

B.C. HUMAN RIGHTS COALITION

RESPONSE TO

CONSOLIDATION OF THE HUMAN RIGHTS AMENDMENT ACT, 2002 (BILL 53)

We welcome this opportunity to provide our views on Bill 53. Our response is rooted in the following principals.

FIRST PRINCIPLES

1. We submit that it is sound public policy for this government to promote diversity and to provide equality without discrimination to all British Columbians. A fair, effective and efficient delivery mechanism is essential; it must balance the needs and rights of equality seekers with the needs and rights of the employer and service provider community.

2. We generally agree with the existing purposive clauses of the Code. We feel the Code should explicitly acknowledge the special status of human rights legislation and note that such legislation is founded on Canada's international obligations and commitments.

We point out that in addition, human rights legislation has quasi-constitutional status and human rights jurisprudence develops in tandem with the equality rights provisions of the Charter. It is much more than regulatory legislation. We submit that these foundations should be reflected in the amendments.

3. Mindful that government mandated the Review that led to the proposed amendments: "To ensure that administrative agencies meet the needs of the people they serve." we urge the drafters of the legislation to keep in mind the needs of the people who require protection under the *Code*.

We submit:

1. the primary interests that should be served are those groups and individuals disadvantaged by discrimination in the public arena. This includes complainants and respondents in individual cases and groups facing systemic discrimination.

2. that individuals tend to have far fewer resources at their disposal when compared to institutions and organizations and that this disparity and imbalance must be reflected in the delivery mechanisms.

3. the secondary interests consist of all British Columbians and all employers and service providers who all need timely quality information and education about human rights issues and protection.

GENERAL OBSERVATIONS

Although we agree with many of the proposed amendments, we are very concerned that the totality of the suggested changes contained in the legislation have led to a public perception that the government's commitment to human rights protection is waning. We had proposed an alternative to a commission model that included a component that would have a mandate to monitor human rights issues and report to the legislative assembly. This important function is missing from Bill 53. We believe that public confidence is essential. We urge the government to consider changes that will achieve this end.

The following are some specific comments about the proposed legislation:

Bill 53

Section 3 - Purposes

- Deletion of subsection (f) *to monitor progress in achieving equality in British Columbia;*[@]

We assume that government wishes to ensure that the purposes that precede this subsection are realized. With this commitment in mind, it seems only reasonable that government would want to monitor progress in achieving equality in British Columbia.

- Deletion of subsection (g) *to create mechanisms for providing the information, education and advice necessary to achieve the purposes set out in paragraphs (a) to (f).*[@]

The government has announced its commitment to provide information, education and advice with regards to the *Human Rights Code*. The Minister Responsible for Human Rights has indicated that these important aspects of the human rights system will be shared by the Attorney General's Ministry, the B. C. Human Rights Tribunal and a legal clinic which will provide education, legal advice and support. Attorney-General Plant in his letter to stakeholders sent August 1, 2002, states that "The Ministry is responsible for this legislation and government clearly has the responsibility to promote human rights and to inform the public about their rights." We agree with this completely, and urge the Attorney-General to reflect his commitment to public education by enshrining it in the Purposes section of the *Code*.

We ask the government to retain the Purposes section of the *Code*, or at least to replace this section with a clear statement of government commitment and responsibility.

Section 18 - Annual Report

- This entire section has been deleted.

We believe that it is essential that an annual report on human rights in the province should be provided to the Minister by an independent body and a copy of this report should be provided to the Legislative Assembly. Despite the fact that we believe a direct access tribunal accompanied by

a publicly funded legal clinic has the potential to ensure that British Columbia has a fair, accessible and efficient human rights system we do believe that taxpayers have the right to have this system monitored and evaluated by an independent party who reports to the Minister and the Legislative Assembly. At the very least there should be an annual accounting of funds spent, complaints carried, and an analysis of outcomes.

Section 20 - Human Rights Advisory Council

- This entire section has been deleted.

As we indicated above, there is public concern that the changes that have been proposed do not include any statutory body with the authority to monitor human rights issues in the province and advise government. In previous proposals, the Coalition, along with others, suggested that a Centre for Excellence could fulfill this important function.

Although government may not agree with the Centre idea, we ask it to consider including some form of monitoring body that can serve as a watchdog for the public interest and provide annual reports to the Legislative Assembly. This need not be a large body like the Council, a single person may be sufficient. Government will be producing educational materials about the new enforcement system. We ask the government to consider changing s. 20 to include an independent Advisor who can take responsibility for educational materials and monitor the effectiveness of the new enforcement system. This office would be small but may satisfy the concern about the omission of an independent voice to safeguard the public interest. In our view, a regular independent assessment is critical to the credibility of the model.

Section 22 - Time limit for filing a complaint

- S. 22 (1) and s. 22 (2) reduce the time limit for filing a complaint from 12 months to 6 months.

We urge the government not to reduce the time required to file a complaint. The reduced time limit could lead to more complaints being filed with the Tribunal. Under the current system there is ample time for the parties to explore informal resolution or try other mechanisms first. With a 6 month limitation, complainants may feel compelled to file a complaint with the Tribunal because there is not enough time to consider other alternatives. In addition, if complainants know that they have 12 months to file, they will take the time to reflect about whether or not going through the formal process is in their interest. Complaints that involve less significant issues, may not go forward. The argument that fewer complaints might be filed under a longer time limitation appears to be supported by the Commission's statistics. From 1984 to 1997, the limitation period under human rights legislation was 6 months. In 95/96 the old Council received 2,138 complaints. In 01/02, the Commission received 816 complaints under a 12 month rule.

-S. 22 (3) allows the Tribunal to extend the time limit but subsection (a) adds a new requirement that a complainant must show that it is in the public interest to accept the complaint.

We question this new requirement for late complaints. Under the current system a complainant must show that any delay in filing was incurred in good faith and no one is prejudiced. Under the proposed changes complainants face a much higher standard. An individual's right to protection from discrimination should not depend upon him or her having to prove that a complaint is in the public interest. How can such a concept be applied? All complaints serve the public interest because they are a mechanism through which service providers, landlords, employers and others become aware of their legal duty to treat all individuals equally. We are not aware of a single late complaint that was accepted by the Commission that was not in the public interest. Relying on good faith and ensuring that no party will experience prejudice works. We fail to see why this new and more complex requirement was added.

We ask the government not to change section 22.

Section 27 - Dismissal of a complaint

- s 27(f.1) new ground for dismissal: A reasonable settlement offer has been made with respect to the complaint and not accepted by the complainant.

In our response to the Review, the Coalition and others made the following comments on this topic:

The issue of dismissing a complaint without a hearing because the complainant may have refused a reasonable offer is more complex. Most offers are made on a without prejudice basis and often come with terms that prohibit disclosure. There is nothing in the current *Code* that precludes parties from asking a Tribunal to decide what might be an appropriate remedy without holding a full hearing. If a respondent does not wish to make certain admissions or the parties cannot agree on a statement of facts, a hearing may be required. If a Tribunal finds that a complainant has acted improperly it currently has the power to award costs in favour of the Respondent. In addition, under the current *Code* a respondent does not face a cost award if a complaint is upheld.

We are aware of considerable public concern about the fact that this new ground for dismissal introduces an element of coercion to the human rights process. We agree.

By way of background however, it should be noted that under the current *Code*, the B.C. Human Rights Commission has a policy that allows a Human Rights Officer to recommend dismissal if he or she believes that a complainant has refused what the HRO deems to be a reasonable offer. We are aware that the Commission has dismissed cases because of it. This policy is similar to one that has been adopted by the Canadian Human Rights Commission. These policies were

adopted even though there is no reference in the legislation. The Coalition has fought vigorously on behalf of our clients when the *Areasonable offer@* weapon was pointed at them. We see no need for such a provocative ground to be legally enshrined in the *Code*. If it is, the Code should also be amended to allow the Tribunal to impose settlements on respondents. We have seen many respondents reject reasonable offers made by complainants.

We are aware that, from time to time, a party to a complaint can become unreasonable. We argue that the Tribunal has more than enough power to deal with intransigent parties without any amendments to the legislation.

Section 35 - Hearings

- S 35 (1.1) (g) new Tribunal powers to set rules regarding mediation: *Arespecting mediation, including, without limitation, rules that would permit or require mediation of a complaint, whether by a member of the tribunal or a person engaged or retained by under section 33(2).@*

The Coalition believes that mediation is the most effective way to resolve complaints. Our concept of mediation requires that it be voluntary and there is no power imbalance between the parties. We have heard some concerns that these new Tribunal powers could result in compulsory mediation. In order to ensure that this does not happen, we suggest that the word *Avoluntary@* be added to this section.

Section 37 - Remedies

- S 37 (4)(a) new Tribunal power to award costs.

Under the current *Code* the Tribunal has the power to award costs if either party has *Aengaged in improper conduct@*. We believe that the current provisions are fair to both parties and are sufficient to ensure that those who waste the Tribunal's and other parties' resources are held accountable.

The wording of the proposed amendment has created a chilling effect in the community. Many wonder how many complainants will go forward with their cases if they face a substantial cost award should they lose.

We urge government to amend this section by adding the words: *Awhen appropriate and in keeping with human rights jurisprudence@*.

- Legal Advice and Support

In its News Release date May 30, 2002, the Government of British Columbia indicated:

The new human rights structure will be supported by an independent legal clinic, which will offer preventative education and training relevant to the code, as well as legal advice and support to parties involved in complaints.

As mentioned previously, the government's commitment to public education should be reflected in the *Code*. In addition, we believe that the government should ensure that the *Code* reflects its promise of an independent legal clinic. While the clinic itself does not have to be mentioned, we urge the government to include the words "legal advice and support to parties involved in complaints" in the amendments to the *Code*. We note that the government believes it is important that people understand that the basic protections under the *Code* will not be affected in the new legislation. We believe that it is equally important that people understand that they will be afforded access to those protections.

Closing Remark

We appreciate the opportunity to provide feedback on this new government initiative. We have made our comments in the hope that they will help create a new human rights regime that inspires public trust and confidence.

Submitted by the B. C. Human Rights Coalition, August, 2002