

TALKING POINTS  
DRAFT GOVERNMENT RESPONSE  
TO RECOMMENDATIONS OF  
EQUALITY RIGHTS SUB-COMMITTEE

Subject

Amendments to Canadian Human Rights Act (CHRA).

Proposed Government Response to Recommendations for  
CHRA amendments:

- a. to add primacy or override clause to CHRA. The Government of Canada agrees that human rights legislation should in general have primacy over other laws. The Department of Justice is conducting a review of the CHRA, considering whether it is necessary, in view of The Supreme Court decision in Winnipeg School Division No. 1 vs Craton, to amend this act;
- b. to oblige employers to make "reasonable accommodation" in response to needs of employees protected from discrimination under terms of CHRA. The Government of Canada agrees in principle that the CHRA should be amended to incorporate "reasonable accommodation". In light of recent Supreme Court decisions, further consideration will have to be given to the best way to amend the CHRA to include reasonable accommodation;
- c. to ensure CHRA covers systemic discrimination. Supreme Court decision in Bhinder vs CNR held that systemic discrimination is prohibited by CHRA. Justice Department is considering amending the CHRA to state expressly that adverse effect discrimination is prohibited;
- d. to abolish mandatory retirement by removing defence mechanisms under section 9(2) (membership in organization) and section 14(c) (normal age of retirement) from CHRA. The Government agrees in principle with this recommendation. Government will consult with private sector employers and employee organizations to determine the most effective way to

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implement. Government would accompany implementation with transitional rules to ensure orderly abolition in private sector;

- e. to apply CHRA to all mandatory retirement policies embodied in legislation, regulations and orders. The Government agrees in principle, but action must await a re-examination of defences available under CHRA. Before implementing this recommendation, the Government will identify any possible cases where mandatory retirement could be justified under the Charter of Rights and Freedoms (the Charter) and decide how these exceptions will be dealt with in the CHRA.
- f. to add sexual orientation to CHRA as prohibited grounds of discrimination. Government will ask Parliament to amend CHRA to make sexual orientation a prohibited ground of discrimination. The Government has decided that the CF and RCMP will be exempted from this amendment; and
- g. to add political belief and criminal conviction or criminal charges to CHRA as prohibited grounds of discrimination. Government will consider this recommendation as part of Justice Department review of the CHRA. Government believes a closer examination of potential impact is required.

#### DND Position

DND is opposed to these amendments because:

- a. Canadian Human Rights Commission (CHRC) and Human Rights Tribunals, appointed non-judicial bodies, would have the power to consider the validity of federal laws (primacy clause); and
- b. each addition to the proscribed grounds of discrimination increases areas in which policies important to national objectives are subject to review and overturning under narrow scrutiny of CHRA by appointed tribunals, rather than broader scrutiny under the Charter by courts of law;

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- a. The wording of the Charter indicates an intent to address the balance of individual rights against the collective rights of society while CHRA focusses on individual rights vis-à-vis the requirements of a specific occupations;
- b. The CHRA does not contain a general provision like section one of the Charter which permits a reasonable limitation on rights;
- c. The bona fide justification and bona fide occupational requirement defences of the CHRA are not as broad as reasonable limits under the Charter;
- d. Consistent with the purpose of the CHRA, new grounds of discrimination would be given broad interpretation while defences and exemptions would be given narrow interpretation;
- e. As a general principle reviewing courts are cautious and sensitive in exercising their powers. Restraint is a prevailing factor on judicial review of the decisions of CHRA tribunals. These principles were set out by Supreme Court in judgement on Bhinder case in Dec 85;
- f. If primacy clause is adopted, it is possible that legitimate distinctions in federal legislation would be upheld under the Charter, but not under the CHRA;
- g. Only the complainant has the choice of proceeding under either the Charter or the CHRA; thus the respondent, often the Crown, can be denied consideration of an important national issue under the Constitution;
- h. The Charter, as part of the Constitution, should be the ultimate arbiter between individual and collective rights;
- j. Issues of national importance should not be subject to examination solely under the CHRA;

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- k. If extra grounds are added to the CHRA, extra defences or exemptions must also be added;
- m. The drafting of additional grounds and drafting of defences and exceptions are critical. DND would require consultation at that stage.
- n. Justice Dept contends it is necessary to amend CHRA to extend increased protection of individual rights to federally-regulated private sectors, to which CHRA applies but Charter does not. No alternative discussed, such as limiting application of amendments to that sector, to avoid adverse consequences to public sector covered by Charter as cited.

#### Key Points

- a. proposed amendments would result in surrender of authority from Parliament and courts to CHRC and tribunals, thereby decreasing Government's power to govern;
- b. do individual rights need further protection at all?; and
- c. if so, are they so vital as to justify the Government surrendering more of its power to govern.

#### Recommendation

- a. Government response not contain any commitment, including approval in principle, to any of proposed amendments to CHRA;
- b. Government consider acceptability of current status, where Supreme Court decision may have already given authority of CHRC and tribunals to consider validity of federal laws, to determine if legislative amendment should be made to deny such authority;
- c. Government seek means to ensure that policies important to national objectives of Canada can always be referred to courts of law for decision under Constitution of Canada. Should be done in respect of current jurisdiction of CHRA as well as a prerequisite for any amendments to expand its jurisdiction; and

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- d. Government not agree to addition of political belief and criminal conviction or criminal charges to prohibited grounds of discrimination of CHRA: could result in CHRC or tribunal ordering CF to reverse referral to enrol a person who was an avowed member of an organization dedicated to change system of government by other than democratic means, or a person convicted or charged for repeated, serious firearms offences.