



December 23, 2004

Introduction

The Public Service Alliance of Canada (PSAC) welcomes the opportunity to provide input into the Canadian Human Rights Commissions' consultation document "Looking Ahead: Consultation Document (September 2004)". The consultation process is particularly important in light of the internal procedural changes that the CHRC has undergone in the last few years. The PSAC believes it is important that the recommendations in the *2000 Report of the Federal Review Panel, Promoting Equality: A New Vision* (also known as the La Forest Report) are implemented and used by the CHRC as the tool to assist them throughout their reform process.

The CHRC has a key role in the protection of human rights in Canada, not only as the forum that protects individuals or groups against human rights violations but also as leaders in the advancement of the human rights agenda nationally and internationally. We are hopeful that the consultation process will result in the much-needed change in the way the human rights agency undertakes to fulfill its mandate to protect and uphold human rights principles.

The PSAC is a union representing over 150,000 workers from coast to coast to coast. Our membership is diverse and growing. While many of our 150,000 members work for the federal government or agencies as immigration officers, fisheries officers, food inspectors, Clerks, customs officers and the like, an increasing number of PSAC members work in the private and other sectors in women's shelters, universities, security agencies and casinos. In the North, the PSAC represents most unionized workers employed by the governments of the Yukon, Nunavut and the Northwest Territories and some municipalities. As the members' Union, the PSAC works to help all of them obtain fair treatment and respect in the workplace, employment security, better pay and safe working conditions.

We would like to thank the CHRC for meeting with us prior to our submission in order to provide us information about the proposed changes. In addition, we

acknowledge the commitment and expertise of the CHRC staff in the area of human rights.

Throughout its reform process, the CHRC is guided by five principles that aim to have a human rights system that:

- serves the public interest;
- transforms behaviour;
- is comprehensive;
- is preventive and forward-looking; and
- is independent, impartial and ensures good governance.

These submissions will be divided into the above five areas. In each of these areas, the CHRC summarizes its objectives and asks a series of questions that will be addressed accordingly. Before examining these specific areas, the PSAC would like to state that the CHRC has been chronically under-funded for many years, which has resulted in a backlog of human rights complaints. Presently, the CHRC has adopted a “streamlining” process to deal with the backlog and the administrative delay in the processing of complaints. The “streamlining” of complaints has decreased the number of outstanding “older” complaints. However, “streamlining” does not address the root causes of the problems in complaint process. There must be a genuine will on the part of the Government to address human rights issues and it must provide adequate financial and political support to the groups and human rights agencies dedicated to eliminating discrimination and harassment in our society.

PRINCIPLE ONE: SERVING THE PUBLIC INTEREST

The CHRC identifies the following purposes for itself:

- to redress discrimination against individuals;
- to correct persistent patterns of inequality;
- to prevent discrimination before it occurs;
- to inform the public about equality; and,
- to identify emerging human rights issues.

The CHRC also states that much of its resources are consumed in processing individual complaints with the consequence that the other broader purposes have not been fully met and have received less focus.

The PSAC supports the CHRC’s approach to develop and implement stronger preventative measures and processes to address systemic discrimination. However, the notion that the CHRC is not viably serving the public interest by participating in all aspects of the complaint process is problematic. The PSAC believes that the CHRC should continue to be present at all stages of the complaint process including before the Tribunal and must continue to provide the

necessary resources to individuals throughout the complaints process. All complaints do advance the public interest and it is important that all individuals have meaningful access to human rights fora and remedies.

The real issue is the lack of adequate resources provided by the federal government to the CHRC to undertake its preventative mandate and to deal with both systemic and individual human rights issues. The PSAC agrees that CHRC has not had adequate resources for its preventative role and has focused on the complaint process. In the past, the CHRC acted out of its public interest role as a party to all complaints that have been referred to the Tribunal. However, the reality is that many individual complainants do not have any representation before the Tribunal and must rely on the CHRC representative to support her or his complaint. As the CHRC is aware, individuals who need the protection of the *CHRA* and the assistance of the CHRC are those who belong to groups from the most economically, politically and socially disadvantaged sectors in our society. Some individual complainants may not have access to legal representation and/or the necessary understanding of the complex and very legalistic human rights process.

Choosing the Right Tool for Each Case

KEY QUESTION:

***Which of these measures would have the greatest human rights impact?
Are there others?***

The CHRC states that it has focused solely on investigation and litigation to resolve human rights disputes and has moved away from its preventative roots due to resource constraints and judicial decisions. The CHRC also notes that an adversarial framework may not be necessary for some human rights disputes and that some cases require broad systemic remedies that are not achievable at Tribunal, such as policy changes affecting an entire sector rather than just one individual respondent. Therefore, the CHRC states that it has begun to implement a system, which helps to restore the balance and flexibility in the tools at its disposal. The CHRC further states that some human rights issues would be better suited to voluntary compliance instruments, such as information, alternative dispute resolution or special reports. Others would be better suited to be addressed through the enforcement instruments such as formal investigation and a full Tribunal hearing. This “tailored approach” includes:

- alternatives to the formal complaints route such as special reports to Parliament and public inquiries and,
- within the complaints stream, a system of triage to ensure appropriate resources and approaches are taken to the cases which will have the greatest human rights impact.

The PSAC believes that both the complaint and non-complaint routes are important and can have a great human rights impact.

The PSAC believes that preventative measures such as education are important, particularly to bring about societal attitudinal changes necessary to eradicate human rights violations. In addition, the lack of understanding and knowledge of

human rights can lead to misunderstandings and unnecessary human rights complaints.

The PSAC also supports the use of reports to Parliament and public inquiries that highlight the importance of human rights principles. In such inquiries, there must be real and meaningful consultation and input from organizations and groups that are directly affected, including unions. However, the fear is that, like many past Parliamentary reports and public inquiries, the findings of these reports and/or inquiries will be discarded.

The PSAC is concerned about the CHRC's use of a "system of triage". The CHRC proposes to process all complaints through a filter process. The CHRC will be processing complaints through different routes based on the factors developed to assess the complaints. Such a system may affect an individual's right to pursue recourse under the CHRA since now complaints will be provided with different degrees of support and resources by the CHRC.

The CHRC's recent move to allocate fewer resources to investigation and formal litigation supports our assertion that some complaints may not receive the adequate support through the complaint process. The PSAC believes both individual and systemic complaints and remedies are important and worthy of receiving assistance. The necessary resources should be allocated to deal with all types of complaints, including the CHRC's carriage of complaints at the Tribunal level.

Alternatives to Complaints: Options for Change

In order to strengthen its ability to use non-complaint tools, the CHRC proposes legislative or regulatory changes including the following:

- enhanced powers to gather evidence in systemic inquiries;
- a requirement that the government respond within a specified period to special reports;
- confirmation that the Commission can review parliamentary bills for consistency with the *Canadian Human Rights Act*;
- granting of a general human rights audit power to allow a constructive, non-adversarial process under *the Canadian Human Rights Act* similar to that in place under *the Employment Equity Act*; and
- a more sound statutory basis for the Commission's information, research and policy tools.

KEY QUESTIONS

Which of these changes would you prioritize?

What changes would you propose in this area?

Although the above proposed changes are to deal with non-complaint tools, the PSAC believes that the CHRC should have more enhanced powers to gather evidence in systemic inquiries and complaints and such evidence should be

shared between the inquiries section and complaints section of the CHRC. If the CHRC gathers evidence only for an inquiry and that inquiry does not have an effective enforcement mechanism then it becomes important that such information be allowed for complaints. Therefore, in order to be effective, the CHRC must be able to gather such evidence for both inquiries and complaints.

The PSAC believes that the CHRC should already be able to identify systemic patterns of discrimination by both the monitoring of the types of complaints received and by the employers or service providers. Once such patterns are identified, the CHRC should be initiating systemic complaints on its own motion.

In its 1999 Brief to the Federal Review Panel on the Revisions to the *Canadian Human Rights Act* (CHRA Review Panel), the PSAC had made recommendations related to systemic discrimination. First, the PSAC recommended that the CHRC be empowered and required to monitor human rights complaints in order to identify systemic patterns of discrimination. Second, the PSAC recommended that prohibition against reliance on statistical evidence alone to file a complaint be removed and Tribunals should not be limited in the remedies they may design in order to address problems in particular workplaces. Third, the PSAC recommended that the statutory barrier which prevents investigators of the CHRC who are investigating individual complaints pursuant to the *Canadian Human Rights Act* and those conducting the audits to the *Employment Equity Act* (EEA) be eliminated to allow investigators to share their information where the information before them suggests the possibility of a systemic problem. The PSAC believes these recommendations are still relevant and valid today.

The PSAC supports the CHRC's proposal to be granted general human rights audit power if adequate new resources are allocated for this function. The CHRC has already conducted one human rights audit of Correctional Services for federally sentenced women. This audit resulted in 19 recommendations. Therefore, there is already precedence in conducting a human rights audit.

In addition, the functions and powers of a human rights audit will need to be clearly defined and have an on-going monitoring process. The CHRC must be independent from the structures, specifically government departments, that are responsible for its budgets and proposals to amend the CHRA. It must also be independent of the entities that it intends to audit. The independent governance of the CHRC is crucial if the human rights audit process is to be effective and meaningful.

These audit powers must also not be limiting or constraining as the audit powers under the *Employment Equity Act* (EEA) are. Presently, the EEA does not have effective enforcement mechanisms or adequate resources to undertake timely audits. Therefore, the human rights audit powers must have effective enforcement mechanisms and adequate staff resources.

The human rights audit functions and powers should build on or add to the employment equity audits. Consequently, a human rights audit and an employment equity audit of an organization should be consolidated and examined together in order to resolve human rights issues from a holistic approach.

The PSAC also believes that human rights audit process should include the meaningful participation of unions and other affected organizations. Presently, the EEA requires the employer to “consult” with “bargaining agents”. There is no requirement of the employer to meaningfully consult or have the unions fully participate in employment equity initiatives or plans. This has resulted in inconsistent participation or input from bargaining agents into employment equity initiatives - from employers doing nothing more than informing the bargaining agents of initiatives to employers actively seeking input from them.

In addition, bargaining agents are not able to trigger employment equity audits, although, they are well placed to do so in their workplaces. In 1999, the PSAC recommended that bargaining agents and employees have the right to trigger workplace employment equity audits by compliance officers where there are concerns about the workplace. This recommendation equally applies for human rights audits.

The PSAC supports the CHRC’s desire to disseminate information, conduct research and studies and develop policy tools. These initiatives become more important in light of the implementation of the *Public Service Modernization Act* (PSMA) that will result in the decentralization and delegation of powers from central agency to managers in departments in the federal public service. While the PSAC and our members have been critical of the role played by central agencies, including the Public Service Commission, in the past, we are more concerned with the move to decentralization. In our view, such decentralization will result in a lack of accountability and inconsistency in the monitoring of human rights issues in the federal public sector. Therefore, it will be important that the CHRC become the body that will set the standards for human rights interpretation, as well as, the body that develops the tools to ensure consistent implementation of human rights such as the proper implementation of the duty to accommodate.

The PSAC also supports the CHRC’s proposal to have the government respond within a specific period to special reports and to review parliamentary bills for consistency with *Canadian Human Rights Act*. However, the effectiveness of the CHRC in these areas will greatly depend on the independence and impartiality of the CHRC from the federal government. The PSAC supports the independent governance of the CHRC, as discussed below.

A Tailored Approach to Cases: Triage

After analyzing its role, the CHRC has concluded that the public interest requires that human rights bodies be able to put the greatest resources into those cases, which will have the greatest human rights impact.

The Commission has identified 10 factors to allow it do this:

- 1) whether the complaint raises broad-based policy or systemic issues;
- 2) whether the complaint addresses a pressing public policy concern as identified by the Commission;
- 3) whether the complaint raises a new point of law, will settle one that remains in doubt or change legislation, policies or programs;
- 4) whether the complaint will significantly advance the purposes of the Act;
- 5) the degree of factual, technical or legal complexity the case entails;
- 6) the impact on the parties;
- 7) the potential remedy;
- 8) whether credibility is a key issue;
- 9) whether the evidence on the record is sufficient; and
- 10) the similarity of facts, issues or grounds with other complaints.

These factors enable Commission staff to identify the most appropriate approach to deal with a particular case.

KEY QUESTIONS:

How has your organization been affected by the application of these factors?

Which of these 10 factors do you see as a priority?

Are there other criteria which the Commission should consider for defining high-priority and high impact human rights cases?

The PSAC has been affected by the CHRC's shift to "streamline" the complaint process in the following ways:

- 1) It has become more difficult for PSAC members to file complaints at the intake stage due to the increased scrutiny by the intake officers. It appears intake officers are taking on the role of assessing the case on merits. In some cases, complainants are asked to revise their complaints a number of times. As well, some complainants feel discouraged in pursuing the complaint process due to the difficulty in filing a complaint.
- 2) The PSAC members are not receiving adequate support from the CHRC before the Tribunal. Members are informed that the CHRC may not be present for all or for parts of their hearing before the Tribunal. Therefore, they are advised to obtain their own legal counsel if they want any expert representation before the Tribunal.
- 3) Complaints are processed or passed on to a number of CHRC staff. Consequently, members are asked to provide the same information with respect to their complaint numerous times, which results in unnecessary delays in processing the complaint. Sometimes, members have to explain repeatedly to CHRC staff why they should be pursuing the human rights

process rather than the grievance process because the CHRC staff does not understand the latter process.

- 4) Complaints are referred to the grievance procedure via section 41 of the CHRA routinely without proper consideration or exercise of discretion. In addition, the PSAC Representation section has not been consulted with respect to the union's carriage of a grievance to adjudication. This is particularly problematic since grievance adjudicators may not have the same scope of remedies as available under the CHRA in order to address human rights issues adequately.
- 5) Complaints have been dismissed due to lack of timeliness without consideration for reasons for the delay or prejudicial effect to the parties involved.

The CHRA Review Panel outlined other factors that CHRC should consider including the following:

- whether the claim would provide a benefit for many other individuals in the same position as the claimant;
- whether the duty to ensure equality in employment and services was breached by activity authorized by statute or regulation; and,
- whether there is a glaring unfairness in the case that should be pursued simply to ensure that justice is done.

In addition to the factors listed above, the PSAC believes that the CHRC should also consider whether there is access to substantial and real redress; and, whether a complainant will suffer in absence of legal counsel.

It is important to note that the CHRC Review Panel also stated that the criteria should be applied by a member of the CHRC who would be available on a full-time basis or be an experienced official with sufficient training to carry out this function. The PSAC supports this recommendation because it is important that people involved in these important decisions be well trained and experienced in the area of human rights.

The PSAC is concerned that the "system of triage" may deny some individual's right to seek an effective remedy under the CHRA, particularly if the objective is to allocate different degrees of resources to complaints depending on what factors are met. However, if the system will allow files to go directly to the Tribunal sooner than the current practice, then such a filtering process would be beneficial from some complainants.

In its 1999 Brief, the PSAC recommended that a mechanism be established to allow complainants to refer complaints directly to a Tribunal, where the case satisfies a threshold test. This recommendation is still valid today. The CHRC should develop a threshold test in determining how to process complaints. Factors such as credibility, sufficient evidence on the record, potential remedies, impact on parties and degree of complexity of the complaint are important

factors. These factors should be considered for the threshold test. For example, if there is a case where there are significant evidentiary differences between parties or credibility is a key issue, then there should be an automatic referral to Tribunal.

A Tailored Approach to Cases: Proposed Legislative Change

The CHRC interprets its Act to allow it discretion, consistent with standards of procedural fairness, to triage – or sort – cases. Some legislative or regulatory amendments to introduce further procedural flexibility include:

- legislative amendments to allow the Commission to refuse to deal with a complaint where it does not advance the purposes of the Act;
- legislative or regulatory changes to confirm more flexible investigation procedures, power to enter premises and compel witnesses; and
- enforceable time limits for various stages of case management.

KEY QUESTIONS:

What impact would these proposed legislative changes have on your operations or mandate?

Are there other legislative amendments which should be considered which would further advance the Commission's goals of efficiency and effectiveness?

How will the proposed legislative amendments affect you?

The CHRC has informed the PSAC that the intent of the legislative change to allow it “to refuse to deal with a complaint where it does not advance the purpose the Act” is only to prevent certain types of complaints from being filed. In the past, the CHRC has used its resources to process “reverse discrimination” cases brought by groups who have not experienced historical disadvantages or institutional and systemic discrimination. If this is the case, then the PSAC supports the CHRC’s proposed change to ensure CHRC resources are not used for such cases. However, the proposed legislative change should not result in human rights complaints that meet the test of *prima facie* discrimination being dismissed, specifically individual complaints that may not have broader societal human rights impact or advance human rights law.

The CHRC’s investigation of complaints has been problematic. Some investigators gather inadequate information or refuse to interview relevant witnesses. They have assessed credibility and merit and have made findings of law that were more appropriate for the Tribunal. They have also lacked the necessary understanding of human rights law to properly investigate complaints. The PSAC perceives that the CHRC had a pattern of accepting the employer’s interpretation of facts without independently verifying the facts. The PSAC recommends that a consistent investigation process and a reporting format be developed for all investigators. In addition, investigators should be properly trained and have on-going access to training and information on the development of human rights law. The investigation process becomes more important in light

of the CHRC's shift to not make representation before all Tribunal hearings. The PSAC also recommends that the CHRC should have more flexible investigation procedures and have the power to enter premises and compel witnesses in order to ensure a full and proper investigation has been undertaken; however, it should not oust the jurisdiction and responsibilities of Tribunals in these areas.

In 1999, the PSAC recommended that all investigations be completed within a reasonable time period. This recommendation is still valid today. However, the CHRC should use its discretion in determining what is a reasonable time period (e.g. prejudice to a party due to a delay, circumstances beyond a party's control such as a disability, etc.).

The PSAC believes that time limits should be enforceable. Some parties (i.e. respondents) have used various tactics in order to delay complaints from proceeding. However, the CHRC must use its discretion to ensure that time limits are not barriers in filing or processing legitimate human rights complaints. The PSAC is aware of complaints that have been dismissed due to time limits regardless of whether there were valid reasons for the delay.

The PSAC also recommends, as it did in 1999, the following legislative amendments:

- a) that where the CHRC does not complete an investigation within the time frame allocated, the matter be automatically referred to tribunal for hearing, unless both parties agree at the beginning that the investigation to be an extended time frame because of the complexity of the matter;
- b) that formal conciliation should take place only at the end of the investigation process, although informal settlement discussions should occur throughout the process;
- c) that following the release of the investigation report, the parties be given reasonable period of time to make further submissions on the content of the report and final submissions at a formal conciliation session that should be included with the investigation report;
- d) that the CHRC be required to provide full and detailed reasoning for its decision not to refer to Tribunal;
- e) that the CHRC be allowed to make interim orders;
- f) that a procedure be put in place to have the Chief Commissioner and two other Commissioners review and reconsider a decision not to refer a complaint to a Tribunal. Such a procedure must allow the parties to make full submissions and any decisions on the request to reconsider must provide detailed reasons;
- g) that the *CHRA* establish an evidentiary and procedural standard for the establishment of a Tribunal, by setting out in detail the circumstances that justify the dismissal of a complaint.

The Canadian Human Rights Tribunal Possibilities for Reform and the Problem with Direct Access

The CHRC Review Panel proposed a system of direct access model where complaints-handling would be transferred to the Tribunal. The CHRC believes that the direct access model is problematic because not all complaints should be resolved through a litigious process which has become increasingly formal, cumbersome, lengthy, and costly. As well, some systemic remedies cannot be addressed through the Tribunal process. The CHRC recommends that Parliament consider amendments to the legislation to make the Tribunal more accessible by use of non-adversarial procedures such as case streaming, expedited procedures and use of technology. In addition, the CHRC recommends that Parliament should consider legal assistance or duty counsel be made available at the Tribunal.

KEY QUESTIONS:

What role should the Tribunal and the Commission play in a reformed complaints system?

Are there are other ways by which the Tribunal could become more accessible?

The PSAC believes that the CHRC should not abandon its responsibility to act as a party before the Tribunal. While it is true that the CHRC represents the public interest and not the complainant directly, the reality is that many complainants will have no legal representation at all before the Tribunal without CHRC counsel. Independent legal representation is not accessible to many complainants due to costs. Consequently, complainants often rely on CHRC representation due to complexity and formality of procedures.

It is disconcerting that the CHRC recommends the use of legal assistance or duty counsel at Tribunals. Duty counsel representation will not be adequate legal representation for complex and legalistic hearings. The CHRC Review Panel had recommended that in cases where the CHRC decides not to join a complainant as a party to a complaint, that the complainant receive independent and effective legal assistance at the public's expense. The Panel also recommended a clinic be established to deal with complicated cases and where the CHRC has not joined as a party. Clinics should also be available for the preparation and presentation of cases before the Tribunal. The PSAC agrees with the CHRC Review Panel that unrepresented parties ought to be provided with access to publicly funded expert legal assistance.

The role of the Tribunal should be as a third party (neutral) decision-maker based on the facts provided by the parties involved. The PSAC recommends that there be a specified number of members from labour on both the CHRC and Tribunal panels. Both the CHRC and the Tribunal should ensure that the complainant has access to adequate representation and that societal, public interest, and systemic issues are addressed before the Tribunal.

The PSAC recommends, as stated above, that a mechanism be established to allow complainants to refer complaints directly to a Tribunal, where the case

satisfies a threshold test. The PSAC also recommends that referral to a Tribunal be automatic in any case where there are significant evidentiary differences between the parties.

Due to the large number of employment-related human rights complaints, the PSAC believes that unions have a role to play in resolving human rights issues. Union involvement is more important when unions and not individual grievors determine whether human rights related grievances will proceed to adjudication. In 1999, the PSAC recommended that there be a mechanism to allow unions a role in representation of their members in human rights complaints, and to allow unions to file complaints on behalf of its members. The PSAC also recommended that unions have the right to intervene in any human rights complaints before the CHRC or Tribunal that concerns any provision of the collective agreement applying to their members. In addition, unions should be given the right to make submissions and to be consulted on any proposed settlement of such a complaint. The PSAC believes that these recommendations are still valid today.

PRINCIPLE TWO: TRANSFORMING BEHAVIOUR

Putting the “Human” Back into Human Rights

The CHRC states that traditional formalized processes involving investigation and an adversarial approach before a tribunal may not be the best way to deliver just, fair and timely resolution of human rights issues. The primary goal of the CHRC should be to establish what is and is not acceptable behaviour under the CHRA.

The CHRC also asserts that procedures have to be highly flexible and creative; be accessible; provide a range of remedies to repair damages; allow for the active participation in finding solutions; address the root causes that led to the discrimination; and encourage the development of respectful relationship among parties.

KEY QUESTION:

In your experience, what are the best practices, which will lead to changing discriminatory behavioural patterns?

Changing discriminatory behavioural patterns is crucial in eliminating discrimination. It has been almost three decades since *the Canadian Charter of Rights and Freedoms* and other human rights legislation were implemented. Our highest courts have given us some of the most progressive decisions in the world, including the recent ruling on the same-sex marriage reference by the government. Human rights law such as in the area of duty to accommodate is constantly evolving. Yet, societal attitudinal barriers continue to persist and human rights agencies receive a growing number of complaints with limited resources.

Education can play a key role in changing discriminatory behavioural patterns, particularly due to the fact that human rights law is changing constantly and becoming increasingly complex. In the workplace, it is very important that all affected parties in an organization be educated on human rights from the top managerial and human resources positions to supervisors, employees and union representatives in the actual workplace. For example, even though it has been five years since the Supreme Court of Canada made its ruling in the *Meiorin* and *Grismer* cases, many managers are still unaware of these decisions and/or the application of these cases in their workplaces. There are many trainers and educators in the area of human rights but it is vital that they be knowledgeable and experts in the area. However, education is not enough to change all discriminatory patterns.

Organizations must be accountable for their discriminatory behaviour. As well, there must be on-going monitoring and effective enforcement mechanisms to deal with discriminatory behaviour. Too often, employers continue to behave in a discriminatory manner because the only consequence of their actions is the filing of a human rights complaint. In the past, the complaint process has taken many years. Due to the barriers in pursuing a human rights complaint, many potential complainants leave the workplace without filing a complaint.

Proactive initiatives are also important in changing discriminatory behaviour such as employment equity initiatives. Unfortunately, employment equity initiatives have not fully resulted in eliminating discrimination or fully addressing the under-representation of disadvantaged groups in the workplace. Positive changes in the workplaces have also been very slow to materialize. Nonetheless, some gains have been made. The CHRC should also be allocated additional resources to undertake its employment equity function in a timely manner.

Lastly, unions and employees also play a role in changing discriminatory behaviour. The PSAC has developed educational tools for members in the areas of accommodation, employment equity and harassment. The PSAC has also negotiated a Joint Learning Program with the Treasury Board which includes joint development of training on issues such as anti-discrimination and anti-harassment. The training is delivered to both employer and union representatives. As well, it is important for unions to be involved in any settlement or orders that affect their members. Unions can play a role in ensuring that such settlements or orders are implemented properly and with the co-operation and understanding of their members.

Alternative Dispute Resolution

The CHRC has already taken a number of steps of the past year to strengthen its ADR capacity and that the public interest is met throughout the ADR process. The CHRC has proposed areas of possible legislative, regulatory or policy change include measure to make sure the processes more efficient and effective, such as:

- binding timeliness for conciliation;
- encouraging the development and use of internal ADR mechanisms consistent with human rights in federal departments, agencies and Crown corporations, and federally regulated companies; and
- introducing the option of binding arbitration.

KEY QUESTIONS:

Have you been involved in ADR? How was your experience?

How will these proposed legislative amendments affect you?

Should mediation become mandatory and if so, in what type of cases?

There are two instances of ADR that engage representation by bargaining agent representatives. There is the initial offer prior to Investigation. At this level, the PSAC has assisted its members by providing services of local representatives such as shop stewards or Local Presidents who traditionally provide grievance representation at the first and second level. Given the majority of the PSAC membership falls under federal jurisdiction, the respondent is either a department of the Government or an Agency such as a Museum or the Canada Revenue Agency, or a Crown Corporation such as Canada Post. It is rare that legal counsel appears on behalf of the respondent at this initial stage. Usually, it will be a Regional Director of Human Resources and someone from the immediate work area. In terms of human rights law, neither party can be expected to have an extensive background.

The PSAC has not committed counsel at this level in the past because it was perceived that the respondent's representatives are not motivated to discuss a file beyond the offer of 'nuisance' money to eliminate the problem. There has been no investigation and the possibility of a Tribunal is not on the near horizon. Often, any admission of discrimination would reflect upon the actions of the respondents' representatives.

The PSAC has been forced to re-consider how to address these initial meetings of the parties because Minutes of Settlement are being signed at this stage. The file comes to the attention of the PSAC when an undertaking has not been met or the parties disagree on the interpretation of the Minutes. At this entry level of the system, in the absence of counsel for either party, it is the CHRC mediator who must take the lead in drafting the Minutes.

When such problems arise, the Minutes must contemplate a failure to meet the objectives of the agreement and set out clear remedies if one of the parties has concerns. If authority to resolve the impasse is not found in the Minutes, then the difficulties begin. There is always the possibility of enforcement by the Federal Court. However, the cost and the practical problems of resolving an impasse at that level are obvious and more onerous for the complainant than the respondent as the latter has access to counsel from the Justice Department.

Mediation is problem-solving and in the case of the PSAC membership, there must be an understanding of how the federal government is organized and what must be done to accomplish the objectives of the parties. If an individual in an accommodation case must be moved from one Department to another, can that be accomplished through a settlement or must it be supported by an Order from a Tribunal? The PSAC has never been given a background on the training and expertise of the mediators. The mediators make it clear that the onus is upon the parties to be certain of the settlement language but that is not particularly useful given the lack of expertise of the parties. The respondent may consult with counsel by telephone and insist upon the usual 'boiler-plate' language stating that no further litigation may arise from the facts and that the respondent makes no admission of fault.

In any system built upon statistics, success is measured by the closing of files. No doubt, CHRC mediators feel similar pressures in terms of work performance. The objective is to settle complaints and if that requires the use of language such as 'best effort' as a qualifier of an undertaking, then so be it. However, this is the sort of language that leads to problems if the unwritten understandings at the table are not met and the only recourse is the Federal Court.

The second instance of mediation arises immediately before a matter proceeds to Tribunal. The PSAC has assisted members with counsel at this level. The file is mediated by a member of the Tribunal and legal counsel to each party realizes that this case must be argued if the mediation fails. There has been an assessment of the strengths and weaknesses of a case and each party knows that testimony before a Tribunal will follow. It is no longer on the distant horizon.

Again, as outlined above, there must be a clear understanding of workable remedies given the statutory framework of staffing within the federal public sector. The pressure of impending litigation motivates the parties to find solutions to the problem and the drafting is sensitive to the interests of each party or there will be a hearing.

There are two inter-related problems that the PSAC has noted in the process. The Complaint is a private matter filed by the individual member. If there is an accompanying section 10 complaint, there is a societal interest as a systemic remedy that eliminates a similar complaint in the future. This is a fundamental objective of the *Act*. As a respondent, if there is a systemic remedy that will cost a good deal of money, prudence based on cost would suggest enriching the financial package offered on the individual complaint in exchange for release from the larger outlay necessary to address a systemic problem. If there is no such release on the section 10, there will be no offer on the personal complaint.

In such a case, counsel to the complainant will advise that such a financial package is unlikely to be ordered by Tribunal. That places the complainant in a position of deciding between personal financial gain and the altruistic option of

proceeding with the complaint and receiving less or possible dismissal of the complaint. If the individual has been out of the workplace for some time, there is an incentive to settle as quickly as possible and address financial problems. CHRC counsel is representing 'societal interest' but the PSAC is not aware of the CHRC opposing a settlement on the ground that the systemic interest must take precedence over the personal interest of the complainant. At this level, the human rights complaint can devolve into simple civil litigation for damages. One can imagine the reaction of the parties if the CHRC refused to cooperate in such a case. Still, if the CHRC has not considered the problem faced by its counsel, it should.

In summary response to the question, the PSAC comments as follows:

The PSAC believes that conciliation or mediation can be appropriate in some cases. The PSAC agrees with the following recommendations made in the CHRC Review Panel Report with respect to ADR at the Tribunal level:

- mediation or conciliation be voluntary, but should be encouraged by advising claimants and respondents of benefits;
- guidelines be developed about the kinds of cases where it should not offer the parties mediation, based on the nature of the claim, the public interest at stake, the likelihood of settlement and interests of justice;
- mediation be confidential;
- mediators be adequately trained for the task;
- an assessment by the Commission of the remedies requested by the complainant prior to mediation and whether an Order from the Tribunal, possibly on Consent, would be necessary to support relief; and
- In cases of power imbalance between the parties, active steps be taken to resolve the imbalance. If a resolution cannot be found, then mediation should be stopped.

Binding arbitration is problematic. Again, the emphasis is upon quick resolution rather than the development of a fundamental understanding of human rights through public decisions reviewed by the Courts if necessary. Arbitration will also add another layer to the already complex area of human rights fora.

The PSAC supports the CHRC initiative to encourage federal departments, agencies, Crown Corporations and federally regulated companies to develop their own internal ADR mechanisms consistent with human rights. Due to the decentralization under the *PSMA*, it will be more difficult to monitor human rights issues in the federal public sector. It is important that the CHRC sets the standards and there is consistent application of human rights throughout the federal public and private sectors.

The problem faced with internal processes is the lack of impartiality of the conciliator or mediator. The PSAC experience with the resolution of personal harassment complaints by such a process has not been positive. It is vital that

any internal mechanism consists of impartial neutral third parties that have no interest in the parties. Often, the person hired is a consultant whose work depends upon the goodwill of the Department and/or is a former employee of the federal government with a human resources department. There is also the problem of the 'fixed fee' regime which encourages a superficial review as the return drops with each added hour of work. In the interests of human rights in Canada, the conciliator or mediator should be an expert and trained in the area of public sector, as well as, the specific human rights issue that he or she must address. Who would have the authority to monitor such hirings and performance to ensure that human rights is served by the process? It is a difficult question but one that should be addressed by the Commission.

PRINCIPLE THREE: A COMPREHENSIVE SYSTEM:

The CHRC proposes that new grounds of discrimination be added to the CHRA, specifically, Aboriginal People and social conditions.

The CHRC Review Panel recommended that some grounds be modified or included such as the clarification of the definition of disability, prohibition of mandatory retirement and the addition of gender identity. The CHRC Review Panel also proposed that the international human rights standards be added to the preamble of the CHRA and that the CHRC be given the mandate to report on the government's domestic and its international human rights treaty obligations. The CHRC supports these proposed changes.

KEY QUESTIONS:

What are your views on the addition of these proposed amendments to the CHRA?

The PSAC believes that all disadvantaged groups in Canada should receive the protection of human rights legislation, including Aboriginal People and people who live in poverty. The CHRC should also look at the inclusion of other grounds examined in the CHRA Review Panel as well.

The CHRC should ensure that the people affected by the inclusion in the CHRA are consulted, particularly Aboriginal People including Aboriginal women's advocacy groups. The PSAC has established a network for Aboriginal members to discuss issues which affect their communities and workplaces. The PSAC would be pleased to assist the CHRC if they wanted to consult these members.

The preamble of the CHRA should include reference to international human rights standards. The government is a party to international treaties and therefore, it should be directly accountable and required to report on its action and lack thereof. As well, the CHRC should be given the mandate to report to Parliament on the government's performance in relation to domestic and international human rights treaty obligations and that its reports should be included in the government's reporting to international agencies. However, in

order to undertake this mandated, the CHRC must be independent and impartial to the federal government. Presently, the CHRC funding is closely linked to the federal government.

Prevention: Future Directions

The CHRC states that it is committed to a broader strategy of prevention that seeks to work with the major respondents and assist them in putting in place a culture of human rights in the workplace. The CHRC is proposing that departments and other federal entities should ensure that their internal responsibility systems dealing with conflicts in the workplace are consistent with human rights. The CHRA Review Panel, in its proposals regarding internal responsibility systems, suggested that a number of elements be in place. These include policies and programs to promote equality, training for all managers and employees, monitoring and documenting of equality issues, liaison with the CHRC and other bodies, and management-labour cooperation to ensure the balance and independence of the internal process. In addition to internal responsibility systems, employers should train managers and employees, and ensure strong workplace policies and awareness of human rights standards and remedies to prevent human rights abuses. The CHRC is currently designing a human rights prevention function which will assist employers in this regard.

KEY QUESTIONS:

What are the elements of a good prevention strategy?

Is the Web a good tool to be used in this area of activity?

Are there other communication tools that could be used?

What internal mechanisms have you or would you develop to prevent complaints to the CHRC?

- 1) Key elements of a good prevention strategy include:
 - a) Mandatory training and on-going training of managers (from the top to the lowest levels) and employees. The training cannot be superficial or generalize discrimination. For example, training on sexual harassment/discrimination should be different from training on racial harassment/discrimination. The training should include proactive assessment of employment systems for barriers and identifying discrimination. It should also include training when discrimination is identified in that workplace.
 - b) The trainers have to be experts and knowledgeable about human rights.
 - c) It is also important to have consistent standards for policies and training on specific human rights issues (i.e. harassment, discrimination, and duty to accommodate). All levels of management should be knowledgeable about its policies (i.e. supervisor, DG, HR or labour relations staff). For example, is three hours of training sufficient to be an expert in harassment or administer the employer's policy?
 - d) There must be effective enforcement mechanisms – if an employer has no incentive (i.e. negative or positive consequences/ recognition) then they will be more reluctant to implement meaningful and effective policies.

- e) It should be mandatory that all managers and new and existing employees be provided with human rights related policies (i.e. duty to accommodate, etc.). The Web (in accessible format) is a useful tool to disseminate information – however; not all workers have access to technology. Employers should be required to provide copies of all policies to present and new employees.
- f) Performance appraisals should be linked to employee surveys related to discrimination and harassment.

Any internal mechanisms should have impartial redress mechanisms. Investigators and decisions makers should be adequately trained and should be neutral third parties to the investigation. They must not know the parties involved personally. For example, a manager who has been alleged to discriminate should not be the decision-maker. The problem has been that managers, including Director Generals, have overturned findings of harassment by an investigator because they do not want to reprimand the wrongdoer.

A Forward-Looking System: Options for Change

The CHRC states that a primary objective of human rights legislation is to change persistent patterns of inequality and identify emerging human rights issues. The CHRC notes that it has been recommended that the Commission should improve its ability to provide qualitative information about the state of human rights in Canada and these recommendations point to the need to improve the Commission's policy research capacity. The Commission's new approach to human rights is guided by a desire to strengthen the information and voluntary compliance functions. Many of the policy inquiries and studies mentioned above will fulfill the purpose of identifying emerging and pressing human rights issues. Options for new policy tools include the development of human rights impact analysis to allow the Commission, Parliament and other stakeholders to assess the human rights effect of new government initiatives or legislation. Other options include a periodic report on the state of human rights in Canada by developing human rights indicators to allow assessment of progress.

KEY QUESTIONS:

Which of these proactive tools would be most effective?

Are there any other tools or proactive strategies that you would recommend?

What indicators do you consider most critical for measuring human rights progress?

What information would you find useful in a Human Rights Report Card?

The PSAC supports the CHRC's initiative in developing human rights indicators to allow assess of progress. Both qualitative and quantitative tools to assess human rights in specific departments, sectors, etc. would be required to measure progress and to undertake a human rights analysis. The CHRC can already monitor complaints by employer, sector and issue. There are also existing tools that measure the perception of discrimination and harassment by employees such as the Federal Public Service Employee Survey conducted by the Federal

government of its departments. In addition, the results of employment equity audits can also be used as a tool to measure progress. Representativeness of the workplace is important in assessing human rights progress. The people who can assess whether discrimination exists in their workplace are those who experience it.

Also crucial in assessing human rights progress would be to workplace policies (both human rights related and other workplace policies) and the implementation of such policies. It is not enough to have good policies in place, especially, if there is no support mechanism to ensure that the policies are effective and respected. In addition, assessing manager and employee knowledge of human rights principles/obligations (i.e. culture change) will assist in assessing whether any initiative has been effective at the actual workplace.

Any assessment of human rights in unionized workplaces should include the participation of the union since they are well placed to assess the effectiveness of any initiative in their workplaces.

Any human rights card should have all of the above information. Finally, it should be made public so that those who receive a good grade and those who do not are recognized accordingly.

PRINCIPLE FIVE: ENSURING GOOD GOVERNANCE

Independence and Impartiality

Current Situation

Presently, the CHRC must ensure that all employees and recipients of services under federal jurisdiction, including the federal government, have access to a system for resolving human rights complaints. The lawyers who represent the federal government before the Tribunal come from the Department of Justice. This is the same department that approves Commission budgets, Treasury Board submissions and is responsible for proposing amendments to the Canadian Human Rights Act. The Treasury Board is the official employer of all public servants and is implicated in many cases dealing with employment in the public service. The Treasury Board is also the central agency that oversees the Commission's budget and mandates our reporting requirements. Audits carried out under the Employment Equity Act often challenge policies and programs for which the Treasury Board is responsible. In addition, the Commission appears before parliamentary committees and other bodies to comment on proposed government legislation and programs.

The CHRC state that it must often be critical of the government, even opposing it before tribunals and courts. The Commission is not, like a federal department, an instrument of government policy. The CHRC is concerned that the relationship between itself and the federal government is structured in a manner which can raise perceptions of conflict.

Options for Change

The CHRC believes that the solution is to strengthen the relationship between it and Parliament in terms of financing and reporting. A strong relationship with Parliament will help to enhance the

CHRC's independence while ensuring accountability. It will also help to address the "democratic deficit" by increasing Parliament's engagement in the CHRC's mandate. Other federal agencies, such as the Office of the Auditor General and the Office of the Chief Electoral Officer, have arrangements that ensure a closer relationship with Parliament. The CHRC believes that many of these provisions could apply equally to this organization and doing so would strengthen overall human rights governance.

KEY QUESTIONS:

Is a stronger relationship with Parliament the most viable means of safeguarding the Commission's independence while ensuring strong accountability?

How would this help your organization or support your mandate?

What other means could help safeguard the Commission's independence while ensuring strong accountability?

The CHRC is accountable to and receives funding from the federal government. Yet, it is mandated to pursue complaints against and conduct employment equity audits of the federal government. Clearly, there is a conflict. In the recent past, the federal department responsible for the CHRC funding has refused to maintain the resources needed to undertake timely employment equity audits.

It is clear that the Canadian Human Rights Commission is under-resourced. As such, it has been forced to devise schemes to eliminate workload and focus its limited resources as best it can. In 1999, the PSAC recommended that the budget of the Commission be subject to Parliamentary debate as its role is fundamental to the ethos of Canada. In this submission we will go further and say that the only effective way to structure the CHRC is as an office of Parliament and its Commissioner as an Officer of Parliament with all the independence from the governmental departmental structure that such an office implies. This would include parliamentary approval of the head of the CHRC, rather than having the position appointed by the Prime Minister as part of the normal rotation of senior officials. The head of the CHRC should have the leadership, expertise and experience in human rights principles and law, as well as, the ability to effectively oversee the operational administration of such an organization.

In summary, the PSAC comments as follows:

- 1) Yes, a strong relationship with Parliament is important. Impartiality is also important to ensure independence while ensuring strong accountability.
- 2) The PSAC recommends that the CHRA be amended to clearly apply to employees of parliamentary institutions. It would send a strong message to the public that politicians are not above human rights legislation.
- 3) The PSAC recommends that appointments to the CHRC leadership be the prerogative of Parliament and include public consultation and consultation with the labour community.
- 4) The PSAC recommends that there be a specified number of members from the labour community on both the CHRC and Tribunal panels. Before

- appointments to either are made, the labour community should be canvassed and given the opportunity to propose candidates for appointment.
- 5) The PSAC recommends that membership of the CHRC be representative of the communities that the *Act* is designed to protect and that it include persons with expertise in labour and employment issues as well as a history of human rights representation and participation in the development of human rights law.
 - 6) The PSAC recommends that the funding of the CHRC must reflect the importance that Canadians place on the protection of human rights in society. For this reason, the CHRC must be directly funded by Parliament.
 - 7) The PSAC recommends that the CHRC be required to report to Parliament on Canada's implementation of its obligations under international human rights agreements and covenants.

An independent and impartial CHRC would benefit the PSAC membership, particularly due to the fact that many members work for federal departments or agencies. If the CHRC could investigate various departments and agencies of the government without the perception of conflict then all parties benefit.

Coherent Governance

Current Situation

A related issue is the coherence of the overall human rights governance structure. The CHRA is a fundamental and quasi-constitutional law. It enshrines basic rights that are fundamental to Canadian democracy. Where there is conflict between the *Act* and other legislation, the *Act* has primacy. It is therefore important to ensure that the mandate of the CHRC is not unduly encroached upon by other agencies or tribunals. Otherwise, the federal government could develop a patchwork of human rights standards. Depending on which body is interpreting them, the specialized knowledge of the CHRC and the Tribunal would not be brought to bear on human rights disputes and the independence of the Commission would be diminished. Increasingly, however, the CHRC has noted examples of other federal agencies making determinations that, in whole or in part, touch upon fundamental issues of human rights. These decisions are not always made according to the same standards and jurisprudence that would be applied by the CHRC or the Tribunal.

Options for Change

The CHRC does not believe it should have exclusive jurisdiction over all matters dealing with human rights. Specialized bodies have an important role. The point is to ensure that there is an overall coherence with regard to the protection of human rights. The CHRC sees two options to ensure overlap is reduced and coherence enhanced:

- Parliament may wish to consider amending the Canadian Human Rights Act to ensure that the Commission has the opportunity to take jurisdiction, if necessary, to advance human rights when fundamental issues relating to the interpretation of the *Act* are raised in other fora; and
- the Commission will continue to work with other regulatory bodies, federal departments, agencies and Crown corporations, and federally regulated employers to enhance partnerships, through Memoranda of Understanding such as those concluded with the Clerk of the Privy Council and the Canadian Transportation Agency, to promote implementation of human rights standards.

KEY QUESTIONS:

How important is it to your organization/mandate for the Commission to pursue means by which to ensure overall coherence with regards to the protection of human rights?

The PSAC believes that individuals be allowed the choice of forum to deal with human rights related issues such as the grievance procedure or the CHRC procedure. However, consistency in the application of human rights is important to maintain, particularly in light of the fact that the new *Public Service Modernization Act* will allow direct access for employees to deal with human rights and employment related issues to the grievance procedure and adjudication. As well, similar remedies as under the CHRA will be available for grievance adjudicators. If the CHRC is not monitoring various fora where human rights issues are being determined, then different and inconsistent standards will be set to resolve similar or the same issues.

In litigation before the Federal Court, the PSAC has argued successfully and continues to argue that the CHRC holds a residual jurisdiction on all cases involving human rights. It recommends that members file human rights complaints even in cases where the governing labour legislation supports the resolution of human rights issues by arbitrators. The rationale is that there must be a source of coherent human rights analysis from a recognized centre of expertise. This issue of 'coherence' is tied to the comments above and the necessity for the CHRC and its leadership to be the subject of public scrutiny before Parliament. If the CHRC and its leadership lose their credibility within the human rights community, human rights law will be shaped by others and the review of such decisions by the Courts. The PSAC does not view such an outcome as in the interests of its members or of Canada.

Therefore, the PSAC is in agreement with the CHRC that Parliament ensure that the CHRC has the opportunity to take jurisdiction, if necessary, to advance human rights when fundamental issues relating to the interpretation of the Act are raised in other fora. As well, the CHRC should work with federal government various parties, including unions, to promote the implementation of human rights standards.

The PSAC supports a consistent and overall coherence in the protection of human rights. In fact, this is the very outcome the PSAC would like to see occur in the federal public service. Presently, individual complaints are filed mainly due to the fact different departments and agencies in the federal public service have different and sometimes opposing opinions of human rights standards.

Conclusion

In conclusion, the PSAC would like to thank the CHRC for its consideration of our submissions during its consultation process. We trust that this process will result in positive changes that will benefit not only our members but also all people in Canada.