SUBMISSIONS TO - Ontario Legislature
Standing Committee on Resources Development

RE - The Ontario Human Rights Code
Bill No. 7

FROM - Canadian Civil Liberties Association

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C O N T E N T S

Introduction

The Canadian Civil Liberties Association is a national organization with a cross-country membership of more than 5000 individuals, nine affiliated chapters, and some thirty groups which, themselves, represent several thousands of additional people. The membership is drawn from a wide variety of callings and interests - lawyers, business entrepreneurs, trade unionists, minority groups, housewives, journalists, media performers, etc.

Among the objectives of our organization is the promotion of the freedom and dignity of the individual. It is not difficult to appreciate the relationship between this objective and the Ontario Human Rights Code. Discrimination on the basis of race, creed, colour, sex, etc. represents a substantial affront to human freedom and dignity. And, to the extent that the discrimination falls within the categories mentioned in the Code, such affront is exacerbated by the loss of vital economic opportunities.

The Canadian Civil Liberties Association welcomes the proposed revised Code. In many important areas, this Bill promises to grant redress and relieve suffering. To that extent, the community should be grateful for this initiative. At the same time, however, there are a number of areas where substantial improvement is needed. There are inadequacies and misconceptions in the proposed protections and administrative machinery. The ensuing submissions are addressed to some of the more salient of these difficulties.

Reducing Structural Inequities

Within the last half dozen years, the Canadian Civil Liberties Association has conducted a number of surveys relating to the employment of non-whites in both the corporate and public sectors of our society. Here are some of our findings.

- a Financial Post survey for the year 1976 disclosed that of 1913 promotions and appointments announced with photographs, no more than six were awarded to non-white people.
- a 1975 survey of the Toronto Fire Department disclosed that of more than 1100 fire fighters, there were only two non-whites.
- of 235 senior positions in the Ontario Government, our 1976 survey found only three non-whites, one black and two of Japanese extraction; not a single native Indian or anyone of East Indian or Pakistani origin.
- despite a relatively high proportion of native people living in the areas around Kenora, Fort Frances, and Sault Ste. Marie, our 1978 survey of more than 500 bank positions in those communities found that only two were occupied by native people and one of them was part-time.

Evidence of this kind cannot support an allegation of racial discrimination against identifiable parties. It would be difficult to believe, however, that such discrimination was not a factor at least in some of these cases. Perhaps in some cases outmoded recruitment and promotion practices have retarded the advancement of non-whites? Perhaps the situation has been influenced also by inertia? Like everyone else, many of these employers may be subject to parochialism; it might never occur to them to look beyond certain quarters in their search for qualified personnel. Doubtless, in many cases, non-whites themselves hesitate to apply for certain positions in the belief that they will encounter discrimination.

Whatever the causes, the results are unhealthy. Both the community in general and non-whites in particular are disadvantaged by the apparently lily white character of certain sectors of our society. The more equitable involvement of non-whites would add a vital perspective to the operations concerned. It would also serve to relieve whatever anxiety some of these ethnic minorities may feel about their mobility and thereby reduce a source of potential inter-group tension.

It has been obvious for some time that the traditional methods of complaint enforcement will not suffice to overcome the structural inequities in our community. For one thing, the volume of complaints is not likely to be large enough to make a significant dent in these entrenched patterns. Moreover, the problems of certain groups are not sufficiently amenable to redress by complaint. Consider, for example, the scandalous under-employment of native people. Even if racial discrimination were to disappear overnight, very little of this problem would be relieved. Disparities between Indians and non Indians in education, training, and acculturation would inflict upon many Indians severe disadvantages in their attempts to obtain employment on the open market. Moreover, yesterday's discrimination has left a widespread reluctance in Indian communities aggressively to seek employment. With the exception of certain traditional occupations, it would take much more, therefore, than the enforcement of discrimination complaints to relieve the under-employment of native people.

No doubt this realization gave rise to the concept of affirmative action - the development of initiatives designed to increase the participation of disadvantaged groups in certain sectors of the economy. For some years, the Ontario Human Rights Code has contained a special provision for the approval of affirmative action programs. Notwithstanding these realizations, the Code's provisions, and our many publicized surveys, the number of racially centred affirmative action programs undertaken through the Code appears to be negligible. Unfortunately, the current Bill contains nothing which is likely to reduce this inertia.

In this connection, the Canadian Civil Liberties Association recommends that the Bill be amended to include a provision for contract compliance. Every year the Ontario Government awards thousands of contracts which produce millions of public dollars for the private sector. In our view, the Code should require that, as a condition of obtaining such government contracts, private sector employers must undertake certain good faith measures to broaden the participation of disadvantaged groups in their business operations. Among the groups which might especially benefit from this approach are non-whites in general, native people in particular, women, and the handicapped.

Such good faith measures would entail special efforts by the employers to encourage disadvantaged people to apply for available jobs. The employers might be required, for example, to advertise in the non-white press and to insert egalitarian statements in their general advertisements. The employers might also approach the leaders of minority and women's groups to recruit suitable candidates for available positions.

In certain situations, employer representatives should visit some of the places where there are large numbers of such disadvantaged people. Employers who are awarded contracts at or near Indian reserves, for example, should arrange to visit the reserves and nearby friendship centres in order to create an interest in available job opportunities. Where there are government subsidy programs which provide on-the-job training for those whose educational background may be deficient, there should be an obligation for employers under government contract to cooperate at least in a reasonable number of cases.

These good faith measures need not involve any suggestion of reverse discrimination or benign quotas. We do not ask, for example, that qualified whites be rejected in favour of unqualified non-whites. What we are asking is essentially twofold:

1. more disadvantaged people should be encouraged and assisted to qualify and to compete
2. employers under government contract should be required to broaden the traditional sources of recruitment and promotion.

The Ontario Human Rights Commission should undertake to monitor employer compliance with these government contracts. Where there is evidence of non-compliance, the Commission should attempt, as in other cases, to effect a voluntary settlement. If that fails, there should be recourse here too to an independent board of inquiry which would be mandated to conduct a full and fair hearing. If such a hearing were to confirm the finding of non-compliance, the board should be able to order, where appropriate, a termination of the contract, subsequent compliance, and/or monetary damages.

At least where private sector employers are concerned, contract compliance would introduce some effective incentives and sanctions. Our community might anticipate at long last, therefore, some meaningful efforts to increase the participation of minorities and women in those sectors of the economy where these groups have been so grossly under utilized. In our view, it is only fair to exact higher standards of public performance from those who are reaping a substantial measure of public benefits.

As far as public sector employers are concerned, contract compliance obviously would not apply. To deal with this problem, the Code should empower the Ontario Human Rights Commission to investigate the state of such "good faith measures" throughout the various municipal and provincial departments of government. Where the Commission believes it finds such measures wanting, it should make the appropriate recommendations to the Minister or municipal council concerned. To whatever extent there is a failure to correct these deficiencies within a reasonable period, the Commission should be mandated to submit its findings in a report to the Legislature. The Code should require at least one annual report on the efforts of the Commission in this area. The adoption of such a procedure would be likely to provide the public sector with a substantial political incentive to improve its employment performance of minorities and women.

Auditing the Intermediaries

In the increasingly complex Ontario market-place, much business is transacted through intermediaries. Increasingly, for example, employment agencies are being used to recruit labour on behalf of employers. A contemporary strategy for fighting discrimination must address, therefore, the policies and practices of such intermediaries.

Within the last half dozen years, the Canadian Civil Liberties Association has conducted a number of surveys into this phenomenon. On the basis of telephone calls to randomly selected agencies, we have posed as representatives for potential employers. In all cases, we asked the agency whether it would be prepared to screen out non-whites. Here are the results.

- of 15 employment agencies surveyed in Toronto during 1975, 11 were prepared to accept discriminatory job orders.
- of 15 employment agencies tested in Hamilton (5), Ottawa (5), and London (5) during 1976, 11 indicated their willingness to fulfill discriminatory requests.
- of 10 employment agencies surveyed during the fall of 1980 in Toronto, only 1 clearly said,"no", as many as 7 expressed a willingness to abide by the "whites only" restriction, and the remaining 2 were somewhat vague but did not refuse.

Whatever successes the traditional methods of human rights complaint enforcement may have enjoyed throughout the years, it is clear that they are not adequate to deal with the phenomenon of discrimination by intermediaries. The job applicant who registers with an employment agency does not necessarily know the identity of all the agency's clients. Thus, he may never know or even suspect when he has been by-passed or screened out. In such circumstances, discrimination can be committed with virtual impunity.

What is required in this situation is an industry-wide auditing or monitoring program. Without waiting for complaints that will rarely, if ever come, the Human Rights Commission should undertake periodic reviews of the practices of these intermediaries. Who are the agency's employer clients? Who are the employment applicants? Is the agency bringing together those who appear suitable for one another? If not, why not?

Obviously, such an approach would increase the probabilities that discrimination would be detected. Detection, of course, would increase the opportunities for for discrimination to be corrected.

Because of the intense competition in their field of endeavour, employment agencies are especially vulnerable to discriminatory pressures. A refusal to comply could mean the loss of a client. The agencies face the perpetual hazard that, if they refuse such a request, any number of their competitors might be prepared to fulfill it. They also know perfectly well that traditional complaint enforcement is very unlikely to discover such improprieties. But industry-wide auditing could finally provide the law-abiding agencies with the feeling of security they need. The knowledge that discriminatory practices are likely to be uncovered could reduce the competitive disadvantage of obeying the law. An agency would be able to refuse a discriminatory request with a greater conviction that the competitor who accepts it would do so truly at his peril.

In this regard, the Canadian Civil Liberties Association very much appreciates the recommendation promised by the Minister of Labour to amend the relevant legislation so that employment agencies will be required henceforth to keep more complete records of their clients and applicants. In that way, they will be more susceptible to auditing procedures.

Since the Minister's statement was made in the wake of the publicity surrounding our most recent survey (CTV's W-5 show on December 7th), it also arose <u>after</u> the new draft Code was introduced into the last Legislature. This explains why the original draft contained no reference to it. This does not explain, however, why the <u>current</u> draft contains no such reference. It may be, of course, that it is the Minister's intention to introduce such amendments, not in the Code, but in the Employment Agencies Act. While there is no particular objection to having it there, we believe it would be advantageous to be guided by the "bird in hand" philosophy. Moreover, since this problem has bedevilled the anti-discrimination efforts of the

Commission, it might better serve that agency's stature with the public to incorporate such amendments in the statute which it must administer - the Human Rights Code. In any event, in the interests of public confidence in the legislative process, it is wise to avoid delaying further a rectification of this long-standing problem.

Promoting Reasonable Accomodation

In the case of handicapped people, we note and welcome the reasonable accommodation provisions of Section 38. It is obviously not enough simply to prohibit discrimination against handicapped people. The law must contain enough flexibility to require some accommodation to their special problems. Yet the Bill's provisions on this matter may be less than complete.

The requirement to make reasonable accommodation appears to arise only after a finding of unlawful discrimination is made. But, as a result of an initial failure to make reasonable accommodation, it may not be possible to conclude that the discrimination was unlawful. Suppose, for example, the failure to install a ramp renders a job inaccessible for a person confined to a wheelchair. By virtue of Section 16, it may be argued that such person is "incapable of performing the essential duties" of the job. On this basis, the denial of the job could not be considered unlawful discrimination and no order for reasonable accommodation could ever arise.

The Bill should be amended in order to break this potentially vicious circle. There can be no objection, of course, to immunizing an employer from liability to the extent that a handicap prevents a potential employee from performing essential duties. But no such immunity should apply where, with little cost or hardship, the facilities could be altered so as to enable the handicapped person to perform. And the Bill should further specify that, with respect to any structures built after the promulgation of the new Code, the responsible parties could be ordered, at their own cost, to make whatever alterations are necessary to ensure access by handicapped complainants.

The need for reasonable accommodation goes beyond the interests of the handicapped. It also arises where religious and cultural minorities are concerned. Suppose, for example, a Jewish or Seventh Day Adventist employee is fired because of a refusal to work on Saturdays. The employer's policy requires that all full-time employees work every second Saturday for reasons of business necessity. Although the employee can find several colleagues who are willing to switch shifts with him, the employer is unwilling to accommodate his situation.

Under the Bill, it might be argued that the discharged employee has no remedy. So long as a general condition or policy of employment is "reasonable and bona fide", the employer may be immune from the Code's instruments of redress. In this situation, the employee would not be asking for the general policy to be vitiated; he would be asking only that the employer make a reasonable effort to accommodate his particular circumstances.

In the foregoing example, it is obvious that the minority dissenter could be accommodated with a minimum of hardship on the employer and the other employees. Such considerations impel us to recommend that a requirement of reasonable accommodation be specifically added to these provisions of the Code. Our position is fortified by the realization that this province is substantially more heterogeneous than it was when the Code was originally enacted or even most recently amended. Our community comprises a very wide variety of religious convictions and cultural orientations. It is important, therefore, that our human rights legislation have the capacity for a flexible response to these diverse constituencies.

We do recognize, of course, that some boards of inquiry have read this "reasonable accommodation" test into the existing Human Rights Code. We are concerned, however, that the new provisions relating to handicapped people might have the effect of modifying these previous interpretations. As noted, Section 38 contains at least some explicit requirement of reasonable accommodation where handicapped people are concerned. Faced with such a specific provision for the handicapped, the boards of inquiry and the courts might well conclude that the silence of the Code with respect to other constituencies must be construed as reflecting a legislative intent to deny them a similar remedy. The best solution, therefore, would be the incorporation into the Code of a more explicit "reasonable accommodation" requirement in these situations. Significantly, the refusal of American courts to interpret the U.S. legislation this way produced a comparable amendment to their civil rights statute.

Reducing Excesses and Loopholes

In some respects, the draft Code attempts too much and, in some respects, too little.

In the former category, section 12 effectively prohibits the dissemination of material which not only indicates an intention to discriminate but also which advocates or incites such conduct. Suppose, for example, a candidate for public office in disagreement with the major thrust of this brief were to declare his desire to repeal the Human Rights Code on the basis that racial and sexual discrimination is morally desireable? The way section 12 is currently drafted, such candidate might well be committing an offence. There are some serious questions as to whether a province is constitutionally competent to enact such prohibitions on freedom of speech. It is also questionable, as a matter of policy, whether such a ban on mere advocacy is appropriate in a democratic society.

In the latter category, one constituency is conspicuously absent from those which the draft Code is prepared to protect. We are referring, of course, to the homosexual community. In view of the number of additional groups which the government has seen fit to include within the scope of the Code's protections, there is simply no basis for excluding this one any longer. Certainly, the public has been made well aware of the grievances and suffering of these people. In our view, elementary equity requires their inclusion within the ambit of the Code's protections.

Some details appear to be less the product of legislative intent than the result of drafting oversight. For the purposes of the various prohibitions against discrimination, "age" is defined in part as being less than 65 years old. On this basis, people who have passed this age may be denied redress if they suffer discrimination in the "enjoyment of services,goods, and facilities" or "the occupancy of accommodation". Such a consequence would appear to be anomalous and we recommend therefore that the Bill be amended to prevent it.

Improving the Adjudications

Inevitably, the boards of inquiry will be determining questions of law of vital interest to the entire community. It is not appropriate, therefore, that the participation in board proceedings be limited always to the parties most immediately involved in a particular complaint. Since wider interests can often be affected by the outcome, wider participation should be permitted in the process. Accordingly, we would recommend that boards of inquiry under the Ontario Human Rights Code be expressly empowered to permit the participation of any person, party, or organization which the board believes can be of assistance in the adjudication of the issues before it. The experience of the Canadian Civil Liberties Association is instructive on this point. On numbers of occasions, we have been granted status to intervene in the proceedings of courts and royal commissions because it was felt that we would raise points which would not otherwise be adequately canvassed. While we have probably done this more often than others, the experience is not unique to our organization. It is not hard to imagine how additional points of view can often enrich the quality of adjudication.

Unfortunately the Bill does not endow the boards of inquiry with the requisite concomitants of independence. The Minister is required to appoint a panel of persons to serve on boards of inquiry but nothing gives these persons tenure of office or a guarantee that they will be called upon to sit. Indeed, the Minister not only selects the panel but also determines which member of the panel will sit in each case. This creates the possibility that in particular cases, boards of inquiry could be chosen on the basis of a known disposition to the government's view of the matter at issue. At least, the Bill could create such an appearance.

In order to reduce this problem, we believe the Bill should be amended further. While it is not inappropriate for the Minister to appoint a panel of persons to serve on boards of inquiry, he should have no power to determine who sits in a particular case. Perhaps the Bill might allow the choice to be made by agreement among the parties as in labour arbitrations? Or perhaps the selection might be handled by the members of the panel or even by lottery? While we are not wedded to any particular alternative, we are satisfied that the present system is inappropriate.

Moreover, membership on the panel should be for a period of years and removal before the expiry of that period should require cause and a procedure analagous to that which obtains with provincial court judges.

The Bill would perpetuate the right of appeal to the courts from decisions of the boards of inquiry. We are not at all persuaded of the justification for so broad a right as the Bill would provide. Indeed, it may cause more procrastination than rectification.

On the few occasions when this right of appeal has brought about a reversal of judgment in the past, it is questionable whether it was the court or the board which exercised the greater wisdom. In re: Cummings and Minor Hockey Association, for example, one of the judicial decisions could well have emasculated the Code's protections. Reversing a board of inquiry, the Ontario Supreme Court held that the provisions of the Code could not apply so as to grant redress to a little girl who had been refused the right to play hockey in a league for little boys. Reaching this conclusion, the court argued that the facilities of the league were not "available to the public" because they were designed only for boys. On the strength of this reasoning, it would be possible to open a restaurant and limit the clientele to whites. In the celebrated Bell v. McKay case, it took a legislative amendment to undo the questionable interpretation which the court had inflicted on the housing provisions of the Code.

In any event, while there may be an argument for allowing the courts to review board of inquiry decisions on questions of law, no such considerations would apply to a review of questions of fact. The boards of inquiry will more likely be able to see and hear the live witnesses. This should give them a greater ability to assess demeanor and credibility. At the very least, therefore, we would suggest that there be no such appeals to the courts on questions of fact.

Adjusting the Sanctions

There should be no particular interest in making offenders suffer for the discrimination they have committed. In our view, the hiring or housing of a qualified complainant is much more important than the jailing or fining of a delinquent respondent. For this reason, we approve of the Code's emphasis heretofore on conciliation. And, in the event of a failure in the conciliation effort, we approve also of the power to be enjoyed by boards of inquiry to order offenders "to do anything that, in the opinion of the board, (they) ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices, and...to make restitution...".

Since board of inquiry orders can be directly enforced in the same manner as orders of the Ontario Supreme Court, it is difficult to appreciate why the Code continues to provide for quasi criminal prosecutions in respect of human rights violations. Unlike the boards of inquiry, the criminal courts can do virtually nothing more than impose small monetary fines. But even an increase in their punishment powers could not compete with the substantial rectification powers which will be reposed in the boards of inquiry. What purpose, then, is served by providing this second proceeding to adjudicate identical issues? Indeed, its very existence might be a disturbing factor. To what extent, for example, might respondents be endowed with a "double jeopardy" defence? Might they be able to argue that where a prosecutorial remedy exists, the state is obliged to adopt such a route first? It is not necessary at this point to evaluate the merits of such claims. Suffice it here to indicate that, apart from certain special matters such as sexual harrassment or the obstruction of complaint investigations, the criminal process can safely be eliminated from the adjudication and rectification of allegations concerning unlawful discrimination.

There is one further sanction which we believe should be available for unlawful discrimination. In our view, the Code should provide that a violator may lose temporarily, or even permanently, his licence to operate the business within which the discrimination was committed. In many ways this represents one of the most

appropriate and effective sanctions of all. The right to enjoy the opportunities of the public market should require compliance with the standards of the public market. It is fitting, therefore, that unlawful discrimination could precipitate removal from the public market.

Improving the Administration

At the moment, the Crown and its emanations are bound by the provisions of the Human Rights Code. With the proposed primacy provision, even more governmental activity will fall within the purview of Commission scrutiny.

In our view, the Commission's structure is not now suited to this expanding jurisdiction over the operations of the government. In the first place, the members of the Commission do not have sufficient security of tenure to endow them with a position of independence. With only two year appointments, they are too subject to early replacement in the event that they displease the government of the day. In this connection, it is significant to note the seven year terms of office which are provided for the Federal Human Rights Commission and the ten year term which is enjoyed by the Ontario Ombudsman. In our view, the Bill should be amended so as to provide more substantial terms of office for the members of the Ontario Human Rights Commission and a further requirement that during such period they can only be removed for cause and by a procedure analagous to that which obtains for provincial court judges.

In the second place, the members of the Commission's staff from the Executive Director down, are subject to the control of the civil service hierarchy within the Ministry of Labour. How, then, are these same staff members supposed to investigate discrimination complaints or initiate affirmative action programs involving their superiors in the Ontario civil service and, indeed, in the Ministry of Labour itself? This arrangement creates a great risk that the Commission's staff will neither feel nor appear sufficiently free to use their available powers and pressures against their employment superiors.

No doubt, the Government of Ontario appreciated the possibilities of such a predicament when it terminated the practice of appointing the Human Rights Commissioners from the civil service. While the non civil service character of the present Commission membership represents an important development, we regret that it does not yet address sufficiently these potential predicaments.

Indeed, under the circumstances, the non civil service Commission simply cannot have sufficient control over its civil service staff. Who is empowered to determine the techniques, restraints, and priorities which the staff must observe? Their civil service superiors in the Ministry of Labour or their non civil service superiors in the Human Rights Commission? What happens in the event of a conflict between the two?

On the basis of all these considerations, we believe that the entire operation, Commissioners and staff, should be removed from any and all civil service direction and control. If it is deemed desireable for the Comm ssion to continue reporting to the Legislature through a cabinet minister, this could be done on the basis of a direct relationship between the Commission and the appropriate Minister, without any civil service intermediaries.

Summary of Recommendations

The Canadian Civil Liberties Association recommends the following changes in the Bill revising the Ontario Human Rights Code.

1. Provide for contract compliance. As a condition of obtaining government contracts, private sector employers must undertake a number of specific good faith measures which are designed to broaden the participation of disadvantaged people in their business operations.

2. Require the Ontario Human Rights Commission to promote such "good faith measures" in the provincial and municipal public service as follows:
   a) periodic investigation and review of municipal and provincial departments of government
   b) recommendations to the relevant ministers and municipal councils
   c) progress reports to the Legislature.

3. Require employment agencies to keep more complete records of their clients and applicants and require that they make such records available for Commission audits of their compliance with the Code.

4. Provide more explicitly that a failure to make reasonable accommodation for handicapped people may lead to a finding of unlawful discrimination.

5. Provide that, with respect to any structures built after the promulgation of the new Code, the responsible parties could be ordered, at their own cost, to make whatever alterations are necessary to ensure access by handicapped complainants.

6. Provide more explicitly that members of religious and cultural minorities are entitled to reasonable accommodation of their particular circumstances.

7. Delete the prohibition on the mere advocacy of discrimination.

8. Include homosexuals within the protections of the Code.

9. Provide that the prohibition against discrimination by reason of age in the "enjoyment of service, goods, and facilities" and "the occupancy of accommodation" apply to people over 65 years of age.

10. Provide that boards of inquiry be empowered to permit the participation of any person, party, or organization which it believes can be of assistance to the adjudication of the issues before it.

11. Deny to the Minister or any other representative of the government the unilateral power to determine which members of the panel for boards of inquiry will sit in any particular case.

12. Provide that membership on the panel for boards of inquiry be for a period of years and removal before the expiry of that period should require cause and a procedure analagous to what obtains in the case of provincial court judges.

13. Delete the right to appeal board of inquiry decisions on questions of fact.

14. Apart from such special matters as sexual harrassment or the obstruction of complaint investigations, eliminate the criminal process from the enforcement of complaints concerning unlawful discrimination.

15. Provide that anyone who violates the Human Rights Code may lose temporarily or even permanently his licence to operate the business within which the discrimination was committed.

16. Provide greater tenure for members of the Ontario Human Rights Commission by adopting the following measures:
    a) longer terms of office
    b) during such period they can only be removed for cause
    c) such removal can be effected only by a procedure analagous to what applies in the case of provincial court judges.

17. Remove the entire human rights administration - Commissioners and staff, from any and all civil service direction and control.