximately \$1.5 billion in the first year alone. The response therefore indicates it is impossible to extend the program further at the present time.
34. Currently the Government is giving close attention to reform of public service pension plans. The response to the recommendations relating to Public Service pension plans indicates that all of the recommendations are being considered. They also indicate agreement in principle to coverage for part-time workers. Consideration is also being

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given to mechanisms for permitting splitting of pension credits upon divorce or marriage breakdown.

35. The recommendation relating to the Pension Benefits Standards Act has been included as part of the recently tabled amendments to the Act. The Act will require employers to provide equal pension benefits to men and women, will provide coverage of part-time workers who earn a specified amount or work an equivalent number of hours and will permit pension credit splitting in accordance with provincial property laws.
36. The Department of Veterans Affairs believes the response to Recommendation 28 recommending that the age of 55 for eligibility for women and 60 for men for benefits under the War Veterans Allowance Act and the Civilian War Pensions and Allowance Act should be negative on the basis that this constitutes an affirmative action program pursuant to section 15 (2) of the Charter. The rationale put forward by the Department is that women are disadvantaged because they did not have the opportunity to participate as fully as males in the labour force and thus they are more vulnerable to financial insecurity as they get older.
- [REDACTED]

The Department of Veterans Affairs has considered other options, the most viable being to lower the age requirement for males to age fifty-five over a five year period. In 1986-87 the cost of this option is estimated at \$9.1 million if all eligible were to take up this benefit. The cost over five years is estimated at \$85 million. If the age was lowered in one step the estimated cost over a five year period would be 125.6 million dollars.

Women and the Armed Forces

37. The response to Recommendation 29, that all trades and occupations in the Canadian Armed Forces be opened to women, indicates that the policy of the Forces to expand the employment of women will be continued. However, it is implicit in this response that the government is not at the present time accepting the recommendation that women be given the opportunity to work in trades and occupations which involve combat or near combat. While the response may be interpreted by some as further stalling on this issue by the Canadian Forces, it is clear from Recommendation 30 that the Sub-Committee contemplated that there would be a transitional period rather than an immediate opening of all trades and occupations. There appear to be some strong arguments to support a steady progression with testing and assessments being made of the success of women in these roles. Even though sex is a prohibited ground of discrimination under the Charter and the Canadian Human Rights Act it may be possible to justify a transitional period, if it is done on a reasonable basis.
- [REDACTED]

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Immigration

38. With the exception of Recommendation 35, the response to Recommendations 31 to 37 indicates that the Government will make or has already made changes recommended by the Sub-Committee. This will ensure that standards of admission to Canada do not discriminate in a manner prohibited by the Charter, medical standards for admission are public, permanent residents have rights of sponsorship similar to Canadian citizens, treatment of adopted children who are coming with their family is similar to natural children, and language instruction is available to all immigrants.
39. The Canadian Employment and Immigration Commission is not prepared to recognize common law relationships for immigration purposes because of the difficulty of ascertaining the nature of relationships occurring outside Canada and the opportunity for fraud.
40. The response to Recommendation 38, indicates the Government is not prepared to remove the preference for Canadian citizens for jobs in the public service authorized by the Public Service Employment Act. The primary justification is that one of the privileges of citizenship is the access to public service employment.

Religious Observance

41. There would appear to be a number of practical problems with implementing the proposal for determinate and floating statutory holidays in Recommendation 39. Many private enterprises under federal jurisdiction now close on listed holidays and to allow for substitution in many cases involving few employees would result in financial hardship and unpredictable work schedules. Even in the public service there would appear to be difficulties and the matter needs further consideration.
42. The best way to resolve these difficulties and to balance the needs of employers and employees would be through reasonable accommodation under the Canadian Human Rights Act (see response to Recommendation 80). This approach would require employers to make provisions for special needs of employees protected by the Canadian Human Rights Act (i.e., accommodate days of religious observance) that would not cause undue hardship to the employer. A further advantage in proceeding in this manner is that there is already a system in place under the Canadian Human Rights Act to adjudicate disputes which might arise.

Access by the Physically Disabled

43. The major recommendations in this portion of the Equality for All Report were put forward in the Obstacles Report. The Sub-Committee noted the slow progress in implementing the Obstacles recommendations and urged the Government to move quicker, especially in the area of access to facilities and services.
44. The thrust of the responses to Recommendations 41 to 50 is that the Government is accelerating the pace of implementing the recommendations of the Obstacles Report. The permanent

establishment of the Status of Disabled Persons Secretariat (announced by the Secretary of State December 10, 1985) will mean that there is a central organization to co-ordinate and advocate programs for disabled persons.

45. The response to Recommendation 48 means that, at least in the transportation field, accessibility regulations will be passed pursuant to section 19.1 of the Canadian Human Rights Act. Complaints of discrimination in this area would then be handled by the Canadian Human Rights Commission.

Mental Disability

46. The Government is prepared to act to implement the recommendations in this area. Amendments to the Canada Elections Act to remove the disqualification for mentally disabled voters will be brought forward (Ontario has already done this and Saskatchewan has legislation pending), (Recommendation 52). The Minister of Justice plans to introduce legislation early in 1986 to deal with the rules of evidence and procedure in relation to mental disorder and the criminal code (Recommendation 53). Some progress has been made in broadening the definition of mental disability used in federal laws and policies providing benefits or protection to mentally disabled persons, but further consideration needs to be given to the implications of this proposal (Recommendation 51).

Part-time Work

47. The response indicates agreement in principle with Recommendations 54-58 on part-time work but there are some specific proposals which cannot be implemented because to do so would be detrimental to part-time workers. While it might be desirable to have a consistent definition of part-time work, to adopt that proposed by the Sub-Committee might deny benefits and protection to individuals currently receiving them. Recommendations dealing with pension benefits for part-time workers have been taken into account in recent amendments to the Pension Benefits Standards Act and will be provided for in expected changes to the Public Service Superannuation Act. The Department of Labour is currently engaged in a major review of part-time work and recommendations are expected in the new year.

Employment Equity

48. In essence, the major recommendations in this portion of the Equality for All Report have been incorporated in the Employment Equity Act which is before Parliament. The Act does not contain an enforcement mechanism as proposed in Recommendation 62 and there appears to be no good reason for making this change since a full discussion of this issue occurred when consideration was given to the proposed Employment Equity Bill. Criticism from certain interest groups can be expected for failure to act on this recommendation.
49. In order to implement Recommendation 67, that the Government actively pursue the implementation of equal pay for work of equal value, the Canadian Human Rights Commission has asked for additional resources. The Commission currently has a six

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person unit, including support staff, assigned to the implementation of the equal pay provisions. Members of the unit answer inquiries about the equal pay provisions, process all equal pay complaints from across Canada, participate in informational and educational activities relating to equal pay, provide technical advice to employers, and provide support in equal pay litigation. The Commission has been engaged in preparing equal wages guidelines pursuant to section 22(2) of the Canadian Human Rights Act, which should clarify the application of the equal pay provisions for the benefit of employers and employees. In order to maintain these functions and deal with an increasing workload, it would appear that the Commission will require additional resources (see Annex B for particulars of this request).

Further Equality Issues

50. There are no major problems anticipated in the responses to the recommendations in this section. In many instances (drafting laws in non-sexist language, considerations in making Governor-in-Council appointments and procedures for dependant voters under the Canada Elections Act) plans are already under way to implement the recommendations. The proposals respecting sexual offences under the Criminal Code and political activities of public servants are under review by the Government.

The Process of Securing Equality

51. The major substantive recommendations in this portion of the Report (Recommendations 79, 80 and 81) have been discussed in the comments under the Canadian Human Rights Act.
52. The response indicates that the Government needs more time to study the proposed amendment to the Canadian Human Rights Act to include political belief and criminal conviction as grounds of discrimination. The meaning of the term "political belief" is unclear and there needs to be more work on the implications of prohibiting discrimination in employment (both for the public and private sectors) on this ground. The implications of prohibiting discrimination on the grounds of criminal conviction or criminal charge also need further study. This study would be undertaken as part of the overall review of the Canadian Human Rights Act.
53. The response to Recommendation 85 indicates that the Government disagrees with the recommendation that the Human Rights Commission should report directly to Parliament. A similar response was made in the response to Equality Now!

Follow-up to Response to Equality for All

54. It is important to provide for a mechanism to ensure follow-up of the response to Equality for All. The Report covers a very broad range of topics and a number of Government Departments have responsibilities for implementing recommendations. The only common factor is the Charter and since the Minister of Justice has already been given responsibility for ensuring Charter compliance, it would be appropriate for him to continue in his role as coordinator and to report back to Cabinet in six months on progress in implementing the response to Equality for All.

Financial

55. (* Departments to provide information on financial implications of the response.)

Conclusions

56. The tabling of a comprehensive detailed response to the recommendations of the Equality for All Report is a key opportunity to indicate the Government's position on a number of important social justice issues.

Recommendations

It is recommended that:

57. The Government table a comprehensive response to the recommendations in Equality for All indicating where the Government has acted and what the Government plans to do to implement the recommendations in the Report.
58. The Government accept the response to the recommendations in Equality for All as set out in Annex A, except for the response to Recommendation 28 which needs further consideration.
59. The Minister of Justice coordinate the implementation of the response to Equality for All and report to Cabinet on June 15, 1986 on the progress of the implementation of the responses to the recommendations in the Equality for All Report.
60. (Financial)