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CANADIAN HUMAN RIGHTS ACT

BRIEF TO

THE FEDERAL DEPARTMENT OF JUSTICE

CONCERNING THE REVIEW OF THE

CANADIAN HUMAN RIGHTS ACT

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The Women's Legal Education and Action Fund (LEAF) is a national charitable organization that has as its goal the implementation of the guarantees of equality for women included in the Canadian Charter of Rights and Freedoms. Many of the founders of LEAF were instrumental in securing those guarantees.

LEAF has a National Board of Directors with representation from every province and territory in Canada, reflecting its widespread activities. It is financed by donations from private individuals, unions, corporations, and foundations, as well as by government: LEAF receives grants from the federal government through Secretary of State and SEED programs, and in 1985 was given funds of $1,000,000 by the Ontario government to do equality litigation for Ontario plaintiffs.

Following the coming into force of Section 15 of the Charter of Rights in April of 1985, LEAF launched a number of court actions to enforce these guarantees. In our first year, we have had three victories, in the Supreme Courts of Ontario and the Yukon, and the Ontario Court of Appeal; and have been accepted as an intervenor in both the British Columbia Court of Appeal and the Ontario Court of Appeal. There are fifteen LEAF cases presently before the Courts.

This brief is submitted in response to the Human Rights Act Review Detailed Work Plan, circulated by the Federal Department of Justice in May 1986.

Before focussing on the questions laid out in the work plan, it is necessary to address some preliminary issues. LEAF welcomes this consultation with government. We believe that the law reform process will be enhanced if the public, and equality-seeking groups in particular, are consulted about proposed changes in the law. We are concerned, however, that the quality of this particular consultation has been undermined by a lack of information. Many of the questions posed in the work plan are vague or confusing because no context for them has been provided. We understand that the Department of Justice has a background paper that was the impetus for the development of the work plan, but our requests for access to this paper have been denied. Perhaps the background paper would have helped us to understand the questions. We have not responded to some of the questions because of our uncertainty about their meaning. We have taken the liberty of expanding upon other questions in order to address important points not directly raised by the work plan.

I What should be the role of the Canadian Human Rights Commission with respect to:

(i) The Guideline-Making Power - Should Guidelines be Binding?

The Commission's guideline-making power is derived from s. 22(2) of the Act. At present, guidelines promulgated by the Commission are binding on the Commission and on tribunals, but

are not binding on the courts: in other words, they do not have the force of law. It has been suggested that making the guidelines binding on the courts would give the Commission more authority; however, it is our view that there is a need for flexibility in this area. If the guidelines of the Commission were to have the force of law, undoubtedly Parliament would require that they be passed, by the Cabinet or Minister, as regulations. Once it is necessary for the guidelines to go through Cabinet, the Cabinet has the capacity to stall or prevent their passage. The Saskatchewan Human Rights Commission has had the experience of having guidelines with respect to affirmative action suspended indefinitely by a Cabinet that had the power to make the Commission's guidelines into law.

It is submitted that there should be a dual track system whereby the Commission has the choice of either making guidelines which are binding on the tribunals or making regulations which are subject to ministerial approval and binding on the tribunals and the courts.

It is recommended that the Commission continue its present practice of consulting with interest groups about its guidelines and, in addition, that public hearings be held. It is acknowledged that public hearings take time and can be costly, but it is submitted that public confidence in the Commission and its guidelines will increase if opportunities for public

participation in the guideline-making process are established. In addition, it is submitted that guidelines evolved through a public process would warrant greater respect by the courts, and would be less likely to be ignored by the courts in judicial review proceedings.

(ii) Recommendations and Advice Regarding "Special Programs"

Section 15(2) of the Act establishes the power of the Commission to make recommendations and give advice regarding special programs. A concern has been expressed by some employers to the effect that the Commission may give advice about a specific program and take a discrimination complaint in connection with the same plan. It is submitted that there is a continuing need for the Commission to be able to give non-binding advice or recommendations with respect to special programs without giving up the power to process a complaint of discrimination. It is not possible for the Commission to predict or foresee all potential instances of discrimination when reviewing a plan. This is especially true of complex systemic discrimination cases. Further, once the Commission gives advice or recommendations, it has no further input into the implementation; there is no monitoring done to ensure that the plan has been carried out as originally advised. Therefore, it is recommended that the Commission should continue to be permitted

to give non-binding advice and recommendations about special programs, without giving up the power to bring a complaint under the Act. Employer concerns about confidentiality within the Commission could be addressed through the creation of a separate advice and recommendation branch along the lines of the advance tax rulings branch of the Ministry of National Revenue.

Although it does not fall squarely within the topic of recommendations and advice, we feel that it is necessary to address the question of the Commission's power to enforce Bill C62, the Employment Equity Bill, and we have chosen to do so in this portion of our brief. It would appear that responsibility for the enforcement of Bill C-62 will fall to the Canadian Human Rights Commission; however, at present, there are no enforcement mechanisms contained in either Bill C-62 or the Canadian Human Rights Act.

If the Employment Equity proposals are to mean anything beyond lip service to the notion of equality, it is necessary to empower the CHRC with the ability to approve and monitor programs as well as to apply sanctions. Without enforcement mechanisms, the Employment Equity Bill stands as a hypocritical statement about the Government's commitment to equality.

There is an essential incongruity between the Canadian Human Rights Act (CHRA) and the Employment Equity Bill, which it is submitted should be reconciled through amendments to the

Canadian Human Rights Act. This incongruity is reflected by the respective purpose clauses of the two pieces of legislation.

Section 2 of the CHRA states:

> The purpose of this Act is to extend the present laws in Canada to give effect, within the purview of matters coming within the legislative authority of the Parliament of Canada, to the following principles:
>
> (a) Every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices...

This contrasts sharply with the purpose clause of Bill C-62, which states:

> The purpose of this Act is to achieve equality in the work place so that no person shall be denied employment opportunities or benefits for reasons unrelated to ability and, in the fulfillment of that goal, to ameliorate the condition of disadvantage in employment experienced by women, aboriginal peoples, persons with disabilities and persons who are, because of their race and colour, in a visible minority in Canada by giving effect to the principle that employment equality means more than treating persons in the same way but also requires special measures and the accommodation of differences.

The fundamental difference between these two statements is that the Employment Equity Bill acknowledges that equality of results are sought, and that this may entail special measures and accommodating practices, while the CHRA speaks about equality of opportunity only.

Assuming that the Commission is to be responsible for the enforcement of the Employment Equity Bill, it must be given powers of enforcement (including powers to investigate, call up data, monitor programs and apply sanctions). It is recommended that enforcement powers be drafted into the CHRA and that the purpose clause of the CHRA be amended so as to reflect the broader purpose of Bill C-62 and not to restrict the jurisdiction of the Commission in enforcing the Bill.

(iii) Approval of Adaptation Plans

The Commission's power to approve adaptation plans is set out in S. 15.1(2) of the Act. It is submitted that there are changes that must be made in this area. As with the Commission's power to give advice and recommendations, discussed above, the power to approve plans or programs should be non-binding. Because there is no mechanism for continuous monitoring of the programs, the Commission must not be precluded from processing a complaint of discrimination under one of these approved plans. In addition, it is recommended that this process be made open to public scrutiny. Opening the Commission's decision-making process to the public and allowing for questions and submissions will not only increase public confidence, but will enhance the quality of the Commission's decisions. It may not be necessary to submit all decisions of the Commission regarding approval of adaptation plans to a full, formal hearing but, at the very least, notice of the proposed plan should be given to affected groups and comment invited.

II Primary and relationship to Other Laws:

> The government in Toward Equality agreed that human rights legislation should in general have primacy over other laws. The issue is whether the Act should be amended to include a primacy clause. If so, what is the best way of facilitating this?

In the recent Supreme Court of Canada decision of Craton v. Winnipeg Schools Division No. 1, [1985] 2 S.C.R. 150, it was established that human rights legislation does have primacy over other laws. However, it is submitted that in order to make this fact known and absolutely clear and, especially, to draw it to the attention of the public, it should be stated in the Act. There are a number of ways that this could be accomplished. It is recommended that the primary statement be made a part of the purpose clause. The following form and content is suggested:

> (1) Where there is a conflict between the Human Rights Act and any other federal legislation, the Human Rights Act shall prevail.
>
> (2) Nothing in this Act shall be construed so as to limit the right to apply to a court of competent jurisdiction for a remedy under the Canadian Charter of Rights and Freedoms.

The second section is suggested in order to avoid any implication that administrative avenues of redress must be exhausted before a Charter remedy could be sought.

III Process:

(a) Hearing Process:

(i) Who should hear complaints - courts or tribunals?

Complaints are presently heard by tribunals. It is submitted that this practice should be continued. A tribunal hearing offers sensitivity, informality, expertise, low cost, accessibility and expediency. We understand that an option which is currently under consideration is that of replacing tribunals with a permanent panel of judges. Although judges are beginning to acquire experience in the area of equality rights, they do not generally have either the life experience or adjudicative experience to make them sensitive triers of human rights cases. We would be strongly opposed to substituting judges for tribunal members selected for their expertise and sensitivity in human rights matters.

(ii) What kind of procedure should be used both prior to and during the proceeding?

A weakness of the tribunal hearing process, as we know it, is its failure to provide access to litigation procedures normally available in civil proceedings. At present, the procedures for the hearing of human rights complaints are very informal. It is submitted that in the interest of facilitating settlement and reducing the number of hearing days for a given

complaint, rules along the lines of civil rules of court should be adopted. The adjudicators should continue to have the discretion to depart from exclusionary rules of evidence in the interest of justice, but the parties should have the benefit of more pre-trial procedures than are available under the present system. The proposed rules would include provisions for exchanges of pleadings, production of documents, examinations for discovery, offers to settle and settlement hearings.

In addition, it is necessary to create a rule that establishes the procedures for class actions similar to that found in section 12 of the regulations of the Saskatchewan Human Rights Code. Furthermore, there should exist under the Act the power to grant interim injunctive relief to the complainant who presents a prima facie case and shows that an injunction is needed to prevent irreparable harm.

(iii)Should there be appeals or judicial review from the decision of the first body?

Section 42.1 of the Act delineates the process for appealing the decision of a single-adjudicator tribunal by establishing a review tribunal, and section 28 of the Federal Court Act allows for judicial review of a tribunal's decision by a court, according to broad administrative law principles. It is submitted that the decisions of tribunals should continue to be reviewable by the court, but that the second tribunal hearing

should be eliminated. Hearings by a second tribunal are actually quite rare, but when they are held they can delay the progress of a case that is destined for court. It is submitted that eliminating the second stage tribunal hearing will reduce delay and expense without any corresponding loss of credibility or fairness in the hearing process.

(iv) If tribunals are retained, what should be their composition?

In complex or controversial cases, the tribunal should consist of three members, rather than a sole adjudicator. It is essential that every human rights tribunal appear fair and well balanced. This appearance of fairness is more likely to be achieved by three adjudicators, than by one.

Human rights adjudicators should be people who have demonstrated their sensitivity and expertise in the human rights area, and who are representative of women and minorities. The existing large pool of potential tribunal members includes some people who have few known credentials in human rights and, perhaps for this reason, the pool is poorly utilized. It is suggested that a smaller pool of well-qualified panelists should be established, and that in addition to "ad hoc" tribunals, there should be a permanent tribunal which sits in Ottawa. An advantage of having a permanent tribunal is that it could hear applications for relief such as interim injunctive relief and variations of orders due to changes in circumstances.

In addition to the question of tribunal composition, there is the critical question of the method of appointment, not just of tribunal members, but also of the Commission itself, its staff and outside counsel. Currently all these appointments are done without notice or consultation, and no criteria for selection have been revealed to the public. It is recommended that criteria for selection of commissioners and tribunal members should be made public, and that recommendations should be invited from equality-seeking groups. It is also recommended that in the interest of assuring the autonomy of the Commission, the Commisison should be appointed directly by Parliament and not through the Department of Justice. Further, it is suggested that a roster of outside counsel, also selected for their expertise in human rights and their representativeness of women and minorities, should be prepared and made public.

(b) Complaints and Investigations:

(i) Should unions be able to make complaints on behalf of members?

It is submitted that a union is a legitimate representative body and, therefore, should have standing to make complaints.

(ii) Should complaints and investigations be subject to publicity prior to any decisions?

Although there may be times prior to the completion of an investigation when it would be inappropriate for the Commission to publicize a case, it is submitted that this is a matter which should be left to the discretion of the Commission. The Commission is currently handling these situations very well; it acknowledges that a complaint is being investigated, and reveals no further details. Given the priority of the education mandate of the Commission, providing the public with information about complaints of discriminatory behaviour or practices is of vital concern. It is submitted that statutory gags should not be placed on the Commission.

(c) Settlements and Conciliation:

(i) Should the investigation and conciliation stages be combined or remain separate?

It is submitted that these processes should continue to remain separate. The Commission has sufficient resources to split the processes and avoid the danger than an investigation may prematurely be converted to a conciliation session. In the interest of fairness and the appearance of fairness, it is necessary to ensure than an investigation is complete before any attempts at conciliation are made, and that the two stages are carried out by different persons.

(ii) Should settlements be published even where no names are given?

It is submitted that it is absolutely essential that settlements be published. Given the educational function of the Commission, it is important that the public be made aware of the pernicious and pervasive nature of discrimination and discriminatory practices; that the public realize that it has an avenue of redress against these practices; and that it sees that the Commission is performing its duties according to its mandate. There may be occasions when the Commission will prefer to publish anonymously and this should continue to be in the discretion of the Commission; however, it is submitted that the Commission should not be permitted to agree to a respondent's demand for secrecy as a term of settlement.

(d) Legal Remedies:

(i) Affirmative Action - should this be available as a remedy for past discrimination?

Purported distinctions between remedies for past discrimination and future discrimination are erroneous. It is submitted that section 15(1) of the Act accurately reflects the purpose of affirmative action:

> A special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by...

It is submitted that a useful, clarifying amendment to section 41(2)(a) would state "that such persons cease such discriminatory practice and take measures to ameliorate conditions resulting from it, or which are likely to arise."

(ii) Should the Human Rights Act make provision for the awarding of costs?

A lengthy and complex case such as Action Travail des Femmes demonstrates the need for cost awards. Costs could be awarded according to a sliding scale, according to the same sorts of principles applied in civil matters. If the complainant wins, costs should be paid by the respondent, and if the complainant loses, costs should be paid by the Commission. It is submitted that costs against the complainant are never appropriate, as such a risk stands to deter the bringing of complaints; moreover, trivial complaints can be screened and dismissed by the Commission and need not ever reach the hearing stage.

IV Discrimination Issues:

(a) Grounds of Discrimination:

The Canadian Charter of Rights and Freedoms guarantees every individual the equal protection and equal benefit of the law. This suggests that every individual should be free from discrimination on irrelevant grounds in employment, accommodation and in access to and use of goods, services and facilities. In keeping with the guarantees of the Charter, it is submitted that

the CHRA should be amended to indicate that the list of prohibited grounds in the Act is not exhaustive. The possibilities for irrelevant grounds of discrimination that violate the human dignity of members of our society cannot be anticipated in advance. Having an exhaustive list of prohibited grounds is at least incongruous with the Charter, and may violate section 15 of the Charter, in that it places an arbitrary limit on the individuals or groups of individuals who shall have an avenue of redress for their complaint of discrimination. The opening of the list should be qualified in some way in order to distinguish irrelevant grounds of discrimination from relevant grounds of distinction such as skill level relevant to job performance. This could be accomplished by the addition of a 'reasonable cause' clause, similar to that which used to exist in the British Columbia Human Rights Code.

(i) Should political belief be added as a ground of discrimination?

It is submitted that political belief should be added to the Act as a ground of discrimination. Freedom from discrimination on the basis of political belief is of fundamental importance, as it relates to the very foundations of the democratic principles of our society. Freedom from discrimination on this ground is tied to the Charter guarantees of freedom of speech, thought, belief, opinion, expression and association.

Political belief or affiliation is a private matter and is not relevant to one's rights to employment, accommodation or access to goods, services or facilities. Canada is party to the International Covenant on Civil and Political Rights, which came into force on March 23, 1976; this Covenant recognizes the individual's right of freedom from discrimination on the basis of political belief. As well, many of the provincial human rights codes have included political belief or opinion in their lists of prohibited grounds of discrimination. Newfoundland has prohibited this type of discrimination since 1971. British Columbia, Manitoba, P.E.I. and Quebec have all since taken similar steps. The Canadian Human Rights Commission has recommended every year, since 1979 in its Annual Report, that 'political belief' be included in the CHRA as one of the prohibited grounds.

It is recognized that there may be some employment situations where political belief is a bona fide occupational qualification, for example, for work in a partisan political organization. We note that P.E.I. has allowed a 'bfoq' defense to discrimination based on political belief in the area of employment within non-profit groups, where the relevance of political belief can be duly demonstrated and justified by the employer.

(ii) Should criminal conviction or charge be added as a ground of discrimination?

It is submitted that criminal conviction or charge should be added to the Act as a ground of discrimination. Persons with criminal records are being doubly penalized: even though they have paid their debt to society, they are discriminated against in finding employment, accommodation and in access to goods, services and facilities. Employers may discriminate against an applicant on the basis of her criminal record without ever inquiring as to the relevance of the conviction to the work to be done. Further, persons with criminal convictions are discriminated against in their access to services. For example, our research indicates that insurance coverage is sometimes denied, on the basis that the applicant for insurance has a criminal record.

In Living Together, the 1977 Report of the Ontario Human Rights Commission to the Ontario government, the Commission suggests that the high rate of recidivism amongst offenders might be related to the difficulty they face in finding employment. The Ontario Human Rights Code now prohibits discrimination on the basis of ~~a person~~'s record of offenses.

Several provincial codes that do prohibit discrimination on the basis of criminal conviction have recognized the need of the employer to know the background of the applicant and have allowed a 'bfoq' defense. However, the employer must show that an examination of the circumstances of the conviction has been

conducted. It is necesary that the employer consider such factors as the age of the applicant at the time of the offense, the circumstances surrounding the event and the time lapse between the offense and the employment situation. The guidelines set out by the Board of Inquiry in McCartney v. Woodward Stores Ltd. (1982), 3 C.H.R.R. D/1113, at D/1121, are a good test of a 'bfoq' defense with respect to criminal conviction:

> (1) Does the behaviour for which the charge was laid, if repeated, pose any threat to the employer's ability to carry on its business safely and efficiently?
>
> (2) What were the circumstances of the charge and the particulars of the offense involved, e.g. how old was the individual when the events in question occurred, were there any extenuating circumstances?
>
> (3) How much time has elapsed between the charge and the employment decision? What has the individual done during that period of time? Has he shown any tendencies to repeat the kind of behaviour for which he was charged? Has he shown a firm intention to rehabilitate himself?

It is necessary to address the issue of discrimination on the basis of criminal charge alone, without conviction. In a society which recognizes the principle of innocence until guilt is proven, it is ironic that questions about acquittals or dropped charges should ever be asked. However, such questions are asked, of applicants for admission to Law Societies for example, and can form the basis for denials of employment opportunities.

It is necessary to extend the equal protection and equal benefit of the law to those who have been charged with or convicted of an offense, by amending the CHRA to bring it into line with the Charter and with provincial human rights codes.

(iii) Should source of income be added as a ground of discrimination?

The Charter guarantees every individual the equal protection and equal benefit of the law, which, it is submitted, necessarily means freedom from discrimination on irrelevant grounds. Restrictions on employment, accommodation and access to goods and services and facilities on the basis of source of income are discriminatory. Of particular concern to LEAF is the difficulty many women face in obtaining banking and credit services because their source of income is a public assistance program.

The provincial human rights codes of Ontario, Nova Scotia, Manitoba and Newfoundland, as well as the Quebec Charter, have, in various forms, prohibited discrimination on this ground. It is recognized that discrimination on the basis of source of income may have limited application in areas of federal jurisdiction, but in addition to providing protection against discrimination in areas of federal jurisdiction, federal legislative leadership may encourage provincial legislative initiatives in those provinces that do not yet provide protection against discrimination based on source of income.

(iv) Should sexual orientation be added as a prohibited ground of discrimination?

Although sexual orientation was not listed as one of the discussion areas for reform of the prohibited grounds, it is critical that this particularly far reaching and injurious form of discrimination be addressed by this review. Lesbians and gay men in Canada face discrimination in employment and in access to accommodation, goods, services and facilities. It is submitted that sexual orientation is a personal matter and is not a relevant consideration for employment and service providers. Since 1979, the Canadian Human Rights Commission has recommended in its Annual Report that sexual orientation be included in the CHRA as a prohibited ground of discrimination. Quebec is the only jurisdiction in Canada that currently offers protection on this basis, but Human Rights Commissions in Ontario, Manitoba, Saskatchewan, Alberta and British Columbia have all recommended that sexual orientation be included in their codes as a prohibited ground.

In Towards Equality, at p. 13, it is stated that "the Government believes that one's sexual orientation is irrelevant to whether one can perform a job or use a service or a facility". However, on the same page, the Government states that it intends to wait until the courts find that sexual orientation is encompassed by the guarantees in section 15 of the Charter, before it takes any action itself. This response is unsatisfactory for a

number of reasons. While it is the general consensus that sexual orientation will be read into section 15 by the courts, it is less likely to happen in the absence of some federal legislative indication that this end is desirable. Further, a constitutional challenge to legislation that would bring about the litigation of the issue is potentially an extremely costly and lengthy process. If the Government of Canada accepts that sexual orientation is irrelevant and desires to end this particularly invidious type of discrimination, then it must take the initiative and amend the CHRA to include sexual orientation in the list of prohibited grounds. We strongly urge that the CHRA be amended to include sexual orientation as a prohibited ground of discrimination.

As a corollary, it is submitted that the Armed Forces and the RCMP must face the same prohibition against discrimination on the basis of sexual orientation. In Equality for All, the 1985 Report of the Parliamentary Committee on Equality Rights, the Boyer Committee states that it did not hear evidence that justified exempting these two groups from the purview of the CHRA. The report states that the arguments presented by the Armed Forces and the RCMP were "based on a stereotypical view of homosexuals that assumes them to be dangerous people imposing their sexual preference on others".

Stereotyping beliefs lie at the root of most discrimination, and far from providing a justification for discrimination,

such beliefs create the necessity for human rights protection for the stereotyped group. The argument most commonly advanced by the Armed Forces is that homosexuals are a security risk because they are targets for blackmail. The persuasive power of this argument depends on employers being allowed to fire employees for homosexual activity. It is submitted that the Armed Forces and the RCMP, along with all other employers, must change their employment policies and practices to eliminate discrimination against applicants, members and staff, based on sexual orientation.

(b) Areas of Discrimination:

(i) Whether personal service contracts should be encompassed within the Act.

It is submitted that personal service contracts should be brought within the purview of the CHRA. Workers should not be denied the protection of the CHRA simply because they are independent contractors.

(ii) Hate Propaganda:

We require clarification of the question in order to consider a response.

(c) Scope of the Obligation of Non-Discrimination:

(i) Should a provision be added dealing with Systemic or Adverse Effect Discrimination or is it adequate to leave the Act as it is in view of the C.N.R. v Bhinder decision of the Supreme Court of Canada?

The Supreme Court of Canada has already decided that the CHRA encompasses adverse effect discrimination. However, it is submitted that it is not sufficient to rely on case law to establish the jurisdiction of the Commission to deal with adverse effect discrimination when there is an opportunity to clarify the intention of Parliament by amending the CHRA. An amendment to the CHRA will serve to make the intention of Parliament clear and to inform the public about the scope of the CHRA.

The question as posed suggests that the terms "systemic discrimination" and "adverse effect discrimination" are interchangeable, and we must caution against this assumption. We believe that systemic discrimination is a concept which may differ in meaning from adverse effect discrimination, and that to use the terms interchangeably may lead to confusion.

> (ii) The government agreed in Toward Equality that the Canadian Human Rights Act should be amended to incorporate the concept of reasonable accommodation. The issue is, in what form should this concept be added?

Reasonable accommodation is an important feature of employment rights of all Canadians, but it is of particular importance to women, disabled persons and religious minorities. It is clear that as a result of the Bhinder decision, the duty to reasonably accommodate must be built into every defense to a discrimination complaint, whether the complaint be based on direct or indirect discrimination.

It is submitted that the amended legislation must indicate clearly that even if the respondent establishes that the practice in question is a 'bfoq', there is a positive duty on the respondent to prove reasonable accommodation of the individual complaint to a standard of undue hardship. The standard of undue hardship places a duty on the respondent to reasonably accommodate the complainant or class of complainants unless to do so would constitute undue hardship. Undue hardship should not be defined in any way that implies a 'de minimis' test but, rather, should be understood to require proof of intolerable financial cost or unconscionable burden to the respondent. Neither should undue hardship be defined in a way which suggests that the test can be invoked to screen out trivial complaints but, rather, should be understood to require a balancing of the complainant's interests against the respondent's interests. Such an approach requires that the level of hardship which the respondent must establish increases in proportion to the severity of the deleterious effects of the discrimination.

(d) Miscellaneous:

(i) Name of Commission and Act - should they be changed?

LEAF has no submissions to make on this question.

(ii) Should the amounts of damages that can be awarded be increased?

At present, the amount of damages available in Human Rights cases are nominal. It is submitted that the levels should be brought up at least to the level of damages available under the Ontario Human Rights Code. As the penalties stand now, there is little incentive to comply with the CHRA.

CONCLUSION

In conclusion, LEAF would welcome further discussions with the Department of Justice as the CHRA review process advances through its successive stages. We realize that it is important to establish basic directions to begin with, and we appreciate having had the opportunity to consult with the Department at this early stage in the review process. We would like to offer our knowledge and expertise, throughout the review process and, in particular, we would be pleased to comment on any draft amendments to the CHRA.