BC Human Rights Commission

BILL BLACK REPORT

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B. C. HUMAN RIGHTS REVIEW

REPORT ON HUMAN RIGHTS IN BRITISH COLUMBIA

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to the

Minister of Environment, Lands and Parks and Minister Responsible for

Multiculturalism and Human Rights

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I. what are the goals of human rights protection?

A. Introduction

This final Report is the last stage of the Human Rights Review that was announced by the Minister Responsible for Multiculturalism and Human Rights on February 9, 1994. The mandate for the Review was to examine all aspects of the Human Rights Act and the way that it fits in our legal system. The terms of reference emphasize that the Review was to be based upon a broad consultation with individuals and groups whose interests are affected by the Act. This consultation was to include community organizations, labour organizations and business organizations.

During the spring, several thousand brochures were distributed announcing the Review and inviting participation. A discussion paper was also prepared and distributed. To assist groups to participate in the process, funding was supplied by the Ministry to help cover the expenses of preparing submissions.

Meetings were held in nineteen communities throughout the Province during May, June and July. These meetings included round-table discussions for human rights groups, labour groups and business groups. In addition, there were evening meetings open to any member of the public. Appendix B contains a list of these meetings. Appendix C lists the participating groups and Appendix D the participating individuals.

These meetings, and the submissions of many groups and individuals, provided invaluable assistance in assessing the Human Rights Act and its administration. In addition, the Special Advisor met more informally with many groups representing business, labour and groups whose members experience discrimination.

As an additional part of the consultation process, letters were sent to approximately 400 people who have been parties to human rights complaints. The letters invited these people to contact the Special Advisor and relate their experiences with the process. This survey was carried out with the permission of the Information and Privacy Commissioner, who specified conditions to preserve privacy and confidentiality.

This process brought to light many insights. It also revealed a considerable degree of consensus about many of the issues. While there was disagreement on some issues, the areas of agreement are more notable.

This Report relies heavily on the insights of the participants in the consultation process. It also has been greatly assisted by similar studies that have taken place in other

provinces, notably New Brunswick, Ontario and Alberta.

The goal of the Report is to translate these insights into a new mechanism for protecting human rights in the Province.

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II. Development of human rights laws

Human rights laws are a central part of the Canadian legal system. The Federal Government and every province and territory have human rights statutes. The Supreme Court of Canada has described these laws as "legislation of a special nature, not quite constitutional but certainly more than the ordinary." They reflect the society we would like to be, but the reality is that too often we fall short of these aspirations.

Why have human rights laws been given this status? What are they meant to accomplish? To answer these questions, we must review the development of these laws and the conditions that gave rise to them.

Canadians represent many cultures, religions and races. Some of us have been here for thousands of years, while others of us are more recent arrivals. We speak different languages. We are different genders and ages and have different skills and abilities. The geography of the country itself creates differences that we must take into account to live together as a nation.

It is not surprising that most Canadians profess the values of equality and tolerance. Yet history shows that we cannot take these values for granted. Discrimination and intolerance have influenced us all too frequently. We need only remind ourselves of the suppression of First Nations cultures, the denial of the right to vote on the basis of race and sex, the internment of people of Japanese origin during World War II, the treatment of religious minorities or the exclusion of people with disabilities from the most ordinary social amenities to see that equality is something we must constantly strive to achieve. It does not come automatically.

In the 1940s and 1950s, human rights legislation began to develop, in part as a reaction to the atrocities of World War II. In 1944, Ontario enacted the *Racial Discrimination Act,* which prohibited the publication or display of signs, symbols or representations expressing racial or religious discrimination. In 1947, the Saskatchewan Bill of Rights was enacted, which prohibited discrimination in new areas such as employment and land transactions. The main focus of these statutes was on racial and religious discrimination.

The primary weakness of the legislation of this era was that enforcement was by means of prosecution for a penal offence. This approach brought with it all the safeguards that apply to penal legislation. For example, the violation had to be proved beyond a reasonable doubt, and

the accused had a right to remain silent. As applied to discrimination, these rules made enforcement almost impossible. It was especially difficult to prove beyond reasonable doubt that the motive for refusing to deal with a person was race or religion rather than some legitimate reason.

To overcome the weaknesses of the penal approach, the provinces enacted fair accommodation and fair employment practices acts. B.C. enacted a Fair Employment Practices Act in 1956 and a Public Accommodation Practices Act in 1961. These statutes were enforced by means of monetary damages rather than penalties. As a result, proof no longer had to be beyond a reasonable doubt. The statutes also authorized public officials to assist a complainant by assessing, investigating and mediating complaints. If mediation failed, a board of inquiry could be appointed to hear the complaint and to order a remedy.

In addition to changing the method of enforcement, these statutes gradually expanded the grounds of discrimination that were covered. In particular, protection was extended to sex and age discrimination, and equal pay acts required that men and women be paid the same wages if they performed the same work. Also, protection was gradually extended from public facilities to areas such as housing, though B.C. lagged somewhat behind many of the other provinces.

One weakness of this approach was that separate statutes applied to different areas of discrimination such as public services and employment, as if the underlying causes of the discrimination in these areas were not the same. In addition, these statutes treated discrimination as a wrong to an individual rather than as a societal problem. While assistance was available once the complaint was filed, little effort was made to inform people of the legislation or to encourage them to file a complaint if they experienced discrimination.

The next stage in the evolution of human rights laws was to consolidate the different statutes into comprehensive human rights statutes. These statutes covered discrimination in employment, public accommodations and services and the sale and rental of housing and land. Over the years, grounds of discrimination have gradually been expanded to include grounds such as disability, family status and sexual orientation that were not included in the original legislation. Human rights commissions were established to oversee the process. These statutes treated discrimination as a wrong to the community as well as to the individual directly affected. They also provided additional resources for activities such as education and information, as well as for investigation and mediation.

This model of human rights legislation is still in existence today in most Canadian jurisdictions. Some jurisdictions have made at least tentative steps beyond this model by enacting employment equity and pay equity statutes. However, the prevailing model remains that developed in the 1960s and 1970s.

The first consolidated human right statute in B.C. was the *Human Rights Act* of 1969. However, this statute had a weak enforcement mechanism. There was almost no staff, and very few cases were heard. In 1973, B.C. enacted a *Human Rights Code*, which established a

Human Rights Commission and provided for larger staff.

The *Human Rights Act* currently in effect in B.C. was enacted in 1984 amid considerable controversy. The Act is described in further detail in Part II of this Report. It differs from other legislation with regard to the administrative structure for enforcing the statute. Its enactment led to the sudden dismantling of the existing enforcement machinery, and the new agency had to make do with substantially reduced resources. But in more general terms, the 1984 Act reflects the model developed in the 1960s and 1970s. In particular, it continues the focus on individual complaints. Solutions to broader issues of equality are treated, at best, as a by product of resolving these individual complaints.

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III. Patterns of Equality and Inequality

The purpose of human rights laws is to achieve equality and eliminate discrimination; that is obvious. But it is impossible to determine the most effective strategy without knowing more about the nature of this inequality. Who is susceptible to discrimination? What are the consequences for those affected?

Human rights laws protect all of us. No one is immune from discrimination or unfair treatment. Housing may be denied to those who are single and live alone or to families with children. Affiliation with a particular religion may lead to easy entry in one setting and exclusion in another. A job may be denied because an applicant is too old or too young. Anyone can have an accident that creates a disability in an instant.

Although anyone can experience discrimination, there is overwhelming evidence that persistent patterns of inequality have a particularly severe effect on some groups. Sometimes, these patterns arise from intentional conduct. For example, sexual harassment of women is an ongoing feature of some workplaces, as are derogatory "jokes" and comments about racial and religious groups.

Often, however, inequality arises from methods of operation that are adopted for sound business reasons and without any intent to discriminate. No one builds stairs to keep out wheelchairs, but that is their effect. Requiring a grade 12 certificate for a job may seem an easy way to weed out applications, but the requirement may have nothing to do with the duties to be performed, and it excludes a higher percentage of those who have fewer educational opportunities, including First Nations people. Work schedules are designed to accommodate the Sabbath and religious holidays of majority religions. Sometimes, they force members of other religions to choose between their jobs or their religious beliefs. Rules regarding work absences often do not take account of child care responsibilities.

The cumulative effect of such rules and practices is to create significant barriers to equality for women, racial and cultural groups, First Nations people, and people with disabilities, to name some of the more obvious examples. Although we have made progress in reducing discrimination, it is simply wrong to assume that such barriers are isolated aberrations. Unfortunately, they are an ongoing part of our social and economic system.

Any effective strategy must take account of the patterns of inequality that exist, without excluding protection for other discrimination that can affect other individuals who are less at risk. Therefore, it is important to review the nature of these patterns. There is more data on some groups than others, and most of the information concerns employment. Therefore, the main focus will be on inequality in employment experienced by women, First Nations people, people with disabilities and racial and ethnic groups in the area of employment. However, there is every reason to believe that groups who experience inequality in employment face similar patterns of inequality in other areas as well.

1. **Women**

   There is a wealth of information concerning inequality experienced by women, particularly in employment. While the percentage of women in the work-force has been increasing, women are still concentrated in relatively few job categories. The three largest occupational categories for women continue to be in the clerical, service, and sales sectors. This means that the majority of women work as secretaries, book keepers, sales clerks, or cashiers. There is also evidence that a "glass ceiling" excludes women from moving into upper management positions. For example, under the Federal Employment Equity Act, only 9.3 percent of the upper-level manager positions are occupied by women. Although the Federal Employment Equity Act covers the work-force of federal employers, such as banks, airlines, and airports, the statistical evidence gathered for the 1991 Census suggests that similar trends are apparent in the work-force at large.

   Arguments are sometimes made that these patterns reflect a natural division of labour between men and women. However, in other countries, the work is divided differently and women are concentrated in different job categories. That fact suggests that the patterns are not based on ability to perform the work and undermines the hypothesis that the patterns are simply a matter of voluntary choice.

   The concentration of women in certain jobs also affects the level of earnings for women. According to the 1991 Census, the average income for women is just over half that of the average income for men. Sometimes, women are paid less than men for essentially the same work. More often, jobs predominantly staffed by women such as clerical positions are paid less than other positions staffed primarily by men even though objective measurements show that the two jobs are of the same value.

   Although statistics are extremely useful for revealing gaps in salary levels between men

and women and for highlighting occupational trends, numbers only show half the picture of discrimination. Organizations dedicated to promoting equality provide the facts needed to describe and better understand the kinds of discrimination faced by women today. We learned from organizations across B.C. that although more women today work in professions of their choice than in the past, many continue to experience sexual harassment in their workplaces. We listened to accounts of women who have endured sexual advances from their supervisors and from others who have survived threats to their physical well-being. Other groups informed us about the more subtle barriers facing pregnant women and women in their child-bearing years in the employment context. Women have entered occupations historically closed to them, demonstrating that progress can be made. Yet the persistence of the gap in both earnings and participation in higher paying jobs shows that much remains to be done.

2. **First Nations People**

Although there has been a heightened awareness regarding First Nations issues recently, extensive barriers to equality remain for First Nations people. The most recent statistics show that the number of people reporting aboriginal origins increased by forty-one percent from the last Census conducted in 1986. In B.C. the aboriginal population represents five percent of the total population. However, the 1991 Census reported that First Nations people face a two and one half times greater unemployment rate than do other Canadians. This pattern has appeared consistently in the Annual Federal Employment Equity reports which last year stated that First Nations people remain under-represented in the federally employed work-force in all the provinces and territories. The Report also emphasized that B.C. is one of the provinces with the lowest representation of First Nations people in its federally employed work-force.

First Nations people as a group also have the lowest incomes in Canada. This is reflected in the fact that forty-four percent of First Nations women earn less than $25,000 per year. The jobs that are available to First Nations people are largely concentrated in the blue-collar sector for First Nations men and in the clerical sector for First Nations women. The opportunities for education and training remain limited, and there are few First Nations role models in positions of authority within educational institutions. Both of these factors make it even harder for First Nations students to succeed.

In addition to these barriers, we heard from many organizations and individuals dedicated to promoting equality that First Nations people face racism on a daily basis. In a survey conducted by the First Nations Women’s Group, sixty-six percent of First Nations people polled felt they had been discriminated against due to their race. This survey also revealed that the majority of the discrimination against First Nation Peoples occurred within the school system and by policing institutions.

The submission of the United Native Nations cited employment and tenancy as areas of

frequent discrimination against First Nations people. This discrimination ranges from blatant statements that "we don't want any natives living here" to more subtle and covert forms of discrimination.

We also heard many personal experiences of discrimination. These included incidents of First Nations people being followed in stores by security guards, of First Nations people being detained by the police for walking in public late at night, and of the overt hostility toward First Nations people in small communities.

All of these factors have inevitable social consequences. Lack of opportunity creates a sense of hopelessness that can lead to depression, suicide or crime for some. These effects sometimes have devastating consequences in First Nations communities and can create a social climate that itself creates new barriers to achieving equality. First Nations people who choose to leave their home communities often find it impossible to obtain the work and housing they need to achieve a decent standard of living.

Many First Nations people have decided that their first priority is to take control of their own communities. They see the right of self-determination and self-government as providing the greatest hope for preserving and strengthening their heritage, as well as for correcting the problems that past discrimination has caused. From that perspective, human rights legislation is only a small part of a much larger picture. That is not, however, an argument for failing to make legislation as effective as possible in dealing with discrimination against First Nations people. Human rights statutes can work together with self-government initiatives to achieve equality for all First Nations people, wherever they choose to live and work.

3. **Racial and Ethnic Groups**

As a province with the second largest concentration of visible minorities in Canada, many British Columbians are affected by discrimination based on race, ancestry or ethnic origin. The most recent data places the visible minority population in B.C. at 14.2 percent of B.C.'s total population. The 1991 Census confirms that this group has a higher unemployment rate than the population as a whole, suggesting that barriers to equality in employment exist. This conclusion is supported by studies showing that a white person has three times the chance of receiving a job offer than an identically qualified racial minority person. There are also indications that racial minorities are more severely affected than others during a recession, suggesting a tendency to treat racial minorities as marginal employees to be hired when a lack of applications from others leaves no alternative.

Another characteristic of racial discrimination is that different racial minorities face different types of discrimination. During the consultation meetings held during this Review, some community organizations explained that refugees and recent immigrants experience many obstacles to equality due to their language and often very visible

cultural differences. On the other hand, racial discrimination against a third or fourth generation Canadian who is Black may take a completely different form, revealing itself in a disproportionately high unemployment rate for this group.

Some racial minority groups have attained an adequate income level, but they remain excluded from certain types of jobs. Other racial minority groups endure an average income well below the norm as well as being concentrated in a few occupations with low pay. For example, seventy percent of visible minority women are employed in clerical occupations and many others are restricted to working as domestic workers.

By averaging together the statistics about different groups, we understate the inequality of all the groups. Different groups are unequal in different ways, and an average figure masks the fact that a particular type of discrimination may have an especially onerous effect on one racial or cultural group. A high and a low income do not make two average incomes, except perhaps to statisticians.

We also heard from concerned individuals within racial minority communities about their personal experiences in Canadian society. Many people told us they had been racially harassed by their neighbours, by the police, and by the staff at hospitals. Parents were especially concerned about the level of racism in the education system and how this was affecting their children. We were told that members of racial minorities generally do not speak up about or report incidents of racism for fear of the potential repercussions.

Although there is evidence revealing the inequality of racial minorities, pin-pointing racially discriminatory practices has proved to be much more difficult. This is largely because the racism of the 1990s is often characterized by subtle attitudes and values that masquerade as concern for Canadian traditions. For example, seventy-two percent of Canadians thought that racial minority groups ought to adopt Canadian cultural values and forget their own traditions.

In the employment context, bias and lack of knowledge about the causes of inequality have led to unnecessary language requirements, the failure to recognize foreign credentials and work standards that conflict with cultural dress or practices. Culturally biased "aptitude tests" are often justified by pointing to the importance of upholding "Canadian" standards and culture. We must recognize that Canada is made up of a variety of cultures, none of which has exclusive claim to being "Canadian."

4. **People with Disabilities**

The idea that people with disabilities are a tiny minority of the population remains popular. However, organizations that study disability issues estimate that ten to eighteen percent of people have a disability if so called "invisible disabilities" such as mental and learning disabilities are counted along with physical disabilities.

The 1991 Census states that eight percent of B.C.’s population have some kind of disability and that over thirty percent of adult First Nations people also suffer from various disabilities. The unemployment rate for people with disabilities in B.C. is more than double the average rate for other British Columbians. Like other disadvantaged groups, the majority of people with disabilities work in low paying jobs with little chance for advancement. This occupational trend is difficult to reverse, since training and educational programs are often not accessible to people with disabilities.

One of the factors that obscures the extent and severity of discrimination faced by people with disabilities is that this category covers a number of disparate groups. For example, the obstacles faced by someone with a mental disability will likely be different from those faced by someone in a wheelchair. The latter may be denied physical access while the former may be thought incapable of productive work. Community groups said that decision-makers often assume that a disability will make it impossible for a person to perform a job and do not check to see if the assumption is accurate. People with disabilities endure many negative stereotypes. For example, they are often perceived as "criminal," "drunk" or "abnormal."

Part of the inequality is caused by the practice of assessing a person with a disability from an able-bodied point of view. Experts have pointed out that this practice fails to account for the fact that people with disabilities develop other skills to compensate for their disability. The result is not that a person with a disability cannot do the job; rather they may do it in a different way or need different equipment or working conditions. Also, disabilities come in many forms, and it is necessary to take account of the particular needs of each individual in order to allow everyone to perform to their full potential.

The discrimination toward HIV-positive people provides an example of the biases against people with disabilities and of the interaction of discrimination based on disability with other grounds of discrimination. Because of limited hospital space for people who are HIV-positive in many communities, these people are often denied the chance to live in their home communities during the last stages of their lives. We were also told of instances in which people who refused to hide their HIV status were subjected to extreme reactions including violence.

Of course, some disabilities have consequences that cannot be entirely avoided. But recent experience shows that much can be done to provide access to people with disabilities. Curb cuts have made it possible for people who use wheelchairs and scooters to gain access to the streets. Closed captioning has made some television available to people with limited hearing. Examples such as these illustrate that we can modify patterns of exclusion that once seemed unalterable.

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IV. What This Evidence Tells Us

This evidence provides information that is useful in assessing the human rights protection that presently exists and in identifying how to make the system work better for all of us. A number of points are especially important:

1. Inequality is caused not only by prejudice and bigotry but by ordinary policies and activities that have the effect of excluding individuals and groups. It is "systemic" in the sense that it is an unintended but integral part of many systems of operation.

2. The causes of inequality are often subtle or arise from conditions that we take for granted and assume are inevitable.

3. Individuals experience discrimination that deserves a remedy, but we miss much of the picture if we focus solely on individuals. Some types of discrimination only become apparent when the effect on a group is taken into account. For example, height and weight restrictions affect both men and women, but they affect women as a group more than men. A focus on groups also helps to identify the interaction of different causes of inequality such as the way that inequality in education later leads to inequality in the job market. Finally, a group focus helps to show the cumulative effect of inequality on certain groups. This focus also reveals the social consequences that this inequality has not only on the lives of those affected but on patterns of poverty, crime and health that ultimately affect society in general.

4. Discrimination faced by disadvantaged individuals is often not confined to one ground such as sex, race or disability but is based on a combination of these characteristics. For example, First Nations people may face racial discrimination as well as discrimination due to disability. Similarly, racial minority women may face discrimination based on their gender and race and the fact that English is not their first language. Considering each ground of discrimination in isolation from the others also presents an oversimplified picture that does not capture the reality or full extent of the inequality.

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V. Purposes and Priorities

Considering the patterns of equality and inequality that exist, what needs to be accomplished? Until we answer that question, it is impossible to assess the existing Human Rights Act or consider modifications to the Act. Besides identifying objectives we must try to set priorities, since there are never enough resources to accomplish every goal instantly.

The consultations that took place during this Review, together with the research of other studies in Canada and elsewhere, suggests that the following objectives should form the foundation of a strategy for achieving equality:

1. To Correct Persistent Patterns of Inequality Affecting Groups

The most important objective is to correct patterns of inequality that are systemic and persistent. These patterns affect some groups more than others, as described in the previous section. For many members of these groups they are an ongoing part of life. Sometimes the effect is to lower markedly the quality of life of the people and groups affected. For example, the effect on some First Nations communities has been to threaten the social fabric itself. Other instances are less dramatic, though no less persistent, as when a woman receives a lower salary than a man for work of equal value.

There are a number of reasons for making the correction of patterns of systemic inequality the primary objective of all governmental equality programs. The most obvious is that discrimination that has an ongoing effect on a person's life usually causes greater harm to that individual than a single discriminatory event. Discrimination is never pleasant, and even a single instance can cause great pain and financial loss. Usually, however, the effects of an isolated event do not have a major effect on the future life of a person. When inequality is an ongoing condition, it can become one of the central themes of a person's life.

A second reason is that ongoing inequality of groups has broad social consequences. Ongoing disadvantage of a group can contribute to a cycle of poverty that is harder and harder to change over time. Disadvantage also often creates resentment. Whether this resentment is expressed in a form that is blatant or subtle, active or passive, self-destructive or destructive of the interests of others, society at large is affected in many ways, including crime and costs associated with poor health. The lost productivity of those who experience the inequality also affects society.

A third reason is that a remedy which corrects ongoing patterns of inequality has greater benefits than one that simply provides compensation for past discrimination. Correcting an ongoing policy or practice does more than assist those originally subjected to the discrimination. It prevents future discrimination against others, avoiding harm before it occurs. It also avoids future human rights cases arising out of the same policy or practice, saving both the government and the parties involved additional expense.

In short, persistent patterns of discrimination cause the greatest harm both to society and to the people affected. They also have the greatest potential for an effective remedy. The strategies for correcting these policies are discussed in later sections of this Report. Sometimes they involve litigation and sometimes other means such as information programs or the setting of standards. But a human rights statute that ignores these patterns of inequality will almost certainly not live up to expectations.

2. To Redress Discrimination Against Individuals

A second objective is to provide redress to individuals who experience discrimination, whether or not that discrimination is associated with broader systemic patterns. While individual cases of discrimination may have more limited consequences, those consequences are often serious for the people directly involved. Discrimination often causes economic harm. It usually has emotional and psychological consequences ranging from simple anger to the destruction of dignity and self-worth. Individuals affected deserve redress that is quick and effective.

Ideally, this redress would occur while it is still possible to correct the situation and maintain relationships between the parties. When that is not possible, an appropriate remedy for past conduct should be available.

This objective has been the central feature of human rights statutes, both in British Columbia and elsewhere in Canada. Though this Report recommends that the legislative purpose be extended to encompass other objectives as well, providing a remedy to individuals must remain an important feature of human rights protection. The Supreme Court of Canada has held that there is no general law against discrimination apart from human rights statutes. Therefore, it would be unthinkable to abandon the protection of individuals in our attempts to correct systemic patterns of inequality.

3. To Prevent Discrimination Before It Occurs

In one sense, the best remedy of all is no remedy. In other words, a key objective of any efficient and effective system of protecting human rights should be to prevent inequality before it occurs so that no remedy is needed.

It is worth reviewing the advantages of prevention even though many of them are obvious. Prevention minimizes harm. It also is usually the least expensive alternative if all costs are taken into account. Prevention may require training programs, modifications to the workplace or changes in procedure that cost something to implement. Those measures almost always have benefits that are ongoing, however, and the costs of maintaining preventive measures are usually modest once the measures are in place. In addition, preventive measures often contribute to productivity.

Preventive measures are generally the option most consistent with the autonomy of organizations. They measure success in terms of results and let the organization decide how best to achieve those results. It is true that they may involve standards for implementation. For example, they might specify how to construct a building in order to provide access to people with disabilities. But such standards are in many ways less intrusive than a determination after the fact that, for example, an employer should have chosen a different applicant on a particular occasion.

Not all preventive strategies work. When done well, however, they can be very effective, in part because they avoid the animosity that is often associated with litigation.

4. When Discrimination Does Occur, to Provide an Effective, Expeditious Remedy Through a Fair Process

This set of objectives operates in tandem with the first two objectives listed. Inevitably, some discriminatory conduct will occur no matter how good the preventive measures. When it does occur, a remedy must be available.

Preventive measures and legal enforcement work in tandem. It is human nature to take greater care when there is a penalty for failing to do so. Even the most conscientious citizen is less likely to speed if the road is being patrolled. Steps to achieve equality are no exception, and preventive measures are more effective if there is an enforcement process available if discrimination occurs.

Any assessment of human rights laws must consider whether the enforcement process is effective. Effective does not mean the same thing as severe. For example, a remedy with high penalties may be ineffective because no one can afford the litigation costs or the rules of evidence make a violation impossible to prove. Effectiveness must take account of factors such as whether the process is accessible, whether the cost is high or low, both in monetary and emotional terms, and whether the remedy is appropriate to the circumstances.

A remedy must also be expeditious. At almost every meeting that took place during the consultation phase of the Review, participants pointed out the harm that delays in the system can cause. People who had filed complaints said that the process sometimes takes so long that it was not worth the effort. Business representatives pointed out that a long process is also a costly one. They also noted the emotional burden and uncertainty caused when an allegation is pending for years, particularly if it turns out that the Human Rights Act was not violated. Trade unions agreed with all of these points, based on their experience both in representing their members and in defending themselves against complaints.

Fairness is also a crucial consideration. All legal proceedings should be conducted fairly, but fairness is a particularly sensitive matter in human rights cases. These cases often involve issues of considerable emotional impact. Those who file complaints want to be sure that their side of the story will be heard and properly evaluated. Those against whom complaints are filed agree and need the assurance that they will be fairly judged. If they do not have confidence in the system, they are unlikely to implement any remedy that is imposed in a way that makes the remedy truly effective.

It is not easy to achieve effectiveness, expeditiousness and fairness at the same time. If the attempts to achieve fairness lead to an unduly complicated and technical process, the process will be long and not very effective. On the other hand, the desire to eliminate delay may make it tempting to take shortcuts that undermine fairness. The goal must be to try to find ways to implement each of these objectives without undermining the others.

5. To Monitor Equality Trends and Patterns in Society

Many factors interact to cause inequality. Income levels, opportunities for education and training, residential patterns, employment practices and eligibility for government programs may all contribute to a situation affecting a particular individual or group. One objective of human rights enforcement should be to monitor patterns of equality, to identify all the factors contributing to the inequality and to recommend solutions that take account of the interaction of different systems.

This monitoring would not be concerned directly with the enforcement provisions of the Act or with the complaints process. Instead, it would entail research and consultation. It would allow the agency to formulate advice to government and to inform the public about matters of social importance going beyond the kinds of issues that might lead to a complaint.

Many equality issues require consideration of a wide range of factors involving different organizations and sectors or activity. For example, it may be impossible to get at the root of inequality in employment experienced by people with disabilities by looking only at the conduct of employers. It may be necessary to examine the educational system, the health care system, the rules about eligibility for social assistance, and licensing requirements, as well as the criteria used to select employees. In theory, each aspect could be examined in a separate human rights complaint. However, it would be very difficult to examine all of these areas by means of a long series of separate cases against different organizations. Even if such a course of litigation were possible, no one would be in a position to see the cumulative effect of these different systems.

The written submissions and contributions at consultation meetings frequently raised broad equality issues of this kind. Poverty organizations said that lack of affordable housing, low benefits and discriminatory refusals to rent often interact to exclude people on social assistance. Workers and trade unions referred to the interaction of barriers created by the Workers' Compensation Act, policies of employers and the terms of collective agreements. Domestic workers cited the interaction of immigration rules and gaps in employment standards protection.

Some part of the system for protecting human rights should have the capacity and resources to identify such patterns and bring them to public attention. Even the broadest of systemic cases will not be able to accomplish this task. A different kind of process for research and monitoring is needed.

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VI. Human Rights Acts As One Part Of Human Rights Protection

The mandate for this Review was to make recommendations regarding the Human Rights Act. The mandate did not extend to a general review of the state of equality in British Columbia. Naturally, the recommendations focus on changes to the Act. The Report would do a great disservice, however, if it gave the impression that the Human Rights Act is alone capable of dealing adequately with problems of inequality or if it discouraged other initiatives to do so.

This Report has tried to identify broader patterns of inequality that have a particularly severe effect on some groups within society. It recommends ways that the Human Rights Act can make a larger contribution to modifying those patterns of inequality. But no matter how it is improved, the Act will fail if it is expected to do this job alone.

There are a number of reasons why it cannot meet those kinds of expectations:

1. The Need for Concerted Action

Solutions often require joint action of many parts of government as well as the private sector. The B.C. Council of Human Rights, like its counterparts in other jurisdictions, is just one agency within one ministry. It does not have the power to change laws or provincial budgets, and it has limited power to change the policies of other parts of the provincial government or of local governments.

2. Limits on the Scope of Complaints

The human rights enforcement machinery is complaints-based. In other words, it takes a complaint by a particular individual or group against an identified individual or organization to put the machinery in operation.

No single complaint under the Act could cover all aspects of a problem that involves the interaction of different parts of government plus organizations in the private sector, such as some of the examples described earlier. Even when a single organization is responsible for the inequality, a complaints-based system will often be inadequate by itself.

3. Limits on the Accessibility of a Complaints-based System

For a complaint to be filed and accepted, several elements are necessary. A person must have some indication that discrimination may have occurred. That person must also have the knowledge, resources and initiative necessary to contact the B.C. Council of Human Rights. For a complaint to succeed, the investigative process must be capable of gathering the necessary evidence.

This process, no matter how finely tuned and effective, inevitably misses many sources of inequality. A particular individual who is an unsuccessful applicant for a job may have no indication that the rejection resulted from a discriminatory barrier, even when such a barrier

exists. The inequality may only become apparent if the cumulative effect of hiring decisions over time is examined or if the entire selection process is assessed. Since no single applicant will have this information, it is unlikely that anyone will file a complaint when the underlying cause is a series of subtle systemic barriers.

Even if particular individuals do have an indication that a barrier to equality affected hiring decisions, they often will not file a complaint. They may not even know that the Human Rights Act exists. Language barriers may discourage them from contacting the B.C. Council of Human Rights. They may fear that knowledge of the complaint will become public and cause them to be labelled as a "troublemaker", making it harder for them to obtain other jobs. Many participants at the public meetings during this Review expressed a fear of retaliation, and some told stories of actual retaliation. Whether such a fear is legitimate or not in the particular circumstances, it will often cause a person to decide not to contact the Council.

A particularly serious concern is that those people who experience the most severe inequality are less likely than others to file a complaint. Past discrimination often has denied these people the education that would give them the skills to use the complaints process. People struggling with poverty may not have the time or resources to make a complaint. For some, discrimination is such an everyday occurrence that a long and strenuous effort to deal with a particular event seems beside the point. Experience with other government programs and institutions sometimes creates distrust of all governmental agencies, including the B.C. Council of Human Rights.

4. Focus on the Individual in Investigations

If a complaint is filed, the investigation may not uncover the underlying cause of the discrimination. The focus of the investigation is almost always on the events directly relevant to the decision about the complainant. Once those facts are determined, there is little incentive to go further. If, for example, the evidence shows that the person who filed the complaint was justifiably rejected for a job, the investigation probably would not examine the selection process to see if it was unfair to other applicants. In addition, the parties may agree to a settlement consisting of a monetary payment, leaving the systemic barriers in place.

If the only objective of human rights legislation were to provide a remedy to the individual, some of these problems would be less serious. For example, a settlement to the mutual satisfaction of the parties would constitute a completely successful resolution of the matter.

If, on the other hand, a key objective is to change persistent patterns of inequality, these limitations are often fatal. Barriers to equality affecting large numbers of people may never come to the attention of the B.C. Council of Human Rights because no one has the information necessary to start the complaints process. If a complaint is filed, the investigation may not be sufficiently broad to uncover the barriers and may focus on the individual situation. The hearing will also usually focus on the individual.

A complaints-based system also makes it difficult for a human rights agency to set priorities and to focus on the most serious problems of inequality. In effect, the priorities of the agency are set by those who choose to file complaints. They often are not the people who experience the most significant inequality for the reasons already mentioned. As a result, human rights agencies are sometimes criticized for devoting too much of their time to relatively minor instances of discrimination though the type of complaints that are filed is largely beyond their control.

A complaints-based system is least effective in dealing with the subtle effects of seemingly neutral policies and practices. Often, no one has the information needed to file a complaint about such practices. Indeed, the organization itself may not realize that a policy has an unintended discriminatory effect.

Amendments to the Human Rights Act in 1992 expand the power to deal with broader systemic issues. In particular, they give individuals and groups with knowledge of human rights violations the power to file complaints even though not personally affected. They also allow new remedies to deal with systemic barriers, including the adoption of an employment equity program or other special program.

This Report contains recommendations to further strengthen the capacity of the Act to deal with broader systemic barriers. Yet it would be a serious error to assume that such modifications will be sufficient by themselves to meet the objective of changing persistent patterns of inequality. No complaints-based system can adequately meet that objective by itself. As Rosalie Abella stated in her Royal Commission Report:

Resolving discrimination ... on a case-by-case basis puts human rights commissions in the position of stamping out brush fires when the urgency is in the incendiary potential of the whole forest.

The lesson is that Human Rights Act should be one of a number of tools that work together to deal with inequality. It has an important role to play, but other measures are also needed.

Other jurisdictions use a variety of additional tools to deal with persistent patterns of inequality. Besides the Canadian Human Rights Act, the Federal Government has enacted an Employment Equity Act and instituted a contract compliance program. The federal Employment Equity Act has been criticized on the ground that the remedies are inadequate. However, it does provide information that is not available regarding provincially regulated organizations in B.C. Ontario has also enacted an Employment Equity Act, as well as a Pay Equity Act, and Manitoba has introduced initiatives limited to the public sector.

In the United States, businesses with more than 100 employees are required to file reports regarding the composition of their work-force and are subject to litigation if the data reveals patterns of inequality. Firms that make contracts with the government are required to meet certain requirements concerning their employment practices and to take affirmative measures if

patterns of inequality exist in their work-force. The Americans with Disabilities Act requires other affirmative measures of employers and service providers. In the United Kingdom and Europe, a variety of other laws require positive measures to deal with discrimination.

Because such measures are beyond the scope of this Review, this is not the place to assess their merits in detail. A key feature of all of them is that the process does not have to be triggered by a complaint of past discrimination. They also incorporate goals and standards that are more consistent with other management decisions.

In some respects, laws such as these go further than traditional human rights statutes. They often contain reporting requirements, set certain standards (for example, accessibility standards) and mandate positive measures to correct barriers to equality. In other respects, however, they are less intrusive than traditional human rights legislation. Instead of asking why an organization made a particular decision about an identified person, they measure results over time. For example, instead of asking why a particular woman was not promoted, they measure whether women and men in general have equal opportunities for promotion, taking account of the number and availability of qualified applicants. Because they are based on standard-setting and objective measures of results, they leave the details of implementation to the organization itself and do not try to second guess the motives for particular decisions.

If prevention and eliminating persistent patterns of inequality are important objectives, initiatives in addition to the Human Rights Act are necessary. This point was noted in a number of submissions to the Review, including those of the B.C. Human Rights Coalition, the Japanese Canadian Citizens Association, and the B.C. Division of the Canadian Union of Public Employees. However, it would not be sensible to simply copy a scheme that exists elsewhere. It is necessary to examine the advantages and disadvantages of these initiatives and to determine what measures would be most suitable for conditions in British Columbia and most compatible with other British Columbia statutes and programs.

1-1 It is recommended that the Government of British Columbia actively study measures in addition to the Human Rights Act to correct persistent patterns of inequality. The study should include an examination of employment equity and pay equity legislation and of contract compliance programs. It should also examine laws and programs outside North America that may provide innovative solutions.

Though the mandate of this Review does not cover such initiatives, it does include a study of the way in which the Human Rights Act interacts with other laws and programs. Of course, it is impossible to consider details of the way in which the Act might operate alongside future laws until decisions are made about those laws. However, the Review has included consideration at a more general level of ways to make the Human Rights Act compatible with such initiatives. In particular, later recommendations in this Report recommend a tribunal structure that could be expanded to cover proceedings under other initiatives, minimizing the risk that parallel proceedings would lead to inconsistent results.

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• current status of human rights protection in British Columbia

This section of the Report describes the existing Human Rights Act and its administration. It also gives an overview of the submissions made to the Review about the Act and the information received during the consultation phase of the Review. It concludes with an assessment of the areas that are working well and those which need improvement.

A. the human rights act and how it operates

The current Human Rights Act came into effect in 1984. It replaced the 1973 Human Rights Code. The Human Rights Commission that had been responsible for administering the Code was dismantled and the staff dismissed. A new enforcement system was not put in place for several months. These events provoked a strong negative public reaction.

The legislation seemed to de-emphasize activities designed to eliminate patterns of discrimination. Instead, the aim was to provide a remedy to identified individuals through an enforcement mechanism that caused the government minimum expense. For example, the open-ended prohibition of discrimination "without reasonable cause" was replaced by a fixed list of grounds. Reference to education was deleted from the legislation, and the right to complain was restricted to the person who experienced discrimination (or another on that person's behalf). Responsibility for carriage of the complaint was transferred from the agency to the complainant. New limits were placed on damage awards.

Enforcement has gradually been modified since 1984. The Act has been amended several times. Some of the amendments have been fairly minor and technical, but others have been more significant. The most significant amendments were enacted in

1992. They expanded the prohibited grounds of discrimination, broadened the power to file complaints and provided a broader range of remedies. The section concerning discriminatory publications (section 2) was amended in 1993, again provoking controversy.

In addition to the statutory amendments, changes in administration have been made over the years. For example, staff were hired to assist with intake, though the staff is still small in comparison with human rights agencies in many other jurisdictions. Despite the lack of explicit statutory authority, educational programs were initiated. In short, the general trend was to expand enforcement beyond that which seems to have been contemplated in 1984.

Ten years of experience confirm some of the criticisms that were made about the legislative changes in 1984. For example, the fact that the Act does not mention educational programs has made it difficult to initiate these programs and to obtain the budget necessary to carry them out. On the other hand, other changes have proven to be beneficial. Most notably, the B.C. Council of Human Rights, the agency responsible for enforcement, has become in effect a permanent tribunal. This system provides greater continuity and greater opportunity to develop expertise than was provided by the 1973 Code.

In light of this experience, it is appropriate to review the existing Human Rights Act to identify both its strengths and its weaknesses.

1. **What the Act Covers**

   The Human Rights Act protects against named grounds of discrimination in certain areas of activity. It does not protect against all forms of unfairness or all types of conduct. Also, it only applies to conduct that is within the jurisdiction of the

provincial government. Areas within federal jurisdiction (e.g. airlines, banks and radio and television stations) are covered by the Canadian Human Rights Act, which is not part of this Review.

The B.C. Act covers the same types of conduct as most other Canadian statutes. The Act prohibits discrimination in four general areas. The first is "any accommodation, service or facility customarily available to the public." This phrase covers a wide variety of activities ranging from hotels to universities and from corner grocery stores to ministries of government.

The second area is the sale and rental of land, buildings and the like. This area covers apartments, condominiums and business premises, for example. The statute covers the sale of property and the rental of property in two separate sections, and the protection for the two is not identical. For example, it prohibits an owner from refusing to rent an apartment to people with children, but it is not illegal to restrict a condominium development to adults.

The third area covered is discrimination in employment. The Act prohibits discrimination by employers, trade unions and employment agencies. It covers a number of areas, including a refusal to hire a person, a termination of employment and other discrimination while a person is employed. Employers cannot pay members of one sex less than members of the other sex for substantially similar work. The Act also covers discriminatory advertisements. Trade unions and occupational associations cannot deny membership or discriminate in other ways such as denying services.

The fourth area covered is discriminatory publications. The Act applies to all forms of publication, whether a book or a sign in a window. It prohibits publications that indicate an

intention to discriminate, as well as publications likely to expose a person or a group or class of persons to hatred or contempt.

To make a claim, a person must show not only that there has been discrimination in one of these four areas, but also that the discrimination was based on a ground covered in the Act. The Act does not cover all possible grounds of discrimination. For example, the denial of a public service based on the municipality in which a person lived or a person's occupation would not be covered.

Certain grounds are prohibited in all the areas of activity mentioned. They are race, colour, ancestry, place of origin, religion, marital status, physical or mental disability, sexual orientation and sex. In addition, discrimination based on age, family status, political belief and unrelated criminal convictions are prohibited in some sections, but not others. For example, age discrimination is prohibited in employment and the rental of property, but not in public accommodation and services or in the sale of property. Also, the protection against age discrimination only applies to people between the ages of nineteen and sixty-five.

Besides prohibiting discrimination in the four areas described, the Act prohibits retaliation against a person who has filed a complaint or is named in a complaint or a person who gives evidence or assists in other ways in carrying a complaint forward.

The Act contains a number of exemptions and defences. For example, public accommodation, services and facilities can be denied if there is bona fide and reasonable justification, and employers are allowed to refuse employment if the refusal is based on a bona fide occupational requirement.

There are also exemptions that apply in certain circumstances to a variety of matters. Exemptions cover areas such as insurance policies and pension plans, the activities of non-profit organizations representing a group, such as religious organizations and organizations promoting the interests of a particular cultural group. If one of these exemptions or defences applies, conduct is legal even if it has a discriminatory effect.

The statute also allows employment equity programs and other special programs such as programs to provide equal educational services. As discussed more fully later in this Report, these programs are not exemptions from the statute. Instead, they are mechanisms to achieve equality and to eliminate the effects of past discrimination.

2. **How the Process Works**

The first step in a human rights complaint usually involves a telephone call to the B.C. Council of Human Rights. The caller explains the situation and is advised whether it is covered by the Act. If it is, an intake/mediation officer prepares a complaint form and sends it to the person for review and signature.

The Council also has a policy of giving priority to certain cases at the intake stage. For example, if a person is denied an apartment that is still available at the time of the call, the intake officer will attempt to mediate the issue as soon as possible.

If the complaint is not mediated immediately, the next step is a decision whether or not to investigate it. The intake/mediation officer has the power to refer the complaint to investigation. However, a complaint can be dismissed at

this stage in four circumstances: if it is outside the Council's jurisdiction, if it could be better dealt with under another statute, if it was made more than six months after the activity complained of, or if it is trivial, vexatious, or made in bad faith. Only a three person panel of the Council itself can dismiss a case at this stage; the power is not delegated to staff.

One of the main differences between the court system and the human rights system is that the latter involves an investigation process. The central purpose of the investigation is to gather the facts. In practice, the investigation also provides an opportunity to explore the possibility of settlement. Other functions of the investigation are to assist the Council in determining whether or not it should hold a hearing and to help the parties to prepare for a hearing.

In gathering evidence, the investigator usually relies on the parties to supply most of the information. Though the investigator has the power to compel parties to supply evidence, this power is not extensively used, and there is some doubt about its effectiveness.

The investigations are conducted by Industrial Relations Officers who work in the Employment Standards Branch of the Ministry of Skills, Training, and Labour. The Act does not establish any particular procedure for the investigation. Often the first step in the investigation is a fact-finding conference at which both parties and the Industrial Relations Officer review the dispute. In addition to holding interviews with both parties, the Industrial Relations Officer also can interview other witnesses of both sides. Sometimes the investigator will ask the parties for other evidence, such as written documents. Frequently, the investigator will attempt to arrange some settlement during this process. Almost one-quarter of all cases are settled at this stage.

After the investigation is complete and if the case is not settled, the Industrial Relations Officer prepares a report summarizing his or her findings. The report usually includes an analysis of the complaint and may also contain recommendations about the case. The investigation report is sent to the Council and to both parties, who have thirty days to comment. The case is then reviewed by the Council. One member of Council can send the case to a hearing, but a panel of three members is required to dismiss it. If the case is dismissed, the Council gives the parties written reasons for its decision.

At all stages of the process there is an emphasis on settlement and mediation. The intake/mediation officer tries to mediate some complaints as soon as they are received. The investigator also attempts mediation, and there is often a further attempt to mediate after the investigation has been completed. There is no requirement that settlements be reported to the B.C. Council of Human Rights, and the parties can agree to keep settlements confidential.

If a case is referred for a hearing, the hearing is held before a single member of Council who has not been previously involved in the preliminary rulings about that case. In effect, the members of the Council are like a permanent tribunal whose main function is to preside over hearings. The member of Council who hears the case has the power to require witnesses to come to the hearing and to give evidence or produce documents. But unlike civil trials, the parties cannot require each other to produce material before the hearing (a process called discovery). However, the Council sometimes holds pre-hearing conferences even though there is no specific provision for this procedure in the Act.

The hearing is relatively formal, though not all the

technicalities and rules of evidence that would apply in a court of law are applicable. Each party can present documentary evidence, call witnesses, and cross-examine each other's witnesses. The evidence is recorded and a transcript is often prepared.

After the hearing is over, the member of Council who heard the case prepares a decision. In relatively straightforward cases, the decision is given orally or by letter within a few days of the hearing. (An oral decision is later transcribed and released in written form.) In more complicated cases, a formal written decision is prepared. Most decisions are published in the Canadian Human Rights Reporter, which is available in law libraries, and the Council will provide copies of decisions on request. Any dissatisfied party can apply to the court for a review of the Council's decision.

If there has been discrimination, the decision will always include an order to stop the discrimination. The order may also require the person who discriminated to take corrective steps such as re-hiring the person who was wrongly fired or to give a person the next available apartment in a building. Usually the most important part of the order is compensation for lost wages and for injury to dignity, feelings and self-respect. Since 1992, the Council also has had the power to order an employment equity or other special program, but there is not yet enough experience to indicate how this power will be used.

Once an order of the Council is filed in the Supreme Court of British Columbia, it can be enforced in the same way as other court orders. It is the responsibility of the complainant to enforce the remedy.

In most provinces, the Human Rights Commission itself

represents the complainant at the hearing. Respondents provide their own lawyer. From a complainant's perspective, the advantage to that system is that the Commission is responsible not just for securing a remedy for the individual but also for correcting broader patterns of inequality.

In B.C., complainants are represented through lawyers appointed by the Legal Services Society. All complainants are eligible for legal aid without meeting the usual financial needs test. This legal representation is justified on the basis that discrimination is a wrong to the public as well as to the specific individuals. Respondents are eligible for legal aid only on a very limited basis and must meet a needs test.

3. **Other Activities of the Council**

Most of the activity of the B.C. Council of Human Rights is devoted to dealing with complaints. However, the Council also performs other functions. For example, it carries out educational activities, although they are limited by lack of resources. It also has the power to approve programs and activities that have as their object the amelioration of conditions of disadvantaged individuals or groups. If a program or activity meets these objectives, it cannot be challenged under the Act.

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- **what we heard**

Sixty-six consultation meetings held across the province, from Fort St. John to Victoria and Prince Rupert to Cranbrook. These meetings included roundtable discussions with human rights groups, labour groups and business groups, as well as meetings to which all members

of the public were invited. In addition, there were meetings with specific groups, including a variety of human rights and civil liberties groups, the B.C. Federation of Labour, the Business Council of B.C. and the Coalition of B.C. Businesses. Many of these groups made written submissions, as well as participating in the meetings. The Ministry of Environment, Lands and Parks and Ministry Responsible for Multiculturalism and Human Rights provided funding to assist groups in preparing these written submissions.

During the meetings, many ideas were discussed. Representatives from the labour and business communities offered their expertise in labour relations, administration and management. Community groups drew on their work with individuals and groups affected by discrimination. Individuals presented their first-hand experience.

The consultation also included a survey of parties to human rights complaints. With the approval of the Information and Privacy Commissioner, approximately 400 letters were sent to a sample of complainants and respondents. The sample was designed to represent different kinds of cases (for example, cases that were settled before hearing as well as cases that went to hearing), but within each group, a random sample of parties was contacted. Participation was completely voluntary, and safeguards were put in place to protect the privacy of those who responded. Most of the responses were from complainants, though respondents also took part. Participants devoted considerable effort to this process. They provided a valuable perspective on human rights enforcement.

Although we heard from many different people representing different points of view during the consultation process, a number of common themes emerged. Among the themes that were raised most often were the following:

The Need For More Education and Information:

Participants told us they wanted a human rights process that focused more on education. For example, one participant voiced her frustration with the present system pointing out, "What the public is told about human rights is totally limited. We hear about human rights only when the media decide to report on the occasional sexual harassment case. We are not even told what our human rights are, let alone informed of the latest developments in the area."

The majority of other participants echoed this sentiment. Support for expanded information and education came from human rights groups, labour groups and business groups alike.

During the consultation meetings, many participants said that they did not know how to file a human rights complaint before their involvement with the Review. The survey of parties to human rights complaints confirmed the conclusion that most people do not know how to start a complaint or find out only after considerable effort. People in various ethnic communities pointed out that most of the human rights literature available is written in the English language, that it fails to reflect cultural differences and that access is difficult.

Participants in the labour and business meetings also expressed the need for increased information. We heard that most unions and businesses would like to be more informed about concepts such as the "duty to accommodate." Many employers wanted to see a human rights system that would provide advice about the validity of different business practices and policies. Labour and Business groups alike expressed the need for more information on what kind of behaviour constitutes a violation of the Act.

The Need for a Faster Process:

Another common concern raised at almost every meeting was the time it takes to get a human rights claim through the present system. Individuals and community groups said that expecting a complainant to

endure discrimination for this long is unfair. Business groups said that a lengthy process is expensive and that the process can damage the reputation of an employer before any hearing takes place.

Many participants also pointed out that this delay often deters people from filing a claim. Moreover, it makes an investigation more difficult, since key witnesses may have moved away and other witnesses may have forgotten key facts. As a result, participants from labour, business, and community groups were all in favour of finding ways to speed up the process. Some of them proposed statutory time-limits on each stage of the process.

The Need to Improve the Investigation and Mediation Process

A number of participants suggested that the process of investigation and mediation needed improvement. This suggestion was made often by those who responded to the survey of parties to complaints. Not only did they say that the process took too long, but a number of them suggested that the investigation was not as complete as it should have been.

The mediation process also received a mixed review. Some participants found it an effective method of resolving the conflict, while others suggested that there was too much pressure to settle and that the process sometimes created a feeling of powerlessness. Others said that the distinction between the investigation and mediation phases was not as clear as it should have been.

The Need for New Strategies Beyond Processing Complaints:

Participants also agreed that human rights protection should not be limited to a process that deals only with complaints as they are received. While there was not complete agreement as to the best alternative strategies, there was a consensus that we should search for such strategies.

Many participants said that the only way for a human rights system to address systemic discrimination effectively is to allow the human rights agency to initiate its own complaints. Throughout the discussions, participants also identified other advantages to establishing a human rights body with the power to initiate its own complaints. One participant pointed out that while the present system offers a remedy to the individual there is no body to monitor against the possibility of the respondent engaging in similar conduct toward other individuals. An agency that had the authority to initiate investigations would be able to address this kind of situation.

Participants who live in less populated areas of the Province described how social pressure can make it impossible for an individual to complain against another member of the same community. They called for an alternative process.

Representatives at labour meetings voiced their preference for a pro-active human rights body as well. They called for a process to deal with ongoing issues in the workplace. They also suggested that this process should be capable of dealing immediately with issues that disrupt the work environment.

Business representatives placed the emphasis on increased advice and assistance. They said that many businesses have no source of information about the requirements of human rights legislation or about strategies to bring their operations into compliance with the Human Rights Act. While these businesses want to comply, they sometimes find that they get into difficulty because of ignorance about what is required and how to achieve compliance.

The Need to Take Account of Other Legal Mechanisms

A variety of groups suggested that human rights enforcement should mesh more smoothly with other areas of the law. Business and labour groups noted that the grievance process and human rights process

sometimes overlap. Labour groups and groups representing injured workers pointed out that human rights protection is interrelated with workers' compensation issues. A variety of groups pointed out the overlap with employment standards legislation. There was agreement that conflict between the laws should be avoided. In addition, some participants said that human rights complaints should take account of the fact that the same facts may have been considered by another agency. Also, there were suggestions that the human rights process should consider the fact that the same issues may have been the subject of an internal complaints process.

The Need for Stronger Links with the Public:

Many participants also expressed the need for a human rights body that not only informed the public of its rights, but that listened to the needs of the community. Business representatives raised the point that a human rights agency can develop realistic and effective policies only if it understands the circumstances of different businesses. Community groups told us that the circumstances of different groups that experience discrimination must be taken into account. Labour groups described the need to understand the way human rights interact with other labour laws.

In order for a human rights body to respond effectively to the specific needs of a community, it must first be aware of what those needs are. Participants in almost every meeting recommended establishing some permanent consultation mechanism through which members of the community could share their practical expertise with the agency.

This Report tries to incorporate many of the suggestions made during the consultation process. That is particularly true of the proposals that had wide agreement. Sometimes it has been necessary to choose between different alternatives, and some suggestions require change to other statutes that are beyond the scope of this Review. But the origin of many of the recommendations in this Report is a suggestion by a

participant in the consultation process.

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- **Summary of advantages and disadvantages of present act**

Measured against the purposes of human rights protection outlined in Part I of this Report, the present system for enforcing human rights has a number of strengths. However, it also has significant weaknesses. Most of these weaknesses are related to the conflicting duties that the Act assigns to the B.C. Council of Human Rights.

The information collected during this Review suggests that the following strengths and weaknesses should be considered in formulating recommendations for change:

1. **Areas Deserving Consideration**
    a. **Limited Effectiveness in Eliminating Systemic Patterns**

        The system is of limited effectiveness in correcting systemic patterns of inequality affecting groups. To a considerable degree, this disadvantage is inherent in any complaints-based system. Part I recommended that the government study additional legislation and noted that the Human Rights Act cannot be expected to meet this objective by itself. Apart from those inherent characteristics, however, there are elements of the existing system that prevent the Act from contributing to this objective as effectively as it might.

        One limitation is the lack of resources for information and education programs. An effective strategy for correcting patterns of inequality would include information to assist organizations to eliminate discriminatory barriers. A second limitation is that no public body can initiate proceedings of a systemic nature. A third limitation is that the Council does not

have its own investigators. The present arrangements make it difficult, if not impossible, to conduct the broad, sophisticated investigation that is needed to change systems. Other elements such as limits on the power to obtain relevant documents also make it difficult to deal effectively with systemic inequality.

b. **Accessibility of the System**

Many serious cases of discrimination never come to the attention of the Council. Again, part of the cause is that proceedings must start with a complaint, but the lack of information and support for complainants also contributes to this result. The lack of information is especially significant for groups that experience multiple barriers to equality and that often face the most serious discrimination. Unequal educational opportunities, language barriers, a reluctance to contact government officials and lack of hope that the situation can be changed all make it less likely that these people will file a complaint. The lack of advice and support for these people also has an effect. A human rights complaint can entail considerable effort. Participants at the consultation meetings also emphasized the emotional costs of bringing a complaint. Without support, people are less likely to assume these burdens.

Access is also uneven geographically. The statistics show that a disproportionate number of complaints come from the lower mainland and south Vancouver Island, even taking account of the fact that these are major population centres. During the consultation meetings, a number of people in other parts of the Province cited the need for some local source of information and assistance. It is now possible to contact the Council using a free long distance "800" line, but some participants argued for local service in person, either by

having a local office or by having human rights officers visit regularly. At present, some information is available at local employment standards offices in many communities, but many of the participants felt that this source of help was inadequate, in part because of the many other duties of employment standards officers.

c. **Need for Preventive Measures**

The system does very little to prevent disadvantage before it occurs. The lack of any legislative mandate for education has contributed to budgetary reductions that have almost eliminated educational and information programs. Amendments to the statute have increased the power to devise remedies to prevent future discrimination. However, the inability of any public agency to file a complaint, together with the fact that the Council has no investigative resources of its own, have made it very difficult to implement these new powers.

d. **Need for Systemic Remedies**

The objective of an effective remedy is partially achieved. Apart from the issue of delay, remedies for individual cases are relatively effective, assuming the case enters the system. However, remedies to deal with persistent patterns of inequality have not yet succeeded. The reason is not that these remedies have proved ineffective. Instead, weaknesses earlier in the process have prevented broad systemic cases from going to hearing, so that no such remedies have yet been awarded.

e. **An Expeditious Process**

The objective of an expeditious process is not being achieved.

It is true that the process is not as slow as in some other jurisdictions, and the existence of larger backlogs in other jurisdictions provides good reason to decline to adopt the model of enforcement that helped create that backlog. That is scant consolation, however, for people in B.C. whose cases have dragged on for several years.

Part of the reason for these delays is the lack of sufficient staff to process all complaints quickly. But there are other causes as well, most notably, the fact that the Council does not have its own investigative staff. Reliance on investigators whose primary job is to enforce other statutes means that human rights investigations are sometimes postponed. Because investigators work for a different ministry, effective management is more difficult. The training of investigators is also undermined, since human rights cases are only part of their job. Indeed, human rights cases are a small part of the duties of most investigators.

These comments should not be understood as a criticism of the investigators as individuals. They have many duties and a heavy workload. During the consultation meetings, no one criticized the commitment of the investigators to their job, and a number of participants singled out the investigator in their region for praise. However, there was universal recognition that these people work under difficult circumstances. The lesson is that the problem lies in the way the system is organized rather than in those who have to work within this system. It is almost impossible to make the human rights process as expeditious as it should be if the Council has no investigative resources of its own.

A contributing cause of delay is the time that elapses between setting a case for hearing and the final decision. On average, the final decision is released fourteen months after the case is

referred for a hearing. It is likely that a variety of factors contribute to this delay. The fact that the members of Council are also responsible for earlier stages of the complaint probably plays a part. Delays caused by the parties themselves or by their lawyers also contribute. But whatever the cause, it is worth seeking ways to shorten this stage of the process.

f. **A Separation of Roles**

As noted earlier, the objective of a fair process is generally being achieved. Nevertheless, the fact that the Council carries out the intake of complaints and is legally responsible for investigation does sometimes create a perception that the hearing itself may be influenced by this earlier involvement. Some business groups expressed the opinion that the involvement of the Council at earlier stages of the proceedings gave the impression that the Council was on the side of the complainant, though this opinion was far from universal. Such an impression can undermine the legitimacy of the process even if it is unfounded.

g. **Monitoring Larger Patterns of Inequality**

The existing system fails almost entirely to meet the objective of monitoring larger patterns of discrimination. Because its adjudicative role requires impartiality, the Council is not able to monitor and report on larger issues of equality. There is usually the risk that such a report would discuss matters that arise in future litigation, and the Council has rightly concluded that it must take pains not to prejudge a complaint. Moreover, the Council has no statutory authority to issue public reports of this nature. Since the Council is alone responsible for implementation of the Human Rights Act, this leaves a void that no one can fill.

2. Features That Should Be Retained

There are a number of features of the current system that are of proven value. While these features may be improved by relatively modest modifications, they represent strengths of the current system that, in general, should be retained:

- Amendments since 1984 have expanded the coverage of the Act. Some of these additions have been essential to bring the statute into conformity with the Charter of Rights and Freedoms. The areas of activity and grounds of discrimination covered are generally in line with the broader statutes in other jurisdictions. There are some gaps and uncertainties, and this Report makes recommendations to fill these gaps. However, it is more important to make sure that the legislation is effective in protecting those already covered than to contemplate a major extension of coverage.
- Because the B.C. Council of Human Rights is composed of full-time members, it has been able to develop expertise in administering and adjudicating human rights issues. Other models, such as the system of part-time commissioners used in many jurisdictions in Canada, make it more difficult to develop such expertise.
- While there is a need to expand efforts to deal with persistent patterns of inequality, those parts of the system designed to deal with individual complaints must be maintained. Indeed, they should be strengthened.
- On the whole, the system is perceived as fair. Some members of the business community recommended a separation of intake, investigation and adjudication. Some human rights groups cited the need for more effective legal representation for complainants. But the consensus was that the members and staff of the Council carry out their duties fairly and that the hearings themselves are consistent with the principles of fairness and natural justice. The changes to the system

should build upon this base.
- The current system makes good use of the resources available. Indeed, it can be argued that inefficiencies are tied to the lack of resources rather than to the wastage of resources. For example, lack of adequate resources for intake and investigation sometimes delays investigations and makes them more difficult and expensive to carry out than if they had been completed soon after the events in question occurred.

In summary, the existing Act focuses almost entirely on processing individual complaints of discrimination. In terms of that goal, the improvements most needed are to provide better access and to avoid delays. The overlap of functions of the B.C. Council of Human Rights may also sometimes create a perception of unfairness.

The more significant concern, however, is that the system is not designed to correct persistent patterns of inequality, to prevent discrimination before it occurs or to monitor and report on larger patterns of inequality. In other words, what the system does not do is a more significant source of concern than the way it does what it does.

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proposals for change

The following sections set out in some detail the changes recommended to strengthen the present system of human rights protection, while retaining the strengths of the present system. These changes are significant enough to require enactment of a new statute rather than trying to amend the existing Human Rights Act.

Human rights legislation has been recognized by the courts as fundamental legislation second only to the Constitution itself. It has a

status above other legislation. This special status should be reflected in the name of the statute.

It is proposed that a new statute be entitled the B.C. Human Rights Code. While there is no legal significance to the words "code" and "act," the former word better reflects the fundamental status of the legislation. It is the word now used in five Canadian jurisdictions. The only statute in British Columbia now called a "Code" is the Labour Relations Code, which is also a statute of special importance though it does not have the quasi-constitutional status of human rights legislation.

3-1 It is recommended that a new statute be enacted to replace the B.C. Human Rights Act and that the statute be entitled the B.C. Human Rights Code.

A. **How to organize the work: A new structure**

There are many ways to organize the work needed to provide effective human rights protection. The structure of the organizations responsible for this work will have an important influence on the effectiveness of the protection. The structure also affects the procedures that will be used and even the activities that are carried out.

The present structure of the B.C. Council of Human Rights inhibits its ability to perform simultaneously all the functions assigned to it. In particular, the Council must make sure that no other part of its activities jeopardizes the impartiality it needs to perform its adjudicative role. As a result, it must avoid certain activities altogether. For example, it cannot speak out publicly on human rights issues. Also, it cannot initiate a complaint or appear as a party at a hearing, since it would be hearing its own case if it did.

Other activities can be carried out by the Council, but they are restricted by the need to maintain impartiality. For example, the

Council must ensure that any educational material it distributes is not written in a way that would seem to favour one side at a future hearing. If a business asks the Council for advice about how to deal with a particular situation, the Council may be reluctant to provide a specific answer for fear of pre-judging a future complaint. When it supervises investigations, the Council must adopt procedures that ensure at least one member will obtain no information about the case so that this member has the impartiality necessary to conduct the hearing.

Because of these limitations, a new structure is needed. The members and staff of the Council have demonstrated unusual dedication to their work and have often been inventive in finding ways to minimize the effect of the limitations. But the structure should help people to carry out their work. It should not be a barrier that gets in the way.

1. **Objectives of a New Structure**

   The key objective is that the structure should allow all the statutory functions to be carried out with full effectiveness. This requires that the work be divided between different bodies. A single agency cannot effectively carry out all the functions simultaneously, no matter what other changes are made.

   The adjudicative function should be separated from other enforcement functions. This proposal has two aims. The first is to preserve the impartiality of adjudication. At present, the B.C. Council of Human Rights divides its duties internally so that there is always at least one member of the Council who has not taken part in the earlier stages of a complaint and who is in a position to adjudicate the complaint impartially. However, the involvement of other members of Council in earlier stages of a complaint may create a perception that the

Council has prejudged the case. Another equally important aim of this division of authority is to ensure that other components of human rights protection such as education, advice, monitoring and the representation of the public interest can be implemented without fear of undermining this impartiality.

A second objective is to preserve the expertise that presently exists within the B.C. Council of Human Rights. One of the advantages of the present structure of the Council is that Council members serve full-time. This makes it easier to develop the expertise needed to operate efficiently. It also promotes continuity and consistency. The proposed structure tries to retain these advantages.

A third objective is to devise a structure that can be efficiently and effectively administered. The structure should clearly delineate the responsibilities assigned to each officer within the system. It should also facilitate the coordination of different activities. The lines of authority should be clear to all.

A fourth objective is to avoid unnecessary costs. The existing system is under-funded, and some increase in the budget is warranted, as discussed later in this Report. However, it is crucial that the additional funds be devoted to direct services to the public and that administrative costs be kept to a minimum.

The recommendations in this Report use three strategies to keep costs to a minimum. First, they streamline the process so that no unnecessary procedures are used. For example, they can allow a case to go straight to hearing without an investigation. Second, they allow the sharing of administrative resources to perform such functions as accounting and clerical support. Third, they take advantage of outside

resources such as community organizations and business and labour organizations. They also provide safeguards against duplicate proceedings about the same matter.

2. **Overview of the Proposed Structure**

   It is proposed that responsibility be divided between two organizations: the B.C. Human Rights Commission and the B.C. Human Rights Tribunal. The Tribunal would be responsible only for matters relating to adjudication of human rights claims. The other functions that are now carried out by the B.C. Council of Human Rights would be assigned to the Commission. In addition, the Commission would have new responsibilities such as the power to initiate a complaint.

   The Commission would have three parts:

   - A Commissioner for Human Rights
   - A Director of Investigation and Mediation
   - A Human Rights Council of Advisors

   The Commissioner for Human Rights would be the focal point of the organization. The Commissioner would have overall responsibility for administration of the Human Rights Code. However, responsibility for enforcement would be divided between the Commissioner for Human Rights and the Director of Investigation and Mediation. The Commissioner for Human Rights would be responsible for matters such as education, research, monitoring of the status of equality in the Province and, when appropriate, initiating proceedings or intervening in proceedings initiated by others. The Director of Investigation and Mediation would be responsible, as the title suggests, for investigating cases and for mediating between the parties. This division should ensure that the system is capable of taking a more active role in achieving equality and

protecting against discrimination while promoting confidence in the impartiality of investigations and mediation efforts.

Establishing a separate Human Rights Tribunal would promote confidence in the impartiality of adjudication under the Code. It would also retain the advantage of a permanent tribunal, which can act more quickly and with more consistency than ad hoc tribunals. At present, the B.C. Council of Human Rights is in effect a permanent tribunal. Establishing a separate tribunal will retain the advantages of the present system while reinforcing the independence and impartiality of the tribunal.

3. **Human Rights Commission**
    a. **Possible Models for a Commission**

        Devising a structure for a new Human Rights Commission poses difficult questions. The limitations of the structure under the existing Human Rights Act have been described. An obvious alternative would be to adopt the model used in most other Canadian jurisdictions. That model assigns responsibility for administration to a human rights commission made up entirely or primarily of part-time commissioners. A variation of this model existed in B.C. from 1974 to 1983.

        The model has serious defects, however. They are summed up in the conclusion that human rights administration is no longer a part-time job.

        Part-time commissioners usually are chosen for their knowledge of broader human rights issues, their involvement in community affairs and education and their knowledge of particular communities within the larger community. Once appointed, these people spend most of

their time processing the complaints that are filed and considering administrative matters. One result is that the processing of cases is delayed because cases must wait for the next regular meeting of the commissioners. Often the workload is so heavy that the commissioners can do little more than rubber stamp the recommendations of staff. Moreover, they do not have time to take an active part in activities such as education and community liaison, though they were appointed because of their skills and experience in these very areas.

The Report of the Ontario Human Rights Review Task Force recently recommended a major restructuring of the Ontario Human Rights Commission because of these weaknesses.

Structures used in other countries also deserve consideration, but none seem entirely suited to the needs in B.C. Some of the models, such as that of Northern Ireland, deal with a narrow range of discrimination. Others, such as the model used at the federal level in the United States, do not fit easily into the Canadian legal system. Therefore, there is no obvious model that can simply be copied.

In considering different models, it may be helpful to start by identifying the different functions the Commission would be expected to carry out. Those functions include the following:

- Intake of claims
- Initiation of claims
- Investigation of claims
- Mediation of claims
- Litigation of claims

- Education and information
- Advice to persons who may experience discrimination
- Advice to persons responsible for compliance with the statute
- Research into the causes of inequality and identifying persistent patterns of inequality
- Monitoring societal trends and patterns relevant to achieving equality and reporting on those trends and patterns.

A wide range of structures might be devised to carry out these functions. There are arguments for assigning almost any of them to a specialized agency that would be responsible for nothing else. Yet there is also a need for coordination of different activities and for establishing a system that does not involve any unnecessary administrative expense.

No single model was identified that is clearly superior in all respects. Three options emerged which merited serious consideration, each of which had its own advantages and disadvantages, though all were preferable to the existing structure.

These three models have certain features in common:

- They establish a Director of Investigation and mediation to carry out those parts of the process that require impartiality and neutrality. Under all the models, this director would have autonomy regarding decisions about investigations and mediation, though the arrangements to preserve this autonomy are not identical in the different models.

- The models all incorporate a Human Rights Council of Advisors that would provide a link with all parts of the community that are affected by the Human Rights Code. The Council would also play a role in monitoring and reporting on broader patterns of inequality and would serve as a source of advice to all those responsible for human rights administration.
- The models also all assign responsibility for other functions such as education and information, representing the public interest in human rights litigation and monitoring and reporting on human rights issues to a person other than the Director of Investigation and Mediation. This division of responsibility would make it possible to take active steps to deal with equality issues without jeopardizing the impartiality of investigations or mediation. In model one, these functions are divided between two commissioners. In models two and three, they are assigned to a single commissioner.
- All the models also assume that adjudication would be carried out by a separate body, the B.C. Human Rights Tribunal. The advantages of separating adjudication from other functions were pointed out by a number of organizations, including the B.C. Civil Liberties Association and the West Coast Domestic Workers Association.

Model One:

A new Human Rights Commission would consist of three full-time commissioners. There would be a Chief Commissioner who would have overall responsibility for the administration of the Human Rights Code and who

would act as chair of the commission. There would also be two other commissioners: the Commissioner of Compliance and the Commissioner of Investigation and Mediation. As in all the models, there would also be a Human Rights Council of Advisors, and the Tribunal would be a separate body.

The Chief Commissioner would be the administrative head of the organization and would report on administrative (but not substantive) matters to the Minister. This person would also be the primary public spokesperson for human rights generally and for the Commission. The Chief Commissioner would be responsible for developing and implementing education and information programs, for reporting publicly on human rights issues and for relations with other parts of government.

The Commissioner for Compliance would be responsible for enforcement under the Act. This officer would ensure that complainants received appropriate support and assistance, though such assistance might be provided through other agencies such as the Legal Services Society. This Commissioner would also take steps to bring equality claims forward that had not resulted in a complaint. In particular, he or she would establish a systemic unit that would initiate and litigate claims involving systemic discrimination. The Commissioner of Compliance would also have the power to intervene in complaints made by others if the complaint raised concerns going beyond the interests of the claimant. This officer would also be responsible for ensuring that remedies were enforced.

The Commissioner for Investigation and Mediation would

be responsible for those parts of the system requiring neutrality. This Commissioner would receive and investigate claims and provide mediation services. The Commissioner would also be responsible for deciding whether a claim should be dismissed before or during an investigation and, whether the claim should be referred to the Tribunal for hearing. A decision not to send the case forward would be subject to review by the Tribunal. This Commissioner would be assigned adequate staff to carry out these activities and would not have to rely on other departments of government.

This model achieves the objective of separating the adjudicative function from the other functions. It should make it possible to carry out each function without interference with the others. Establishing three full-time commissioners, and integrating investigation and mediation activities into the Commission, would preserve and enhance the expertise that now exists. Having three commissioners may make the system less prone to bottlenecks than the two person models described below.

This model has advantages and disadvantages in terms of the goal of efficient and effective administration. Three full-time commissioners should facilitate coordination of activities. Also, assigning overall responsibility to a Chief Commissioner helps to define lines of authority. There is a risk, however, that the functions of the Chief Commissioner and the Commissioner of Compliance may tend to overlap. One possible result is duplication of effort. Another is that one of these positions would gradually assume the overlapping functions so that one position would become overloaded and the other under-utilized.

This model might also involve some additional expense, though the difference between the cost of this model and the others should not be exaggerated. In comparison with the other models, it provides for one additional statutory office. It is true that the other models would reassign much of the staff reporting to the third officer to the two remaining officers. However, an additional statutory official would entail the cost of additional support staff, as well as the salary of the third commissioner.

Model Two:

There would be a Human Rights Directorate (or Commission) consisting of two persons; the Commissioner for Human Rights and the Director of Investigation and Mediation. These offices would be housed together and would share resources such as administrative and support staff. However, the two offices would have independence from one another and would each report to the Minister on matters of administration. The two offices would have equal status within the public service.

As in model one, the Human Rights Directorate (or Commission) would have the advice and assistance of a Human Rights Council of Advisors, who would be chosen from the community and serve part-time.

The Commissioner for Human Rights would be responsible for all the functions divided between the Commissioner for Human Rights and the Commissioner of Compliance in model one. Therefore, the Commissioner would be responsible for matters such as

education and information, as well as for initiating systemic claims and intervening in claims brought by others when appropriate.

The functions of the Director of Investigation and Mediation would be almost identical to those assigned to this position in model one. The primary difference would be that the Director of Investigation and Mediation would not report to another commissioner for any purpose and would instead be an officer of equal rank who reported to the Minister.

The Commissioner for Human Rights and Director of Investigation and Mediation would share staff to carry out functions common to both of them such as accounting, human resources, informational and computer systems and clerical support. They would also share legal counsel. In the rare case in which sharing legal counsel created a conflict of interest, one of them would retain an outside lawyer.

There would be a strict separation, however, between the activities of the two officers. The investigation and mediation functions carried out by the Director require confidence in the impartiality of the process, and the Director would not participate in other activities that would undermine this confidence. For example, the Director would prepare factual information and statistics for the annual report of the agency but would not join in any conclusions or recommendations contained in the annual report. The Commissioner, on the other hand, would not participate in investigation and mediation activities.

Like model one, this model for a Directorate or

Commission would work in conjunction with the B.C. Human Rights Tribunal, which would be responsible for adjudication.

Of the three models, this option provides the most airtight guarantee of the separation of functions requiring impartiality, notably investigation and mediation, and other functions requiring a more active stance. Neither the Commissioner nor the Director would have any position of authority over the other.

The fact that the two officials would share support services would have the advantage of keeping administrative expenses to a minimum. There would seem to be no danger that the sharing of administrative services would have any adverse effect on the separation of the two functions. Both the Commissioner and the Director would have additional staff reporting only to them to perform those functions that might compromise the separation between the two offices.

This model is flatter and less hierarchical than model one. That is both an advantage and a disadvantage. On the positive side, it helps to achieve the goal of devoting as many of the resources as possible to direct services to the public. It is consistent with the trend to try to eliminate as many levels of middle management as possible.

On the negative side, there would be no one responsible for overall management of the agency. The lines of authority would not be clear. As a result, time could be wasted in internal negotiations about overlapping functions and about how to share resources. The only way to resolve such disputes might be to involve senior

officials within the ministry, and that could undermine the independence of the agency.

Clearly, the Commissioner and Director would have to find ways to cooperate to make the system work well. While management techniques exist to achieve such cooperation, implementing them would take careful planning. For example, an ability to work cooperatively with others would have to be one of the primary job qualifications of both positions.

There is little precedent in the public service for a model in which an agency is headed by two co-equal officials. The recent trend in both the public and private sector toward teamwork and levelling hierarchical structures suggests that this model should not be rejected simply because it is somewhat uncommon. However, model three achieves most of the advantages of model two while mitigating some of the disadvantages.

Model Three

Like model two, this model places responsibility for administration of all aspects of the Human Rights Code other than adjudication in two officials, a Commissioner for Human Rights and a Director of Investigation and Mediation. The two officials would divide responsibility in essentially the same way that it is divided in model two. The primary difference would be that the Commissioner for Human Rights would have overall responsibility for all aspects of administration other than adjudication, which would be assigned again to the Human Rights Tribunal. The Director of Investigation and Mediation would have autonomy over decisions about claims that had been filed, but the Director would report to the Commissioner

for Human Rights on administrative matters.

Because the Commissioner for Human Rights has final responsibility for questions of administration, there is less danger of "turf wars" or of unproductive negotiations than with model two. At the same time, this model represents a simpler and less hierarchical structure than model one, and there is less of a danger that the functions of the officials would be unclear or would overlap. This model should be somewhat less costly than model one.

The primary disadvantage in comparison with model two is that the independence of the Director of Investigation and Mediation is not quite as clear. Even though the Director's decisions about cases could not be overturned, the fact that the Director reported to the Commissioner for Human Rights for administrative purposes might cause some to think that the Director did not have sufficient independence.

Preferred Model

On balance, the risks of inefficient administration in model two outweigh the risks in model three that the Director of Investigation and Mediation would not be seen to be independent. Most human rights statutes in Canada do not make any distinction between the functions of investigation and mediation on the one hand, and other enforcement activities. Under most statutes the human rights commission takes a direct part in all of these functions. Therefore, model three represents a considerable move in the direction of ensuring that investigations and mediation will be treated as distinct from other enforcement functions.

The choice between model one and model three is difficult because the overall merits of the two models are almost equal. In the end, it is proposed that model three be adopted. However, both deserve serious consideration.

3-A-1 It is recommended that there be established a Human Rights Commission consisting of three elements: a Commissioner for Human Rights, a Director of Investigation and Mediation and a Human Rights Council of Advisors. The Commissioner for Human Rights should have overall responsibility for administration, but the Commissioner should not have the power to overrule decisions of the Director of Investigation and Mediation about claims that are filed. The Human Rights Council of Advisors should have the power to give advice and to make that advice public without being subject to the direction of the Commissioner for Human Rights.

The following sections outline in greater detail how model three would be designed and implemented. They also discuss the establishment of a new Human Rights Tribunal that would also be established. Although the discussion describes model three, most of the recommendations that follow could be implemented with minor modifications if either of the other two models were chosen. In particular, model one could be implemented by assigning the same duties to the Director of Investigation and Mediation as in model three. The Commissioner of Compliance would be assigned enforcement duties such as the initiation of systemic cases that are assigned to the Commissioner for Human Rights in model three. Model two could be implemented by making minor modifications to the reporting

arrangements for the two officials.

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b. The Commissioner for Human Rights

The Commissioner for Human Rights would be a position similar to the Ombudsman and the Information and Privacy Commissioner. The Commissioner for Human Rights would be the administrative head of the organization. This person would also have overall responsibility for human rights enforcement, though certain duties would be assigned by the statute to the Director of Investigation and Mediation or the B.C. Human Rights Tribunal.

Working together with the Human Rights Council of Advisors, the Commissioner would be the human rights conscience in British Columbia and would evaluate and report on human rights issues of public significance. When these issues came within the terms of the Human Rights Code, the Commissioner would take steps to deal with them. When they did not come within the Code, the Commissioner would call them to the attention of the government and the public and could make recommendations for solving them. For example, the Commissioner might call attention to a matter that constituted a violation of equality rights under the Charter of Rights and Freedoms, whether or not it was covered by the Code.

These responsibilities require that the Commissioner for Human Rights take an active role in seeking to achieve equality. While overall supervision of the claims process under the Code would be an important part of the job of the Commissioner, it would only be part. The Commissioner would also take other steps, whether through initiating claims or through advice and persuasion, to promote human rights.

Part I of this Report described the limitations of a complaints-based process in dealing with systemic discrimination and persistent patterns of inequality. The responsibilities assigned to the Commissioner for Human Rights are a step in the direction of circumventing these limitations. It was recommended in Part I that the government study the adoption of additional laws and programs to deal more effectively with these issues. The work of the Commissioner for Human Rights would be most effective if carried out in conjunction with other initiatives. In the meantime, however, it is important that the Human Rights Code itself become more effective in finding solutions to these issues. That role would be assigned to the Commissioner for Human Rights.

Selection and Appointment

The Commissioner for Human Rights should be selected through a process that is open and public. The process should also preserve the independence needed to carry out the duties of this position.

Two appointment mechanisms deserve serious consideration. One is appointment by the Cabinet (technically, the Lieutenant Governor in Council) from a short list of candidates submitted by a special selection committee appointed for this purpose. The Commissioner would then report through a minister, though the minister would not have the power to intervene in decisions made by the Commissioner. The second method is appointment on the unanimous recommendation of a special Committee of the Legislature. The Commissioner would then be an officer of the Legislative Assembly.

The Ombudsman, Information and Privacy Commissioner and Auditor General are all appointed on unanimous recommendation of a special committee of the Legislative Assembly. This option was supported in some submissions to the Review.On the other hand, other important tribunals such as the Labour Relations Board are appointed by Cabinet.

The advantage of appointment by unanimous vote of a committee of the Legislature is that this process provides the greatest protection against a partisan appointment and against interference from the government of the day. Such an appointment will require the consent of members of the opposition as well as of MLAs from the party in power. This process also would have a relatively high profile.

There are several disadvantages to this system:

- over the long run, this process may result in the appointment of compromise candidates, and compromise candidates are not necessarily the most outstanding candidates.
- if the Commissioner for Human Rights is an officer of the Legislature and reports to the Legislature, it can be more difficult to obtain the support within Cabinet for an adequate budget.
- political factors may affect the response of such a committee in making decisions other than decisions about appointments, and changing composition of the committee could require the Commissioner to devote considerable time to establishing relations with new members.

While the option of appointment by a special committee of the Legislature deserves, and received, careful consideration, it is proposed that the

appointment be made by the Cabinet with the participation of an outside selection committee. The duties of both the Ombudsman and the Information and Privacy Commissioner relate primarily to the activities of the Provincial Government itself. Therefore, independence from the executive branch of government is paramount over almost all other considerations. Though the Human Rights Commission will often deal with cases involving government, that is not its sole focus by any means. As a result, other considerations should play more of a part.

One such consideration is participation in the selection process by members of the public who are not a part of government. It would be unlikely that non-governmental members of the public would be involved if the choice was that of a legislative committee.

The current practice for selecting members of the B.C. Council of Human Rights is to publicly advertise the opening. Applicants are then evaluated on objective criteria. A short list of applicants is then interviewed by a committee that includes community representatives. This process has received praise and compares very favourably with the process in many other jurisdictions. It should be retained and entrenched in the statute.

It is proposed that the Commissioner for Human Rights be appointed by the Lieutenant Governor in Council (Cabinet) from a short list of candidates submitted by a selection committee. The procedures to be used and the method of choosing the selection committee would be established by regulation. This process would have some similarities to the process for appointing judges under the Provincial Court Act. Judges are appointed by Cabinet on recommendation of the Judicial Council, which includes non-governmental members.

The Commissioner should be responsible to the Minister who is in turn responsible for human rights. However, it is crucial to maintain an arm's length relationship that precludes government interference in the activities of the Commission.

The Commissioner for Human Rights will have overall responsibility for enforcement under the Human Rights Code. The government is the largest employer and service provider in the Province, and the public must have confidence that the Commissioner has the necessary independence when considering the conduct of government. Moreover, the Commissioner will have the duty to monitor and inform the public about equality issues, whether or not they are the basis of a claim under the Act. Such issues will often involve the government in one way or another, and independence is needed to carry out this role.

At present, the Human Rights Act provides that the members of the B.C. Council of Human Rights shall "hold office during pleasure." This means that the Human Rights Act allows them to be dismissed at any time. In practice, the members are appointed for a specific term, and there has been no attempt to remove a member before the term has expired. However, there is no legal guarantee that this practice will continue. Also, the length of the term of office is not specified in the statute, and some members have been appointed for shorter terms than others for various reasons.

It is essential that the statute set a fixed term of office for the Commissioner for Human Rights. If the Commissioner can be dismissed at the discretion of the government, the Commission will not have the independence it needs. The submission of the Ombudsman of British Columbia stated that a fixed term of office is essential to maintain independence. A fixed term was also recommended in submissions of the Committee for Racial Justice and the federated anti-poverty groups of B.C.

It is proposed that the term of office be for five years, and that the Commissioner be eligible for reappointment for one additional term. Some submissions recommended a shorter term of office. For example, the B.C. Human Rights Coalition and the Business Council of B.C. both recommended fixed terms of office but said that the term should be three years. The Coalition also recommended that a person serve a maximum of two terms.

The terms of office of the Auditor General, the Ombudsman and the Privacy Commissioner are all six years. The Auditor General and Ombudsman are eligible for reappointment without limit, while the Privacy Commissioner is not eligible for reappointment. The Ontario Task Force recommended a term of five years for the proposed commission, with the possibility of reappointment for one additional term.

There is a trade-off between the desire to keep a Commissioner who is performing well as long as possible and the ability to appoint another person if the Commissioner is not performing up to expectations. One must also take account of the fact that qualified people frequently will leave other positions to accept an appointment, and this will be a major career shift for many. The term of office should be long enough to provide the incentive to make such a shift.

The proposal for a five year appointment is designed to provide enough

security to attract highly qualified people while preventing the position from becoming a sinecure. Of course, a member whose performance was unsatisfactory presumably would not be reappointed for a second term.

The Commissioner for Human Rights must combine a number of skills to do an effective job. It is impossible to list all the relevant skills, and they must be left to the body that appoints the Commissioner. However, the following skills would seem to be of special importance:

- A thorough knowledge of human rights principles and enforcement mechanisms: The Commissioner will be the head of the agency responsible for human rights enforcement. She or he will not only be responsible for enforcement but for recommendations about changes in the system of protection. A thorough knowledge of the field of human rights is essential.
- A knowledge of the social and economic forces and trends that are relevant to equality issues: Along with responsibility for enforcement of the Human Rights Code, the Commissioner will be expected to analyze and report on equality trends and patterns and to make public recommendations on issues needing attention. Therefore, it is important that the person have the knowledge and experience needed to identify and assess these trends and patterns.
- The ability to act as a public spokesperson for human rights: The Commissioner for Human Rights will be the primary public spokesperson within the Commission. The person must be able to effectively explain human rights to the public, and, when necessary, to defend human rights principles and mobilize support for human rights.
- The respect of all sections of the community interested in human rights issues: While the Commissioner for Human Rights must promote human rights principles, such promotion is most effective if people on all sides have respect for the Commissioner and confidence in the Commissioner’s judgment.
- To merit such respect, the Commissioner will need the capacity to understand the interests of all those concerned. He or she must have an understanding of human rights from the point of view of those groups that have experienced inequality and have been excluded from full participation in the social and economic system. Also needed is an understanding of the concerns of those responsible for the changes needed to eliminate patterns of inequality. Without an understanding of both perspectives, the Commissioner will be incapable of devising effective strategies for change.
- The management and administration skills needed to lead an agency: The Human Rights Commission will have many functions

and many parts. The Commissioner should have the skills needed to lead such an agency effectively. Of course, administration will have to be carried out with the assistance of other managers. But leadership from the Commissioner will be needed to make the agency work well.

3-A-2 It is recommended that the Commissioner for Human Rights be appointed by the Lieutenant Governor in Council from a short list of candidates submitted by a selection committee appointed for the purpose.

3-A-3 It is further recommended that regulations under the Human Rights Code specify the procedures to be used in the selection process and the method of choosing the selection committee. The procedures should include public invitations for applications and a process that ensures the appointment will be based on relevant criteria.

3-A-4 It is recommended that the Human Rights Code specify a term of appointment of five years and that a Commissioner for Human Rights be eligible to serve no more than two terms.

Powers of the Commissioner for Human Rights

The Commissioner for Human Rights should have the following powers:

- A statutory mandate to develop and implement education and information programs. This mandate would include advisory services to all sectors of the public, including potential complainants, employers, trade unions and housing and service providers.
- A power to monitor complaints that are filed and to intervene as a party in cases raising issues of significant public importance in order to represent the public interest. The Commissioner would not, however, necessarily have responsibility for representing the claimant in cases in which she or he did not intervene. As discussed below, the preferred option is that this function be carried out by outside lawyers with the participation or assistance of a specialized Human Rights Law Clinic. This arrangement would leave the Commissioner free to represent the public interest, whether or not it coincides with that of a claimant. However, if this arrangement is not feasible, the staff of the Commissioner would provide legal assistance to claimants in the same way that human rights commissions provide such assistance in other Canadian

jurisdictions.

- A power to file a complaint. This power would be used when matters come to the attention of the Commissioner for Human Rights that are of public importance or that have significance going beyond the interests of any single person. For example, if a complainant filed a case concerning harassment and it became apparent that the particular events arose out of a broader systemic pattern, the commissioner could file a complaint about the broader pattern, leaving the complainant free to settle the individual case.
- A duty, in consultation with the Human Rights Council of Advisors, to submit annual reports to the Minister about the status of human rights in British Columbia, and about matters needing attention. The Minister would be required to table these reports in the Legislature.
- A power, in consultation with the Human Rights Council of Advisors, to submit special similar reports when a matter is of such importance or urgency as to justify immediate attention. Again, the Minister would be required to table these reports in the Legislature.
- A power to conduct research into issues concerning equality and discrimination.
- A power to conduct inquiries into issues relevant to equality in British Columbia.
- The power to approve special programs, including employment equity programs, that have as their object the amelioration of conditions of disadvantaged individuals or groups.

Most of these powers are discussed in detail in other parts of this Report. Those sections set out recommendations concerning the powers. However, three of the powers are not discussed elsewhere and require further consideration here.

Annual Reports

The human rights commission must file an annual report in eight Canadian jurisdictions. These reports must be tabled in the Legislature and become public documents. Therefore, they give the commissions the ability to call matters to public attention even if the government of the day does not agree.

The B.C. Council of Human Rights has prepared and distributed annual reports, although the Human Rights Act does not require such reports. There is no right to file the reports in the Legislature. Also, there is no guarantee that a report will be prepared every year. For example, the Council has had to defer publication of an annual report for the last fiscal

year because of budgetary restrictions.

The annual reports that have been prepared by the Council are very useful. They provide statistics about cases and information about other activities of the Council. They also contain informative summaries of cases and information about notable settlements. Their main limitation is that they do not make recommendations for change because of the risk of jeopardizing the impartiality required to carry out the Council's adjudicative role.

The Commissioner for Human Rights should have a statutory duty to prepare an annual report. The Act should also require that the report be tabled in the Legislature within a specified period of time. This power would help to make the human rights process more open. It also would assist in the educational role of the Human Rights Commission. The Report could contain recommendations about human rights issues, since the Commissioner does not perform an adjudicative role.

3-A-5 It is recommended that the Human Rights Code require the Commissioner for Human Rights, in consultation with the Human Rights Council of Advisors, to file annually a report on the activities of the Commission and on such other matters as warrant public consideration. This report should be filed with the responsible Minister, who should be required to table it in the Legislative Assembly within a specified period.

Special Reports

The federal Human Rights Act gives the Canadian Human Rights Commission the power to file special reports that also must be tabled in Parliament. This power is useful when the Commission wants to call special attention to an issue, as it did in its report on First Nations people. It is also useful in calling public attention to matters too urgent to await the next annual report. This power also would allow the Commissioner to file a detailed report about a specific problem without overwhelming other parts of the Annual Report.

3-A-6 It is recommended that the Human Rights Code empower the Commissioner for Human Rights, in consultation with the Human Rights Council of Advisors, to transmit to the Minister a special report regarding any matter that warrants an immediate response because of its urgency or importance. The report would be tabled in the Legislative Assembly in the same manner as the annual report.

Research and Policy

Our understanding of the meaning of equality and of the causes of inequality has grown dramatically since human rights statutes were first enacted. This growth in understanding has come about in great part because of the research carried out by human rights agencies and other research institutions.

Without research to attempt to find new solutions, human rights legislation will become less and less effective as the same old techniques are used to try to deal with new issues. Research is essential to take account of the changes that are taking place in what equality means. It is also essential that human rights agencies engage in research to find new solutions to inequality. If the Human Rights Code does not specifically require the Commissioner to carry out research, short term needs are likely to prevail over research activities that hold promise of greater long run gain. The statutes of seven Canadian jurisdictions specifically mandate the human rights agency to engage in research. A similar provision should be included in the B.C. Human Rights Code.

3-A-7 It is recommended that the Human Rights Code specify that one of the duties of the Commissioner for Human Rights is to conduct research programs into matters relevant to the purposes of the Code and to encourage similar research by others.

Later sections of this Report describe the role of the Commissioner for Human Rights in initiating cases concerning systemic discrimination. Systemic cases are crucial to the goal of correcting persistent patterns of inequality. However, such cases are almost impossible without the research capacity to identify systemic patterns and to effectively present a systemic case. Therefore, research programs are an essential part of dealing with systemic discrimination.

Special Inquiries

Other parts of this Report have described the limits of human rights statutes in dealing with persistent patterns of inequality that can arise from the way systems operate. The primary barrier is that enforcement must start with a complaint and the complaints that are filed often do not concern the equality issues of greatest importance.

This Report recommends that the Commissioner for Human Rights have

the power to initiate a complaint. This recommendation is a step in the direction of making the Code more effective in dealing with equality issues that have not led to a complaint. Yet even systemic cases cannot be broad enough to deal with larger patterns of inequality in society. For example, a systemic case might consider systemic barriers within the educational system, but, no single case could deal with the interaction of the education system, the health care system and public assistance programs.

It would be appropriate to allow the Commissioner to conduct a special inquiry about such a situation. The purpose of the inquiry would not be to enforce the prohibitions in the Code, but as a research tool to gather information that might lead to recommendations in the annual report or in a special report. Sometimes, the inquiry might serve as an occasion on which to develop a consensus on the issue.

The primary fear about such a process is that it might allow the Commissioner to circumvent the procedural safeguards that apply to the filing of a claim. That is not the intent, and there should be protection against misuse of this power. In particular, such an inquiry should not involve the power to subpoena witnesses or demand the production of documentary evidence. Participation in the process would be voluntary.

Two other Canadian statutes grant the human right commission powers somewhat similar to that proposed. The Ontario Human Rights Code states that among the functions of the Human Rights Commission are:

- to inquire into incidents of and conditions tending to lead to tension or conflict related to a prohibited ground of discrimination; and
- to initiate investigations into problems related to a prohibited ground of discrimination that may arise in a community, and to encourage and coordinate plans, programs and activities to reduce or prevent such problems.

The Quebec Charter of Rights and Freedoms empowers the Human Rights Commission to consider submissions concerning human rights. This power allows the Commission to invite interested persons to present their views if it believes that the interest of the public or of a group requires this step. The purpose is to allow the Commission to make appropriate recommendations.

The Commission should have the power to conduct such inquiries if the purpose of the Human Rights Code goes beyond providing a remedy to

individuals, as suggested in Part I of this Report. It would be a valuable tool to mitigate the limitations created by a system tied to the investigation of claims through litigation.

3-A-8 It is recommended that the Commissioner for Human Rights have the power to conduct inquiries into matters relevant to achieving equality that go beyond those matters that would be the subject of a human rights claim. There would be no legal obligation on any person to participate in such an inquiry.

Staff of the Commissioner

The Commissioner for Human Rights must have sufficient staff to carry out these functions. At present, the entire staff of the B.C. Council of Human Rights is assigned to functions directly relating to the processing of complaints, except for staff performing administrative functions such as finance and office systems. There is no staff for research or education. Because the Council has no power to initiate complaints, there is no unit within the Council to deal with systemic discrimination.

It is essential that some additional staff be allocated to the Commissioner for Human Rights to carry out the functions that have been described. In particular, staff is needed to develop and conduct education and information programs, to provide advice to persons who experience discrimination and those responsible for avoiding discrimination and for research into systemic discrimination and the preparation of systemic cases. As a result, some additional budget for staff will be needed. This step is needed to bring B.C. into the mainstream of human rights protection in Canada.

There is also a need for legal counsel within the Commission, which would be shared by the Commissioner for Human Rights and the Director of Investigation and Mediation. At present, the B.C. Council of Human Rights has no internal source of legal advice, and the Attorney General has declined to provide such advice because doing so would create a conflict of interest. Although the separation of the Human Rights Tribunal from the Commission has overwhelming advantages, one disadvantage is that the Commission would not have ready access to the legal expertise of the adjudicators.

If the Commissioner for Human Rights is to participate in litigation, by far the most cost effective way to obtain the necessary legal services is to have legal staff within the Commission itself. This staff could also

provide advice to investigators and mediators.

3-A-9 It is recommended that the Commissioner for Human Rights be allocated staff sufficient to carry out the duties assigned to the Commissioner.

3-A-10 It is further recommended that the staff of the Commission include legal counsel.

c. Director of Investigation and Mediation

The Director of Investigation and Mediation should be a statutory position, because the Director would have overall responsibility for the process of investigation and mediation, including the power to dismiss a case. Because of the importance of such decisions, this position should be established at the same salary and level of importance as the members of the B.C. Human Rights Tribunal other than the Chair.

The Director of Investigation and Mediation would be responsible for all aspects of intake, investigation and mediation of a case. This person would have a staff to carry out these functions. The position would share staff with the Commissioner for Human Rights to carry out other administrative and clerical functions, in the interests of reducing administrative costs.

The proposed system would more clearly separate the investigation and adjudication functions by making the Director of Investigation and Mediation responsible for investigations and the Human Rights Tribunal responsible for adjudication. At present, the Chair of the B.C. Council of Human Rights is legally responsible for investigations and also adjudicates cases. Although the Council has established safeguards to protect against any unfairness, the wording of the statute may create the perception that these functions are not properly separated. The proposal would avoid any such perception.

The mediation function of this position is also of crucial importance. Mediation and settlement have important roles in human rights cases. Indeed, far more cases are settled than go to hearing, a pattern that exists across the country. The Director of Investigation and Mediation must be able to determine when mediation is appropriate and to effectively direct mediation activities.

Among the key qualifications for the position are the following:

Investigation skills: The Director will be the chief investigator within the system, though the vast majority of cases will be investigated by staff. The Director must have the knowledge and experience to train staff and to supervise investigations. Human rights investigations require special skills. Those skills are different from the skills necessary to carry out police investigations, for example. A closer analogy would be the skills necessary to carry out an investigation under the Ombudsman Act.

Mediation skills: Mediation requires skills different from those required to carry out an investigation. Though the skills are not incompatible, they are distinct. Again, the Director should have the experience necessary to train and supervise staff. In cases of special importance, the Director might personally participate in mediation efforts.

A thorough knowledge of human rights law and principles**:** Effective supervision of investigation and mediation requires a knowledge of the relevant law and the ability to evaluate the strength of the case. While this qualification may not be quite as important for the Director of Investigation and Mediation as for a member of the Tribunal, it is a significant qualification.

A knowledge of the social and economic forces and trends that are relevant to equality issues: The courts have made clear that equality and discrimination must take account of the social and economic background. An effective investigation and mediation system will require an understanding of these forces.

An understanding of the principles of impartiality and fairness and the ability to put these principles into practice: It is crucial that people on all sides have confidence in the fairness and impartiality of investigations and mediation efforts. One of the key reasons for recommending the creation of this position is to ensure that such confidence exists. The person chosen for the position must have the skills necessary to create and to merit this confidence.

The managerial skills necessary to supervise and train staff to carry out these functions: The Director of Investigation and Mediation would be responsible for a larger staff than any other manager within the system. The tasks of human rights intake, investigation and mediation are not easy. Besides developing the skills needed to carry out these tasks, the Director would have to demonstrate the leadership and supervisory skills that will provide the support that line officers need to carry out their duties effectively. Also, those officers often must deal with contentious issues and adversarial situations, and it is important that the Director

foster a supportive atmosphere within the agency to help them deal with those situations.

3-A-11 It is recommended that a Director of Investigation and Mediation be appointed specially to the position rather than being selected from the public service.

Selection and reporting

The Director of Investigation and Mediation should be appointed in the same way as the Commissioner for Human Rights. Again, independence is a crucial consideration. This Director will frequently have to investigate or mediate cases involving the government itself, either directly or indirectly. All parties, as well as the public, must have the assurance that extraneous factors will not affect the way the case is handled. Because of the importance of the position, and to ensure that the Director has the necessary independence, it is proposed that this position be a statutory office rather than a civil service position. Therefore, appointment by Cabinet (technically, the Lieutenant Governor in Council) seems appropriate. It seems clear that appointment by Cabinet does not imply control by Cabinet, for many other independent officials, including members of the Labour Relations Board are appointed in this manner.

Like the selection of the Commissioner for Human Rights, it is important that the selection process be broad and open. The appointment should be made from a short list submitted by a special committee that includes non-governmental representatives, and regulations under the Human Rights Code should set out the process. There is no reason why the same selection committee could not be responsible for nominating candidates for both the positions of Commissioner for Human Rights and Director of Investigation and Mediation..

Like the Commissioner for Human Rights, the Director of Investigation and Mediation should have a fixed term of office in order to preserve independence. It seems appropriate to make this term of office the same length as the term for the Commissioner for Human Rights, though it might be useful to arrange the two terms so that they did not expire simultaneously. The one difference concerns eligibility for reappointment. It was recommended that the Commissioner for Human Rights be eligible to be reappointed for one additional term. It seems more appropriate that no specific restriction be placed on the power to reappoint the Director of Investigation and Mediation. The justification for this difference is that the Director would play less of a policy-making role. Because each term of the Director would be for five years, the opportunity would exist to

replace a Director who was not carrying out the duties satisfactorily.

3-A-12 It is recommended that the Director of Investigation and Mediation be appointed by the Lieutenant Governor in Council from a short list of candidates submitted by a selection committee appointed for the purpose. The appointment should be for a term of five years, and the Director should be eligible for reappointment.

3-A-13 It is recommended that the Director of Investigation and Mediation be responsible to the Commissioner for Human Rights for purposes of administration, but that the Commissioner should have no power to intervene in the exercise by the Director of the powers granted by the Act.

Powers of the Director of Investigation and Mediation

The Director of Investigation and Mediation should have the powers necessary to carry out both functions efficiently and expeditiously, consistent with principles of fairness.

The details regarding powers of investigation are set out in the section on procedures, later in this Report. Briefly, there must be a power to require the production of evidence, and it should be possible to enforce this power effectively. These powers should be limited in such a way that they are consistent with fairness to all parties.

The Director should have the power to determine if an investigation is useful in a particular case. Sometimes, an investigation might not be useful because there is no reasonable chance that it will produce evidence that would justify a hearing. In other cases, it may be appropriate to send a case straight to hearing without an investigation. For example, that step might be useful if the parties agree about the relevant facts and the only dispute is about a question of pure law.

The Director should also have the powers and resources to act effectively as a mediator. Again, the details are set out below. Mediation would be voluntary because a mandatory process is unlikely to lead to a satisfactory settlement and because some human rights cases involve emotional issues that would make it impossible for the two parties to participate together in mediation efforts.

Staff of the Director of Investigation and Mediation

The Current Situation

At present, all investigations are carried out by Industrial Relations Officers (IROs) within the Employment Standards Branch of the Ministry of Skills, Training and Labour. These officers are responsible for investigations under the Employment Standards Act and the Labour Code as well as the B.C. Human Rights Act. This arrangement came about after the dismissal of the staff of the Human Rights Commission in 1983. Although the arrangement was justified as an economy measure, expediency seems to have been a major factor.

It is hard to justify this arrangement in principle. No other human rights agency in Canada has to rely entirely on personnel from another ministry to conduct investigations.

Human rights investigations require a detailed knowledge of human rights law and of the forms that discrimination can take. At present, it is difficult to develop and maintain that level of knowledge because human rights investigations are a relatively small part of the work of most Industrial Relations Officers.

Human rights investigations are often broader and more complex than investigations under the Employment Standards Act or Labour Code and often require different skills. The present arrangement is particularly unsuitable for dealing with investigations of systemic discrimination. Those investigations can require a team of investigators working full-time for a long period. They require special skills such as the analysis of statistics and of job descriptions. Such an investigation would be simply impossible in a system in which an investigator must juggle duties under three statutes. The submission of the Canadian Jewish Congress (Pacific Region) made a similar point about investigations of cases concerning hate messages.

The structure can also cause human rights investigations to be delayed because proceedings under other statutes must take priority. For example, the Labour Code establishes time limits for certain types of investigations that must take precedence over human rights investigations.

An additional source of delay is that the files must be transferred from one ministry to another. That process inevitably takes some time, as well as making communications about the file more formal and less flexible.

The arrangement makes effective management difficult for both the B.C. Council of Human Rights and the Employment Standards Branch. Overall

supervision of the work of Industrial Relations Officers is the responsibility of managers in the Employment Standards Branch. An IRO's general supervisor thus has no direct responsibility for administering human rights complaints. One possible result is that human rights complaints may be given lower priority than matters for which the supervisor has direct responsibility. Another consequence is that the Manager of Investigations at the B.C. Council of Human Rights has no general authority over the work of the IROs. From the point of view of the IROs themselves, no single person is able to assess their overall workload and adjust it where appropriate.

The Director of Investigations of the Council has responsibility for supervising human rights investigations themselves, but the Council has no financial accountability for the time that these investigations take. It does not appear that the actual time for an investigation is excessive, but this division of authority reduces the incentive to find the most efficient ways to carry out investigations.

Communication is more difficult between different agencies than within an agency. During consultation meetings, a number of Industrial Relations Officers expressed the opinion that they are not given sufficient information by the Council. For example, they said they are not given adequate information about pre-investigation mediation efforts and often do not have easy access to recent human rights decisions or to quick advice about a file. Staff of the Council reported that it is not always easy to get information about the current status of an investigation. Each agency has its own computerized case management system, but neither agency has access to the system of the other.

Representatives of both organizations expressed the view that the investigation process should be more flexible. Some cases deserve only a brief investigation, while others require a very extensive one. The difficulty of inter-agency coordination creates a tendency to treat all cases in the same manner, resulting in over-investigation of some and under-investigation of others.

In fairness, there are also advantages to the current system. The most important advantage is that the Employment Standards Branch has seventeen offices throughout the Province, while the Council has offices only in Victoria and Vancouver. While this Report recommends some regionalization of the human rights enforcement machinery, it is not feasible to have anything approaching seventeen human rights offices. Therefore, use of Industrial Relations Officers provides a local representative in less populated areas. A number of participants at

consultation meetings emphasized the need for a local representative who could deal with human rights issues. Many praised the efforts of the local Industrial Relations Officer but noted that the officer was overworked and sometimes difficult to contact personally.

A second advantage arises from the fact that that eighty percent of human rights complaints concern employment, and Industrial Relations Officers have the experience to see the human rights case in its broader setting. Moreover, some provisions of the Employment Standards Act, such as rules regarding leaves associated with pregnancy, are also relevant to the objectives of the Human Rights Act. This overlap is not an unmixed blessing, however, since an officer who has dealt with an organization under one statute may face complications if required to intervene again under another statute.

A third advantage is that some of the investigation and mediation skills used in employment standards and labour investigations carry over into human rights investigations. As noted earlier, however, there are also significant differences, and this advantage should not be overestimated.

On balance, the disadvantages of the current arrangement clearly outweigh the advantages. Though it is always worth trying to make adjustments to improve a process, the primary source of most of the problems is the division of responsibility between two agencies in two separate ministries. Even the best management techniques cannot circumvent these problems.

The Proposed Staffing Arrangements

The Director of Investigation and Mediation should have the staff necessary to conduct the great majority, if not all, human rights investigations. That Director would then be accountable for all aspects of the process, including the quality of investigations, the fairness of investigations, the speed of investigations and the cost of investigations. This change was recommended in the submission of the Ombudsman of British Columbia, based on the experience of that office in dealing with complaints about the human rights process. It was also recommended in other submissions, including that of the Committee for Racial Justice.

It may be useful in special circumstances to arrange with another part of government to share staff in less populated areas of the Province or to designate a public servant in another agency to carry out a special investigation requiring specialized skills. The norm, however, should be that investigations are carried out by the staff of the Director of

Investigations and Mediation.

There have been some attempts to move in this direction. The B.C. Council of Human Rights and Employment Standards Branch have established a special task team of Industrial Relations Officers to investigate human rights cases. Five or six officers are appointed to the team for approximately a year and devote all of their time to human rights investigations during that period. They deal with approximately one quarter to one third of all investigations.

This represents an improvement on the system in which each officer devotes a relatively small proportion of his or her time to human rights investigations. However, it is a half-way measure. It requires that a new team be appointed and trained every year. Over time, recruiting members of the team has become more difficult. While former members of the team have added knowledge of human rights investigations, this advantage dissipates over time as their experience becomes dated and memory fades. The team processes a minority of human rights cases that are filed. It has only been fully implemented in the Lower Mainland.

One relevant issue is the cost of giving the Director of Investigation and Mediation the staff required to conduct investigations. It does not appear that the expense of investigating a case would be significantly different from the present system. The cost of new staff of the Director of Investigations and Mediation would be offset by the reduction in the workload of the Employment Standards Branch.

There might be a modest increase in travel costs to investigate cases in areas where the Employment Standards Branch has offices and the Director would not. These additional costs could be kept to a minimum by locating some of the staff of the Director in those regions where the caseload is sufficient to justify a full-time investigator. In more remote areas, a local official from the Employment Standards Branch (or another agency) might be assigned to conduct a particular investigation or to conduct investigations on an ongoing basis if the Director concluded that such an arrangement was warranted. Moreover, any assessment of costs should take account of the likely savings if the inefficiencies caused by the involvement of two separate agencies are eliminated.

These proposals would have an impact on the collective workload of Industrial Relations Officers. This study has not examined if the change would justify a reduction in the staff of the Employment Standards Branch. While human rights investigations are a significant part of the workload of the Branch, other responsibilities are much more significant,

and an increasing workload in those other areas might offset the reduction due to the transfer of human rights investigations. The important point, however, is that the cost of investigating and mediating human rights cases would not rise significantly, if at all. Decisions about enforcement of other legislation are beyond the scope of this Report.

It should be emphasized that these proposals should not reflect adversely on the performance of the Industrial Relations Officers as individuals. If the problem were the performance of these officers, the solution would be to take steps to improve this performance, not to change the structure of the agency. The proposals are based on the conclusion that the weaknesses in the system of investigation and mediation relate to the structure of the agency, not the personnel.

3-A-14 It is recommended that the Director of Investigation and Mediation be assigned staff sufficient to carry out the functions assigned to the Director.

3-A-15 It is recommended that investigation and mediation should not be assigned to another agency or ministry of government unless the Director of Investigation and Mediation has determined that special circumstances justify a departure from the normal process.

d. Human Rights Council of Advisors

In most Canadian jurisdictions, there is a Commission composed, in whole or in part, of part-time members. These members are usually chosen because of their community involvement. The goal is to ensure that the human rights process, which is designed to modify patterns of exclusion, itself includes representatives from all parts of the community.

This kind of mechanism for community participation is somewhat unusual among government agencies. Most government departments and agencies do not have a community advisory body. However, the special nature of human rights legislation, and the importance of the legislation to different parts of the larger community, provides strong justification for such a mechanism. The late Walter Tarnopolsky described the development of human rights commissions as one of the two key features of the human rights reforms of the 1960s and 1970s.

Unfortunately, commissions have often not achieved these benefits. A major reason for this failure is that commissions take a direct part in the management of cases in many jurisdictions. Such a system made sense in

the early days of human rights legislation when there were many fewer cases. But as caseloads have grown, case management has taken up most of the time of part-time commissioners. As a result, these commissioners have no time for the communication and community relations that were the reason commissions were established.

The existing B.C. Human Rights Act provides no formal mechanism for community participation or representation. This makes it more difficult to maintain links with the community, as noted in the submission of the Affiliation of Multicultural Societies and Service Agencies of B.C. The five members of Council are public officials who serve full-time. Though many of them have significant community involvement as individuals, they obviously cannot serve as community monitors of their own activities.

It is proposed that the Human Rights Code establish a Human Rights Council of Advisors to provide community representation. The Council of Advisors would serve a number of functions:

- It would serve as a conduit of community concerns into the human rights enforcement process.
- It would provide information to the community about the activities of the Commission and the Tribunal.
- It would provide a source of advice to the Commissioner for Human Rights.
- In conjunction with the Commissioner for Human Rights, it would have the power to file a report to the Minister on an equality issue, whether or not that issue could be the subject of a complaint. The Minister would be required to table this report in the Legislative Assembly.
- It would have the right to comment on matters of public interest in the annual report filed jointly with the Commissioner.

The Human Rights Council of Advisors would be composed of not less than seven nor more than eleven persons. Those persons should be representative of the community, both in terms of the grounds of discrimination covered by the Code and in terms of areas of activity covered by the Code. It is crucial that representatives of groups who historically have experienced discrimination be represented on the Council, because it is such groups who are often excluded from governmental decisions. It is also important that groups such as labour and business be represented to ensure that all points of view are considered by the Council.

The members of the Council should be appointed by the Cabinet (technically, the Lieutenant Governor in Council). Security of tenure is less crucial than in the case of the Commissioner for Human Rights, the Director of Investigation and Mediation or the members of the Human Rights Tribunal. The members of the Council do not serve full-time, and the primary role of the Council is to advise rather than to make decisions directly affecting government.

The Council of Advisors should meet often enough to stay informed, but they would not meet as often as human rights commissions in other jurisdictions that take part in case management. Three or four meetings per year might be appropriate. Members would receive an appropriate honorarium and expenses. They would also have access to support staff supplied by the Commission.

3-A-16 It is recommended that there be a Human Rights Council of Advisors composed of not less than seven nor more than eleven members broadly representative of the community. In particular, the Council should be representative of groups who have been historically excluded from the government process. It should also include representatives of labour and business.

3-A-17 It is recommended that the members of the Human Rights Council of Advisors should be appointed by the Lieutenant Governor in Council for such period as that body determines but should be removable only for cause during the term of their appointment.

3-A-18 The Human Rights Council of Advisors should have the following powers and responsibilities:

- **to serve as a link between those responsible for administering the Human Rights Code and the community;**
- **to advise the Commissioner for Human Rights and the Director of Investigation and Mediation on the administration of the Code;**
- **in conjunction with the Commissioner for Human Rights, to participate in preparation of any special reports that are transmitted through the Minister to the Legislature;**
- **to make such statement as it deems appropriate in the annual report that the Commissioner for Human Rights**

transmits through the Minister to the Legislature.

e. **Sharing Administrative Staff**

The administration of the Human Rights Code should be cost effective. That does not mean that it should be as cheap as possible. The experience with the changes in 1983 and 1984 demonstrates graphically the damaging consequences to the effectiveness of an organization that budgetary reductions can have. It does mean, however, that as much of the budget as possible should be used for direct services to the public.

This Report proposes a division of functions between the Commissioner for Human Rights and the Director of Investigation and Mediation in the interests of effectiveness and fairness. That division is in no way threatened if these officers share administration staff performing functions such as accounting and bookkeeping, information services, human resources, reception and, to a degree, clerical services. On a more limited basis, the Human Rights Tribunal could also share services such as accounting and perhaps information services with the Commission. However, care should be taken to ensure that this sharing of personnel does not jeopardize the arms-length relationship between the Tribunal and the Commission.

3-A-19 It is recommended that the statutory officers within the Commission have a common pool of administrators to perform functions such as accounting and bookkeeping, information services, human resources, and other services that can be shared without undermining the functional division between the statutory officers.

3-A-20 It is recommended that, on a more limited basis, the Human Rights Tribunal share technical resources such as accounting and bookkeeping with the Commission.

Regional Offices

Until 1983, the B.C. Human Rights Commission had its headquarters in Victoria and regional offices in Vancouver, Cranbrook, Kamloops, Prince George and Terrace. These offices provided a physical presence, not only in the communities in which they were located but in the surrounding regions. They also were administratively efficient, because they reduced the need for officers to travel from Victoria to conduct investigations or to carry out educational activities.

Since 1984, the only office outside Victoria has been the Vancouver

office. Investigations are carried out by Industrial Relations Officers working out of the seventeen Employment Standards Branch offices located around the Province. However, this system does not provide a full range of services of the B.C. Council of Human Rights. Most of the work of Industrial Relations Officers in these offices is unrelated to the Human Rights Act. While the officers try to comply with requests for education and information about the Act, their other duties prevent them from doing so except on an occasional basis.

This Report recommends that investigations be reassigned to the staff of the Director of Investigation and Mediation. This change would have a number of important advantages, and it is essential to achieving the objectives of human rights enforcement set out in Part I of this Report. However, one disadvantage of the proposal is that the work would no longer be done in all the communities in which the Employment Standards Branch has offices.

It is not feasible to set up Human Rights Commission branch offices in all of those communities. The cost would be too great, and the volume of work in some communities would not be sufficient to justify an officer. However, establishing some offices outside Vancouver and Victoria not only would provide better service to the public but would be cost effective. It would reduce travel costs and help avoid delays. Costs are further minimized by the fact that many communities have an access centre in which various government departments share space and support facilities. If a human rights officer were located in one of these centres, it would not be necessary to incur the costs of separate telephone systems, reception areas, and other office accoutrements.

At present, slightly over one quarter of the cases comes from regions outside the Lower Mainland and lower Vancouver Island. It is likely that the number of cases from these areas is reduced by the absence of regional offices. The toll free long distance line that is in place facilitates access. Nevertheless, many participants at consultation meetings outside Vancouver and Victoria said that the process is considerably less effective than if there were a regional officer, even if that officer were located in another community and made only periodic visits to their community. The need for regional offices was also supported in the submission of the Affiliation of Multicultural Societies and Service Agencies of B.C.

The present volume of cases outside the Lower Mainland and Greater Victoria justifies the assignment of some officers to regional offices. Moreover, the probable increase in cases that regional offices would generate further justifies a regionalization of services.

Regional officers should be assigned a variety of duties. They should carry out investigations and mediation. They should also develop and deliver educational programs in the region. They should participate in the monitoring of larger trends and patterns of equality and inequality, since regional differences will sometimes produce different trends and patterns.

These varied duties would blur somewhat the distinction between the functions of the Commissioner for Human Rights and the Director of Investigation and mediation. The two officers would have to cooperate in the supervision of regional officers, and internal guidelines would need to be established to identify any conflicts of interest that might arise. For example, a regional officer might not be assigned to investigate a case if the officer had prompted the filing of the claim. (The mere fact that the officer had assisted a complainant to file a claim would not create such a conflict.) In addition, officers would have to take care that they did not carry out their educational mandate in a way that undermined the impartiality needed in their role as investigators. While this situation represents a compromise, the benefits of a full range of services regionally outweigh any disadvantages that might arise.

3-A-21 It is recommended that staff be assigned to regional offices if the volume of complaints and the other duties of the officers are sufficient to justify a full-time position in a region.

3-A-22 It is recommended that these officers work out of the Access Centre in the community in order to make the office accessible and to keep costs to a minimum.

3-A-23 It is recommended that to the extent possible, the regional officers provide the full range of services offered by the Commission and that the Commissioner for Human Rights and Director of Investigation and Mediation work together to coordinate these services.

1. **The B.C. Human Rights Tribunal**

A key element of the proposed structure is a new B.C. Human Rights Tribunal. This Tribunal would take over the function of adjudicating cases that is now assigned to the B.C. Council of Human Rights. Unlike the Council, it would not be responsible for functions such as receiving and investigating complaints.

The new Tribunal would retain the advantage of a permanent adjudicative body. It would allow the development of expertise. It would facilitate consistency of

decisions. The fact that the Tribunal is a permanent body would also help avoid delays.

At present, Quebec is the only jurisdiction in Canada with a permanent human rights tribunal. It is composed of one or more provincial court judges and lay assessors. A judge and two assessors sit together to hear any particular case.

While no other jurisdiction now requires a permanent tribunal, a recent report by the Alberta Human Rights Review Panel also recommended establishing a standing human rights tribunal.A bill presently before the Ontario legislature also would establish a standing tribunal.

The system proposed for B.C. has some similarities to the Quebec arrangement, but the proposal is for a pure administrative tribunal instead of a tribunal composed of judges and assessors. A judicial model helps to ensure fairness, but it is important that the human rights process be more flexible than the procedure used in court, and a tribunal composed of judges might tend to become too rigid and technical. It would also be less likely that the Tribunal would represent different sections of the community if the search for a candidate were limited to judges.

The system of lay assessors used in Quebec has the advantage of bringing a lay perspective to the process and of making the Tribunal more representative. However, a system using three member panels that included lay assessors would be more expensive and somewhat more cumbersome than one in which a single adjudicator can hear a case. The budget that would be needed can be more productively devoted to other parts of the process.

Until 1973, human rights hearings were referred to boards of inquiry in B.C. The boards, which often consisted of one person, were people outside government appointed by the Minister to hear the particular case. This system still exists in many provinces. Boards of Inquiry of this type have the advantage of separating adjudication from other administrative functions. But they have other serious disadvantages.

If a special board must be appointed every time a case goes to hearing, the appointment process itself will cause some delay. In addition, since the appointee is an outside person, usually with a full-time job, it becomes more difficult to arrange a hearing date. In some provinces, there have also been complaints that the people appointed are not necessarily experts in human rights law. It is *not* recommended that the pre-1983 system be restored.

The Canadian Human Rights Act contains a variation on this system. It provides for the appointment of a panel of part-time adjudicators. The President of the

panel appoints one or more members of the panel to hear any particular case. This system has advantages over a system of purely ad-hoc appointments, but it does not provide the expertise and consistency that is possible with a permanent tribunal.

The system recommended for B.C. tries to incorporate the advantages of a full-time tribunal and also the flexibility that can sometimes be achieved by using part-time adjudicators, as described in the next section of this Report.

3-A-24 It is recommended that a tribunal to be named the B.C. Human Rights Tribunal be established to perform the adjudicative functions required by the statute.

a. **Composition of the Tribunal**

The B.C. Human Rights Tribunal would be composed of not less than three full-time members, one of whom would be designated Chair of the Tribunal. In addition, there would be a power to appoint not more than six additional part-time members. The limit on the total number of part-time members would help ensure that the system did not revert, in effect, to a system of ad hoc adjudicators.

The appointment of part-time members would be permitted by the statute but not required. The purpose of allowing for a mixture of full-time and part-time members is to achieve the speed, expertise and consistency of a full-time tribunal, while ensuring quick access in all parts of the Province. It is anticipated that any part-time members who are appointed would be residents of communities outside the Lower Mainland and south Vancouver Island. The recommendation for part-time members is based on the conclusion that a local person far from Vancouver or Victoria could conduct hearings more quickly and at lower expense than could a permanent tribunal member located in either of those cities. However, this conclusion should be re-evaluated as experience with the system accumulates. Part-time adjudicators should be appointed in a region only if it is determined that they can provide a better service to the public. They should not be appointed simply because there are not enough full-time adjudicators to deal with the volume of cases.

If part-time members are appointed, the Chair of the Tribunal would decide whether it was most appropriate to assign such a member to hear a particular case or whether it was worth sending a full-time member to the region. If a case was particularly significant or required special expertise, it would be appropriate to assign a full-time member despite the added expense.

Based on the workload of the B.C. Council of Human Rights, it seems clear that there is sufficient work to occupy a minimum of three full-time members. That conclusion takes account of the efficiencies it is hoped that the new system will achieve. Given the increase in the number of cases over the past few years, the more significant question is whether more than three members should be appointed at the outset. Further analysis of the caseload of the present members of Council would be needed to answer this question fully.

The recommendations in this Report would assign certain functions now carried out by members of the Council to officials separate from the Tribunal. In particular, members of the Tribunal would play a much more limited role in deciding whether a case should be dismissed before full investigation and whether a full hearing should be held. However, this reduction in workload may very well not be sufficient to allow a reduction from the present five adjudicators to three. The Tribunal would be assigned a number of new functions, such as new remedial powers, that must also be considered in deciding the appropriate size of the Tribunal. The proportion of cases heard by part-time members of the Tribunal is also relevant. Whatever number is initially appointed, the workload should be monitored frequently so that additional full-time members can be appointed if necessary before a backlog of cases builds up.

The Tribunal will be a crucial part of the human rights process. Therefore, it is essential that the Tribunal have the qualifications necessary to perform this work. Most human rights statutes say nothing about the qualifications of persons appointed to positions under the statute. Interestingly, the Quebec Charter of Human Rights and Freedoms provides that President of the Quebec Human Rights Tribunal should have "notable experience and expertise in, sensitivity to and interest for matters of human rights and freedoms."

While the body that selects the Tribunal will have to develop detailed criteria, the following qualifications deserve consideration:

- A thorough knowledge of human rights law and principles: One of the major reasons for the decision in the 1960s to assign responsibility for human rights to commissions and boards of inquiry rather than the courts was the belief that the courts did not have sufficient expertise in this area. The advantage of a specialized human rights tribunal is lost if the members of the tribunal are not knowledgeable about human rights issues.
- A knowledge of the social and economic factors that are relevant

to equality issues: The Supreme Court of Canada has said that in considering equality under the Charter of Rights and Freedoms, it is necessary to look at "the larger social, political and legal context." Human rights litigation requires the same broad examination. Equality is no longer measured in terms of identical treatment. It instead assesses the effects of the conduct in question and takes account of this social background. Therefore, members of the Tribunal should have the social knowledge that helps them to make such an assessment. Sometimes this knowledge will have been acquired academically and sometimes through community work or other means.

- The temperament, knowledge and skills necessary to effectively conduct a fair, impartial and effectively supervised hearing: If the goals of fairness and expeditiousness are to be achieved, it is essential that the adjudicator be able to conduct a hearing that is both fair and expeditiousness. Fairness requires impartiality between the parties, though it is in no way inconsistent with a commitment to human rights principles. To effectively preside over the hearing, the member must have a knowledge of legal rules and procedures and the ability to direct the proceedings.
- The skills needed to write decisions in a timely fashion and in a manner that will provide guidance about the law: Human rights is a changing area of law. Therefore, the decisions of the Tribunal should do more than decide which of the parties should win and which should lose. They also should provide guidance to others about the rights and obligations created by the statute. This requires the ability to explain the reasons for reaching a decision and to state these reasons in a way that will tell others how to deal with similar situations. Moreover, a Tribunal member should be able to do so without undue delay in order to meet the objective of an expeditious hearing.
- Collectively, to be as representative as possible of different communities and sectors of the public: Obviously, a small tribunal cannot possibly be representative of all parts of the community. Nevertheless, it is an advantage to try to achieve as representative a body as possible, given the small numbers of people. Not only does it help ensure that the conditions experienced by different parts of the community will be understood, but it also promotes confidence in the fairness of the process and provides its own message about the importance of equality of participation.

These qualifications obviously require a knowledge of the law, but they do not require that the person be a lawyer. Indeed, over-reliance on legal technicalities can undermine the process.

Any part-time members that are appointed should also have these skills. In addition, part-time members would have to be very aware of possible conflicts of interest that might be created by their work or activities carried out in other capacities.

3-A-25 It is recommended that the B.C. Human Rights Tribunal be composed three or more full-time members, one of whom would be designated Chair of the Tribunal. In addition to the full-time members, the statute should authorize the appointment of not more than six additional members to serve part-time.

b. Selection and Appointment Process

The members of the Tribunal should be appointed by the Cabinet (technically, the Lieutenant Governor in Council). This is also the method of appointment of other boards such as the Labour Relations Board.

It is crucial that the Tribunal be independent from government. If anything, independence of the Tribunal is even more important than the independence of the Commissioner for Human Rights and the Director of Investigation and Mediation. The perceived and actual independence of the Tribunal is essential if all sides are to have confidence in the fairness of the process.

As with the Commissioner for Human Rights and the Director of Investigation and Mediation, there will be doubts about the independence of the Tribunal unless its members have a measure of job security. The present situation, in which the members of the B.C. Council of Human Rights serve "at pleasure" should not be replicated.

The statute should provide for a fixed term of office, as recommended by the Ombudsman of British Columbia. The terms of office of the members of the Tribunal should be staggered to provide continuity. The members should be removable before that time only for serious misconduct, and the process should ensure so far as possible that this power of removal is not misused.

It is proposed that a member of the Tribunal be appointed for a term of five years and be eligible for a renewal for one additional term. The proposal for a five year appointment is designed to provide enough security to attract highly qualified people while helping to ensure that the Tribunal is, over time, representative of all parts of the community. Limiting reappointment to one term ensures that there is some rotation in

the membership of the Tribunal, while providing continuity and a way not to automatically lose people who have proved their merit during the first term. Of course, a member whose performance was unsatisfactory presumably would not be reappointed for a second term.

The selection process should be designed to attract the most capable candidates. Therefore, it is important that the process be broad and open. An important purpose of human rights legislation is to change patterns of exclusion and to ensure that a selection process is not limited to those who have traditionally been considered. The process for selecting those who will administer the statute should exemplify this objective.

It is proposed that the members of the Tribunal be appointed by the Lieutenant Governor in Council (Cabinet) from a short list of candidates submitted by a special selection committee. This is the same process used to select the Commissioner for Human Rights and the Director of Investigation and Mediation. This process is designed to provide safeguards against political favouritism, but to provide a degree of political accountability. Provincial court judges are appointed by the Lieutenant Governor in Council on recommendation of the Judicial Council. This process has a number of similarities to the proposed process.

An alternative that was seriously considered was appointment by a committee of the Legislative Assembly. The Ombudsman and the Information and Privacy Commissioner are both selected on unanimous recommendation of a special committee of the Legislative Assembly. This process provides maximum protection against a politically biased candidate. However, other advantages, including the participation of non-governmental representatives in the selection process, led to the proposal that is being recommended.

3-A-26 It is recommended that the members of the B.C. Human Rights Tribunal be appointed for a fixed term of five years, renewable once.

3-A-27 It is recommended that the members of the Tribunal should be removable before their term expires only for serious misconduct or incapacity and only by the Lieutenant Governor in Council on address to the Legislative Assembly.

3-A-28 It is recommended that the terms of office of the members of the Tribunal be staggered in order to provide continuity.

3-A-29 It is recommended that the selection process be designed to attract the most capable candidates and to ensure that the persons nominated have the necessary qualifications. The following features would be a part of the selection process:

- **There should be public advertisements about the opening.**
- **Representatives from outside government should participate in the selection.**
- **The appointment should be made by the Lieutenant Governor in Council from a list of candidates recommended by a selection committee appointed for the purpose.**

c. **Reporting Structure Within Government**

It is important that the reporting structure be consistent with the independence of the Tribunal. While some reporting relationship for purposes of administration is inevitable, there should be no possibility of interference with the adjudicative functions of the Tribunal.

Other comparable tribunals report to a minister for administrative purposes, but the Minister has no power to intervene in any way in the adjudicative work of the Tribunal. For example, the Labour Relations Board is responsible, for administrative purposes, to the Minister of Skills, Training and Labour, and the Workers' Compensation Appeal Board is in a similar relationship with the same ministry.

It would be advantageous if the Human Rights Tribunal was administratively within a ministry with experience in dealing with independent administrative agencies. This matter is discussed in more detail elsewhere in this Report.

3-A-30 It is recommended that the reporting relationship with government be the same as the relationship of the government with other independent tribunals such as the Labour Relations Board. While the responsible Minister would have administrative responsibilities, the Minister would have no power to direct the Human Rights Tribunal in the exercise of its adjudicative functions.

d. **Powers of Tribunal**

The Tribunal would generally be responsible for conducting hearings under the Act. It should have all the normal powers associated with these functions, such as the power to subpoena witnesses and documents. Tribunal should also have the power to hire staff.

At present, there are no published rules concerning the conduct of a hearing. Participants in the consultation process criticized the absence of published rules. Such rules would provide useful guidance to the parties and would help to expedite proceedings. The Tribunal should have the power to make and publish binding rules.

The Tribunal should also have the power to engage in pre-hearing conferences. Such conferences are useful in narrowing the areas of dispute. Experience with other courts and tribunals suggests that this process can also encourage a settlement between the parties.

Part III, C, 6 of this Report describes the powers of the Tribunal and the procedures for a hearing in greater detail.

2. **What Ministry Should Be Responsible for the Commission and the Tribunal**

The B.C. Council of Human Rights has reported to three different ministries over the last few years. When first established, it was within the Ministry of Labour. It then moved to the Ministry of Education. It now is in the Ministry of Environment, Lands and Parks and Ministry Responsible for Multiculturalism and Human Rights.

A number of participants at consultation meetings remarked on the lack of a connection between human rights and most of the other responsibilities of the Ministry, multiculturalism being the notable exception.

The fact that most of the other responsibilities of the Ministry have little or no relationship to human rights may not directly affect the work of the Council. The Council, as well as any organization that takes its place, should have an arms-length relation to the Ministry. By and large, the Council should make its own decisions about how to carry out its duties, and there is not a great need for specialized human rights knowledge within the Ministry.

What is more troubling is a potential lack of continuity in the Council's relations with government. While the Council and any successive agency should be independent, there is a need for administrative support from the Ministry. For example, someone within the Ministry must assume responsibility for matters such as appointments to the agency, presenting proposed regulations to the

Cabinet and helping to formulate and to present the budget of the agency. These responsibilities require that senior public servants within the Ministry develop and maintain the administrative structure necessary to ensure that such support is available on an ongoing basis.

Unless the Council or other human rights agency is permanently assigned to a particular ministry, there is little incentive to develop the necessary administrative support system. Developing such a system takes considerable effort, and no one is likely to take on this task with enthusiasm if it is likely to be dismantled at any time. The fact that a ministry's main work is unrelated to human rights may not directly impinge on the effectiveness of the human rights agency. Yet that fact does make it less likely that a ministry will remain responsible for human rights after successive cabinet shuffles by different governments over the years.

The choice of ministry is a political decision beyond the scope of this Review. A key criterion in choosing a ministry is an understanding of the proper relationship between the ministry and an independent tribunal. Therefore, it makes sense to choose a ministry that deals with other independent offices or agencies. The Ministry of the Attorney General is one obvious possibility, but there are others as well.

3-A-31 It is recommended that the agencies designated to administer and enforce the Human Rights Code report on an ongoing basis to a ministry with experience in administering the affairs of independent offices, agencies and tribunals.

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B. public information and education

Perhaps the most consistent theme at the consultation meetings during this Review was the need for education and information about the Human Rights Act. Many human rights groups and labour groups said that many individuals are not aware of the Human Rights Act or of how to claim the rights set out in the Act because of lack of information. For example, the submission of the federated anti-poverty groups of B.C. noted that education can be remedial by helping people to avoid discriminatory practices and that it is a key element in providing access to the complaints process. The submission of the Japanese Canadian Citizens Association noted the need for liaison with those responsible for curriculum development. The Vancouver Multicultural Association also stressed the need for education in schools. The Minister's Multicultural Advisory Council emphasized the need for a both statutory mandate and adequate resources for educational activities.

Business representatives said that many businesses need further information about how to promote a discrimination-free workplace. For example, businesses need information on the most effective strategies for preventing harassment and for dealing with it when it occurs. The submission of the Business Council of British Columbia said:

Human rights protection starts with education. Revisions to the current system of human rights protection must include educational programs that inform both employers and employees of rights and obligations under B.C. human rights legislation.

This section of the Report discusses how to implement these and similar suggestions. It is important that all aspects of the work of a human rights agency be planned in a way that provides an educational component and that the agency develop a coordinated educational strategy. For example, it is useful to view decisions at hearings as an educational tool as well as a resolution of a dispute. In addition, the statute itself can serve as an educational document. This section discusses the elements of a coordinated strategy.

1. **Programs to Provide Information and Education**

The B.C. Council of Human Rights is well aware of the need for education. However, there is no budget for education during the current fiscal year. Members of Council and staff try to meet requests for information and for speakers, but the Council has no educational officer and these activities are on top of the regular duties of staff. They are done when there is time, but other duties have priority.

At present, the Council does not even have up-to-date pamphlets explaining what the act covers and how to file a complaint. Pamphlets on sexual orientation, sexual harassment and disability have been drafted and are ready for printing, but there is no money to print and distribute them. The only current material presently available is a copy of the Act itself or of the latest annual report, covering 1992-1993. Both are useful, but they do not come close to meeting the need for accessible information. Moreover, plans for an annual report this year are suspended because of lack of funding.

The lack of education and information programs is unacceptable. If a central goal of the Code is prevention, education and information must be a key part of the strategy. Informational material helps employers, trade unions, apartment owners and service providers to become informed about the requirements of Human Rights legislation. It also assists those responsible for compliance to develop effective plans for achieving equality.

Education and information also are necessary to provide effective access to all who may experience inequality, as the submission of the federated anti-poverty groups of B.C. noted. During the consultation meetings, people in regions where there is no office of

the B.C. Council of Human Rights placed special stress on the need for information. They said that the lack of information makes it less likely that people from these regions will file complaints. The statistics support this theory. They show that a disproportionate number of complaints come from the Lower Mainland and Vancouver Island, even after taking account of the fact these areas have a higher population.

Even within the larger population centres where there are human rights offices, lack of informational material makes it much less likely that some groups who experience persistent discrimination will know of the Act and how to file a complaint. For example, the submission of the West Coast Domestic Workers Association stated that domestic workers who come from other countries are very unlikely to know about the Act. A number of groups noted the need for information in different languages. The B.C. Federation of Labour added that employees and employers alike find it difficult to obtain the information they need. The B.C. Division of the Canadian Union of Public Employers said that the need for information is as great in the public sector as in the private sector.

A significant cause of the lack of education and information programs is that the statute does not require such programs. The 1973 Code did require the Human Rights Commission to develop and conduct educational programs, but this provision was removed when the current Act came into effect in 1984. B.C. and the Northwest Territories are the only jurisdictions in the country that do *not* have a statutory mandate for education.

It is legally possible for the B.C. Council of Human Rights to provide information and educational materials, despite the failure of the Act to refer to education. However, the lack of a statutory mandate makes it much more difficult to obtain the budget needed to produce and deliver these materials. Such a mandate is the norm in Canadian human rights statutes, and the lack of an educational mandate weakens the B.C. Act.

3-B-1 It is recommended that the Human Rights Code explicitly mandate the Commissioner for Human Rights to provide information and education about human rights. The Commissioner should be provided with adequate resources to carry out that mandate.

The statutory framework encourages the Council to think of itself as primarily an adjudicative agency. Education is not a traditional part of adjudication. In addition, the Council must be careful to see that educational materials are not phrased in a way that might lead to claims of bias. The fact that the members of the Council personally devote most of their time to adjudication may also colour the attitude of the entire agency.

The recommendation for the establishment of a separate tribunal should help correct this problem. It leaves the proposed Human Rights Commission free to concentrate on other activities, including education and information.

a. What Types of Education and Information

A more difficult question is what types of information and education should receive priority. The words "education" and "information" are very broad. For example, they encompass curriculum units for schools, bulletins about recent cases or pamphlets on how to file a complaint. They could take the form of written material, a television advertisement, a training program or a speech.

Human rights agencies have not always been successful in developing effective educational programs. Providing a statutory mandate and an adequate budget eliminates two key barriers to effectiveness, but it certainly does not guarantee effectiveness.

There was a range of opinion at the consultation meetings about what kinds of education and information should receive priority. Some participants argued that human rights would be best served by long term programs to change attitudes that cause discrimination, while others opted for specific information to meet immediate needs. Some suggested that human rights should become a mandatory part of the curriculum of primary and secondary schools, and others suggested television advertisements about human rights. Some participants would give priority to information for the benefit of employers, apartment owners and service providers to inform them about the Human Rights Act and about how to develop policies to comply with it. Still others emphasized the need for information directed at those who experience discrimination, telling them how to file a complaint.

These are difficult choices. All of these forms of information and education are useful. None of them can be rejected for any obvious reason. Choices are more difficult because it is hard to measure the effect of any particular strategy of education and information. Often, the effects will only become apparent over time, and it is hard to know whether a change resulted from a particular initiative. That does not mean that there should be no attempt to evaluate programs, however. There are techniques for testing the effect of different educational strategies, though no technique is foolproof.

An Education and Information Strategy

Any realistic plan must take account of the fact that there is almost no base of educational activities on which to build. Even if there were such a base, the range of activities that seems appropriate would be almost impossible for one agency to develop and deliver by itself.

It is proposed that the Commissioner for Human Rights develop a two-pronged

educational strategy. The Commission would deliver some educational material and information directly. It would act as a facilitator and coordinator of other programs and initiatives. The direct delivery would concentrate, at least at the outset, on information about the Act, the enforcement process and how to develop policies to bring organizations into compliance with the Act. The Commission would serve as the coordinator and facilitator of longer range programs such as developing a human rights curriculum for schools or devising a program to promote better understanding of different groups within society. Other agencies and organizations would be directly responsible for developing and delivering these longer range programs.

One reason for this proposal is that it should be easier for an agency building a new program of education and information to start with more specific material about its own process. A second reason is that no one else can be expected to produce material about this process. A third reason is that broader educational programs are more likely to succeed if carried out in conjunction with others.

Coordinating Educational Initiatives

Other public bodies deal with issues relevant to human rights. For example, the Legal Services Society has been active in the area of human rights education. It has published material on various aspects of human rights, and staff frequently make presentations about human rights issues. The Ministry of Women's Equality publishes material and develops educational programs on matters concerning women. The Ministry of Aboriginal Affairs publishes material concerning the rights of First Nations Peoples. Multiculturalism B.C. develops programs to promote an understanding of multicultural issues and to combat racism. The Office on Disability Issues promotes an awareness of equality for persons with disabilities. The Ministry of Education works with school districts to develop curriculum and to make material available in the schools.

There are also many human rights initiatives outside government. Human rights organizations and groups representing particular communities have produced an impressive array of material to inform their constituencies about human rights issues, often with very few resources. Trade unions have distributed material to advise union members of their rights. They have also published material such as model harassment policies to help prevent discrimination. Employer's organizations and organizations of human relations managers have sponsored seminars and published manuals on human rights issues. These organizations often have knowledge about how a particular sector of activity works that would be very difficult to duplicate within any human rights agency working alone. The submissions made to this Review illustrate graphically the capacity of these organizations and the value of their work.

The cumulative effect of these initiatives in other parts of government and outside government is far greater than the Commission could hope to accomplish on its own. Also, a cooperative approach is more likely to be effective. For example, the

Commission probably could not develop a human rights unit that could be easily integrated into the school curriculum without the cooperation of those responsible for the rest of the curriculum. Even if it could do so, a unit developed jointly with experts in the Ministry of Education would have a much better chance of being used.

Similarly, material developed in consultation with an organization representing a particular community or with an organization representing employers or trade unions often will have greater credibility than if it was prepared solely by the Commission.

Coordination requires ongoing effort that can only be carried out by full-time educational staff. The staff responsible for this function should, along with expertise in human rights issues and in education, have the skills necessary to assume a leadership role in organizing joint activities and in persuading other parts of government that these projects are worthwhile. The senior member of staff must also have the stature within the agency and the government necessary to carry out a coordinating role and to deal with senior managers inside and outside government.

3-B-2 It is recommended that the Commission appoint staff to work full time on programs and initiatives to develop educational and informational materials on human rights. The staff should be expert in techniques of education and information, as well as knowledgeable about human rights issues.

3-B-3 It is recommended that the Commission work together with other ministries and agencies of government and with organizations outside government to develop a coordinated strategy in areas of mutual interest, to provide information, training and education about human rights.

The work of organizations outside government will sometimes require financial assistance. That is particularly true of organizations representing disadvantaged groups since these groups often have almost no budget. These organizations have the capacity to provide information not available elsewhere and to analyze and present that information in a manner that is sophisticated and meets professional standards. They lack only the budget to carry out the work. Such organizations should not be prevented by lack of funds from taking part in human rights education, as consultants to the Commission, in joint projects with the Commission and in producing their own material for their own community.

3-B-4 It is recommended that the educational budget provide funds to assist organizations to work with the Commission on projects of mutual interest and to develop and deliver their own material on human rights.

The Delivery of Information and Education

More specific information about the human rights enforcement machinery should be prepared and distributed by the Commission itself. Such material is essential to provide access to the complaints process. It also serves the interests of fairness by informing all parties to human rights complaints of what to expect and how to prepare for the process. It also serves a preventive function.

A number of submissions, including that of DAWN Vancouver, recommended that the material be prepared in plain language format. Plain language should always be the goal. In addition, information should be presented in different formats to meet the specific needs of different users. For example, some people will want a quick overview, while other will need more detailed information.

A high proportion of many communities who experience discrimination has a first language other than English. As noted in the submission of the Minister's Multicultural Advisory Council, the information will not be available to many people who experience discrimination if it is written only in English. At least the basic informational material should be available in all the languages spoken by substantial numbers of British Columbia residents. If information is available only in English, some of the people most vulnerable to discrimination will be deprived of access to it. To be effective, this material should not be simply a translation of other material written in English. It should be designed for the community that will use it, taking account both of the goal of plain language and of the need to be sensitive to the culture of the community.

For similar reasons, information should be available in formats accessible to people who do not have access to the usual print formats. Different formats such as large print, Braille and audio tapes may be useful. Such formats should be developed in consultation with individuals and organizations who use these formats and who have specialized knowledge of the best ways to provide accessibility.

This material also should be readily available in all communities and in all regions of the Province. It should be prominently displayed not only in the offices of the B.C. Council of Human Rights and any successor agencies, but also in other government offices that serve members of the public. For example, it should be available in Employment Standards Branch offices, Legal Aid offices and offices of the Ministry of Social Services. Government Agents could play a useful role.

Community groups, unions and businesses can also play a valuable part in distributing this material, along with libraries and service organizations inside and outside government. Often these organizations are more accessible than government offices, particularly in smaller communities. For example, Friendship Centres and cultural centres could help distribute this material. Their assistance would be enhanced if the education officers of the Commission provided some training to people within the organization so that they could help others to understand the material and could answer at least basic questions not covered by the material.

The need for basic informational pamphlets is urgent. They should be printed and distributed as soon as possible and should not await the structural reforms recommended in this Report. If necessary, there should be a budgetary reallocation, even at the expense of delaying or modifying other activities, to make at least basic material available without delay.

Along with basic informational pamphlets and material, it would be useful to prepare more extensive packages of material for those involved in human rights cases or responsible for human rights issues within their organization. The decisions of the members of the B.C. Council of Human Rights are a valuable source of information, and the decisions themselves are available from the B.C. Council of Human Rights. The value of this information would be enhanced further if regular bulletins outlining recent developments were prepared. Such information could be distributed directly and should also be available at public libraries.

At present, the annual report of the Council contains useful summaries of cases and of significant settlements. These reports obviously appear only annually, however, and sometimes well after the year reviewed in the annual report. A more frequent and up-to-date source of information would be useful.

3-B-5 It is recommended that information about the rights and responsibilities under Human Rights Code, and about the enforcement machinery, be prepared by the Human Rights Commission.

3-B-6 It is recommended that basic information about the Human Rights Act and its enforcement be prepared and distributed as soon as possible. This step should not await the broader structural change recommended in this Report.

3-B-7 It is recommended that informational material be prepared in different formats that are accessible to all users.

3-B-8 It is recommended that, in particular:

- **Material should be available in plain language format.**
- **Material should be available in all the languages spoken by substantial numbers of British Columbians.**
- **Material should be available in a variety of formats used by people who do not have access to the usual print formats. Plans for such formats should be formulated in consultation with users of this information and organizations with specialized knowledge of such formats.**

3-B-9 It is recommended that material be readily available in all communities and all regions of the Province. It should be available in government offices of other ministries and agencies. Community groups, unions and business organizations can also play a valuable role in distributing the material.

3-B-10 It is recommended that in addition to basic informational material, more detailed material be prepared and distributed to assist those who are involved in human rights cases or who are responsible for human rights issues within their organizations.

Advice to Individuals and Organizations About Human Rights

Some participants at consultation meetings, including the B.C. Federation of Labour and representatives of the business community, asked whether the B.C. Council of Human Rights could provide advice about whether a practice or policy conforms to the Act or about how to best eliminate discrimination. For example, a business might seek advice on whether a particular job qualification is a bona fide occupational requirement under the Act or whether a particular accommodation is required. A business might also ask for advice on how to eliminate harassment in a workplace or how to develop an employment equity policy.

Such advice can play a valuable role in preventing discrimination before it occurs. Many organizations do not have the in-house knowledge or expertise to answer such questions. Such advice can be particularly valuable for smaller organizations.

There is also some possibility that such advice could create a potential for unfairness if a complaint is filed about the very matter on which the advice was given. This potential arises if a person is advised that certain conduct is permissible and a human rights claim is later filed about the conduct. It is not fair to a claimant to reject the claim because the advice was given. The claimant had no opportunity to present arguments about the matter and cannot be bound by the advice. On the other hand, an organization that was conscientious enough to seek advice will feel unfairly treated if it is later held liable for the conduct that was approved.

The answer is not to refuse to give such advice. This service is too valuable to be sacrificed if other precautions will suffice. Instead, the advice should be given by the office of the Commissioner for Human Rights rather than the Director of Investigation and Mediation. Moreover, the person giving the advice should make clear that neither the Director of Investigation and Mediation nor the Tribunal is bound by the advice. In short, the structure proposed in this Report would minimize any conflict of interest within the agency.

Advice of a more general nature is even less problematic. For example, the office of the

Commissioner for Human Rights might prepare pamphlets on how to identify and eliminate particular types of discriminatory barriers.

3-B-11 It is recommended that the Office of the Commissioner for Human Rights provide advice to individuals and organizations about their obligations under the Act. Such advice should be available about specific policies or practices, as well as about more general strategies for complying with the legislation. The person giving the advice should make clear that the advice does not bind the Director of Investigation and Mediation or the Human Rights Tribunal.

2. **The Code as an Educational Document**

Besides setting out legal rights and obligations, the Code can itself be an effective educational document if it is drafted with its educational potential in mind. Too often, legislation is drafted by lawyers for lawyers and is more useful as a cure for insomnia than as an accessible source of information.

There are a number of ways in which the Code could be written to enhance its educational potential.

a. **Setting Out The Purposes of The Statute**

It would be useful to add language setting out the purposes of the Human Rights Code. From the point of view of education, such language would establish a framework that would help all readers to interpret the rest of the Code.

Such a section would also help the Tribunal and the courts to interpret the rest of the Code. The courts have made great strides in defining the meaning of equality and of discrimination in the period since the Human Rights Act was enacted in 1984. It is important that new legislation explicitly incorporate those developments.

The submission of the Ombudsman of British Columbia points out that such an addition would also promote administrative fairness. It says:

- It would help people to understand what they could expect from the application and enforcement of the statute and to articulate a standard against which the agency charged with administration and enforcement of the *Act* could measure its own conduct and be held accountable to the public.

The wording should also take account of other human rights initiatives. In

particular, it should make clear that the purposes of the Human Rights Code are consistent with those of the Multiculturalism Act enacted in 1993, as recommended in the submission of the Affiliation of Multicultural Societies and Service Agencies of B.C. As recommended by the Minister's Multicultural Advisory Council, there should be explicit recognition that the Code has primacy over other legislation.

B.C. is the only jurisdiction in Canada that does not have a preamble, purpose or objectives section describing the goals of the statute. It is time to correct this omission.

3-B-12 It is recommended that provisions be added to the legislation setting out its purposes and the assumptions on which it is based.

3-B-13 It is recommended that the section should set out the following purposes:

- **to foster the creation of a society in British Columbia in which there are no impediments to the full and free participation of all British Columbians in the economic, social, cultural and political life of British Columbia;**
- **to promote a society in which there is at the community level a climate of understanding and mutual respect in which all people will be made to feel that all are equal in dignity and rights, that each is a part of the whole community, and that each has a rich contribution to make to the development and well-being of the Province and the Nation;**
- **to encourage measures to prevent discrimination by identifying and eliminating the causes of inequality before they result in discrimination;**
- **to monitor progress in achieving equality in the Province and to initiate and encourage positive measures to eliminate persistent patterns of inequality associated with grounds of discrimination set out in Code;**
- **to implement rights set out in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic Social and Cultural Rights, and other solemn undertakings that British Columbia has committed itself to honour; and**
- **to provide the information, education and advice necessary to achieve these goals.**

3-B-14 It is also recommended that the section acknowledge and adopt the following principles:

- **that equality is measured in terms of the effect on the individual or group concerned rather than the intent of those responsible for the conduct;**
- **that equality must be assessed not only in relation to the alleged discriminatory conduct, but in the larger social, political and legal context;**
- **that identical treatment may produce serious inequality and that achieving equality often requires the accommodation of differences and positive measures to ameliorate conditions of disadvantaged individuals and groups;**
- **that multiculturalism is a fundamental characteristic of the society of British Columbia that enriches the lives of all British Columbians;**
- **that the Human Rights Code sets out matters of fundamental public policy, and where there is conflict between a provision of the Code and a provision of another enactment, the Code prevails.**

Finally, it is important that the Human Rights Code explicitly take account of those parts of the Canadian Constitution that protect the rights of citizens and of collectivities. The most notable examples are the Charter of Rights and Freedoms and the provisions of the Constitution Act, 1982 that affirm rights of First Nations Peoples. The language would serve a number of objectives. It would encourage an interpretation of the Human Rights Code that is broad enough to fully implement the equality rights provisions of the Canadian Charter of Rights and Freedoms. It also would recognize the constitutional rights of First Nations peoples and the obligation to interpret the Code in a way that promotes these fights.

A final objective is to ensure that the Code is interpreted in a way that respects other rights set out in the Charter. A notable example is the right to freedom of expression. As discussed in greater detail below, a number of groups have expressed concern that the protection against discriminatory publications might be interpreted in a way that denies freedom of expression. A reference to the Charter would help allay that concern, as well as educating readers about the need to consider all Charter rights.

3-B-15 It is recommended that the Code state that it shall be interpreted in a manner that is consistent with all rights set out in the Canadian Charter of Rights and Freedoms.

3-B-16 It is further recommended that the Code provide that it shall be interpreted in a manner that recognizes and enhances the aboriginal and treaty rights of the aboriginal peoples of Canada.

b. The Language of the Statute

A number of submissions to the Review said that the statute should be drafted in plain language to enhance its educational value. For example, the Victoria Status of Women Action Group and the West Coast Domestic Workers Association stressed this point.

It is not easy to write laws in plain language. For example, a human rights statute covers many activities. It sets out a fairly complex set of procedures. The statute must provide enough detail to guide those who must apply the statute. Accomplishing all of this in plain language is a challenge.

To make the language of the statute as plain as possible, drafters should try to avoid legalistic jargon. Even with the best efforts, the statute will not be fully accessible to all readers, and more readable explanations should also be available. But it should not take a law degree to understand the statute itself.

Some submissions also pointed out that parts of the Human Rights Act are misleading in the sense that they do not set out the process that is now used. In particular, sections 14 and 16 give the impression that cases needing a hearing are usually sent to the Minister, who appoints a special board of inquiry. Instead, cases are uniformly heard by a member of the B.C. Council of Human Rights under a power hidden in section 14(1)(d). It would be useful to correct this source of misunderstanding.

The Victoria Status of Women Action Group noted in its submission that parts of the Human Rights Act use gender biased language and recommended that gender neutral language be substituted. This recommendation makes sense. At present, the official title of the head of the Council is "chairman", though the Council sensibly uses the term "Chairperson" in its annual report. Ironically, the section providing that an employer must pay males and females at the same rate for similar or substantially similar work (section 7) is drafted in wording that would suggest to most readers that only men can recover. The traditional response is that this is not a problem since the Interpretation Act says that words referring to males also include females. But from the point of view of education, this wording sends exactly the wrong message.

3-B-17 It is recommended that every effort be made to draft the statute in plain language accessible to all.

3-B-18 It is recommended that the statute be written in gender neutral language throughout.

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C. the process for protecting human rights

1. Goals of the Process

This section of the Report discusses the process for dealing with human rights claims. The word "claims" has been substituted for the word "complaints" to better reflect the fact that the Code sets out fundamental legal entitlements. (For convenience, the term "claim" will be used to refer to the present process as well as the proposed process.) Other sections outline preventive strategies to avoid discrimination, such as standard setting and education and information programs. No matter how effective, however, such strategies will never eradicate discrimination entirely, and an enforcement mechanism is needed.

Part I of the Report set out the key foundations of an effective enforcement mechanism. It must be effective, expeditious and fair. The challenge is to achieve each of these goals without sacrificing any of the others.

When the system of comprehensive human rights protection came into effect in the 1960s and 1970s, the goal was an informal process that not only would resolve cases quickly but also would help to change discriminatory attitudes so that future discrimination would be prevented. Neither goal has been achieved, either in British Columbia or elsewhere. We have made great progress in developing the concept of equality. We know more about the causes of inequality. But we have lagged behind in developing an effective process for dealing with inequality when it occurs.

The experience since the 1960s has shown that the original goals are harder to achieve than was anticipated. The framers of the system did not contemplate the volume of claims that now exists. Also, human rights cases deal with subjects of great emotional impact and that impact cannot be ignored in developing procedures to resolve disputes.

We also now know that solutions may require significant changes in the way systems operate. In some situations, for example, buildings or vehicles may need modification or schedules of operations may need adjustment. The organization may not have the knowledge necessary to plan and implement those changes. Sometimes it is necessary to demonstrate the discriminatory effect of a seemingly neutral policy as a step in persuading an organization to change the policy. The perceived cost of the changes may also create resistance. Achieving change can require considerable planning and study even when the organization has no objection in principle to the change.

Sometimes resistance to a human rights claim lies in the fact that the claim

challenges long-standing patterns of behaviour, and the person responsible strongly resists the suggestion that the conduct is improper. For example, sexual harassment – particularly in forms short of explicit sexual demands – has been prevalent in many workplaces. If it is challenged, the reaction may be anger towards both the investigator and the person who made the claim rather than a willingness to discuss the matter. Changing such patterns usually requires more than a single informal meeting. Often an ongoing education program will be needed.

In still other cases, the growing social consensus about the unacceptability of discrimination can ironically make that discrimination more difficult to detect and eradicate. For example, even those who may be motivated by racial prejudice generally realize that their attitudes are socially unacceptable. They may strongly deny an accusation of race discrimination and take elaborate steps to conceal the discrimination. Again, a quick and informal process is unlikely to resolve the problem amicably or to cut through the camouflage.

The procedures for dealing with claims must be flexible enough to deal with all types of claims. If the claim is amenable to a quick and informal resolution, the process should facilitate such a solution. If detailed investigation is needed, it should be carried out. If further information or expert advice is called for, it should be provided. If only a mandatory remedy will suffice, it should be available.

It is also crucial that the process be fair, and it is equally important that it be perceived as fair. If potential claimants perceive unfairness, they may never file a claim. They also may resist a sensible resolution because they do not have confidence in the process and feel unduly pressured. Those against whom claims are filed are unlikely to cooperate with a process that they see as unfair. If a remedy is imposed, they are unlikely to cooperate in its implementation.

If parties are to have confidence in the process, they must feel that it gives them some control over how it operates. An Ontario study found that the lack of control was a major factor undermining confidence in the process under the Ontario Human Rights Code. The existing process in B.C. is different, but consultations suggested that here, too, parties sometimes feel that they do not have the information, advice and procedural powers necessary to effectively manage their cases.

Discrimination causes harm to the entire community, not simply to those directly affected. Therefore, the process should also be designed to serve the public interest in achieving equality as well as to resolve disputes between private parties. Part I of this Report found that resolving individual disputes was just one of the purposes of human rights legislation. Other purposes included correcting

persistent patterns of inequality, preventing discrimination before it occurs and monitoring larger patterns of inequality. While the claims process cannot alone achieve all of these objectives, it should play its part. Therefore, the system should provide for consideration of these larger objectives as well as for the concerns of the private parties to the dispute.

There is sometimes a tension between the control of cases by parties and furthering the larger public interest. For example, both parties may want to resolve a claim with a monetary payment that leaves the underlying causes of the discrimination in place. Claimants have little incentive to seek a broader remedy if they no longer work for an employer or no longer want the apartment or service that was denied, for example. The respondent may want the quickest possible resolution. A monetary settlement in this situation will do nothing to prevent future discrimination or to achieve systemic change. On the other hand, pursuing a broader systemic remedy may delay or deny a personal remedy to a claimant that a respondent is willing to provide immediately.

The process cannot eliminate the tension between private and public objectives, but it should take account of this tension and seek ways to achieve both to the extent possible.

2. Access to the Claims Process

This section deals with access to the process for filing a claim. Access to other services, including information and advice to businesses and organizations, is covered in other sections of this Report.

As described in Part II of the Report, there is a major concern that people who experience serious violations of the Human Rights Act may not have effective access to the process for filing a claim. Of course, the rest of the process is irrelevant for those who never get over this first hurdle.

a. Starting the Process – Making a Claim

As discussed earlier, one of the main barriers to the claims process is that people do not know the process exists or are reluctant to use it for a variety of reasons. Once these barriers are overcome, the process for filing claims is, in many respects, fairly accessible at present. However, the process does have limitations and further improvements can be made. Most of the recommendations in this section do not require legislative change.

Under the proposed process, claims would be laid with the office of the Director of Investigation and Mediation. The Director would have

sufficient staff to deal with intake quickly. Because the Director would also have staff to carry out investigations and mediation, it would not be necessary to have the strict division that presently exists between staff responsible for intake and for investigation. The result would be greater flexibility. For example, the person carrying out intake could start the investigative process almost immediately if the matter was urgent. That person could also try to mediate the claim quickly. Both steps would be particularly helpful when the benefit that had been denied (for example, rental of an apartment) was still available at the time of the first contact.

If the Director of Investigation and Mediation is responsible for intake, a formal mechanism is needed to ensure that the Commissioner for Human Rights is informed about claims and has the opportunity to intervene as a party, as discussed earlier in this Report. Though the staff of the Director of Investigation and Mediation would likely inform the Commissioner of cases that seemed to be of particular significance, this step should not be left to chance.

3-C-1 It is recommended that the Director of Investigation and Mediation should be responsible for receiving claims and should have sufficient staff to carry out this function.

3-C-2 It is recommended that a mechanism be put in place to ensure that the Commissioner for Human Rights is informed of all claims and has the opportunity to intervene in appropriate cases.

Communications Issues

It is possible to file a claim in person with the B.C. Council of Human Rights. The great majority of claims, however, are presently made by telephone. Both options should remain available.

The Council has a toll-free long distance number that facilitates this process and should be continued. However, it should be supplemented by regional offices, as discussed earlier in this Report.

The submissions and comments at consultation meetings suggest that improvements can be made in telephone access. One improvement is that the toll-free number could be better advertised. Perhaps the most frequent criticism was that people who call the Council almost always are connected immediately to a voice-mail system rather than speaking with a human being. Although this system was installed to avoid a busy signal, it creates a first impression of an impersonal agency.

A number of suggestions were made that deserve consideration. While some of these suggestions may at first glance seem minor, they can make a crucial difference in the accessibility of the agency and its perceived openness:

- The initial phone contact should be with a live person rather than a message system, even if the caller then has to leave a message for the appropriate person on voice-mail. Initial human contact is less intimidating and allows the person who answers to assess whether special measures are needed (for example, whether there are linguistic barriers).
- There should be some way to arrange for a confidential conversation outside normal work hours. Some people have no opportunity to have a private conversation during the day. The problem is particularly acute for people with complaints of employment discrimination who work in a public area or do not have access to a telephone during their working day.
- There should be a way at least to leave a message outside normal work hours, for many of the reasons just mentioned.

In addition, the system should be fully accessible to persons who cannot communicate by telephone because of hearing limitations, as noted in the submission of DAWN Vancouver. The Council does presently have TTY facilities in Victoria and Vancouver. It is important that such facilities be well publicized and that they be modernized as new technology becomes available. It is also important that interpretation be easily arranged for persons with hearing limitations who come to the offices in person.

Linguistic, and Cultural Barriers and a Representative Staff

The Canadian Anti-Racism Education and Research Society and the Affiliation of Multicultural Societies and Service Agencies of B.C., among other groups, recommended that the services of the agency should be offered in different languages. The same proposal was made by participants at community meetings.

This recommendation has merit. Language is one of the barriers that contributes to inequality. There is evidence that persons whose first language is not English are more vulnerable to discrimination than others. Therefore, it is important that the system of protection not itself be denied because of linguistic barriers.

There is reason to believe that the intake system presents barriers to

certain cultural and linguistic communities. No exact statistics are available. However, both community representatives of racial and cultural groups and persons within the B.C. Council of Human Rights feel that linguistic barriers discourage claims from some communities. This situation should be corrected.

It is also important that staff carrying out intake be as representative as possible of the larger community. For example, the staff should be representative in terms of race, gender and disability. The representation of different communities on staff sends the message that the agency has a knowledge of different communities and is sensitive to the culture and the concerns of these communities. An unrepresentative staff sends the opposite message. There is evidence that members of a community are more likely to make contact when another member of the same community is on staff. The numbers seem to fall off if the community is no longer represented due to staff changes.

3-C-3 It is recommended that the services of the Commission, particularly at intake, be available in all the languages spoken by substantial numbers of British Columbians.

3-C-4 It is recommended that efforts be made to ensure that the staff of the Commission is representative of the larger community.

Assistance of Staff in Filing Claims

At present, intake/mediation officers draft the claim and the particulars of allegation after discussions with the claimant. This service is designed to provide access to claimants who might be deterred from filing a claim if they had to fill out these forms themselves.

Intake/mediation officers do not represent the claimant in performing this function. Their job is simply to translate the claimant's story into the required written form, not to take the claimant's side. Nevertheless, some participants at meetings with business organizations said that this assistance created the appearance that the Council had sided with the claimant.

Perceptions are important and should not be lightly dismissed. In this case, however, the perception seems to be based on a misunderstanding of the facts. The crucial point is that withdrawing such assistance would deny access to a significant number of claimants, and in particular to groups most vulnerable to discrimination. As discussed elsewhere in this

Report, those groups do not have equal access to the human rights process even under the present arrangements. Access would be even more difficult if they did not have assistance in filing a claim. This detriment outweighs any benefits that would be achieved by ceasing to supply this service.

One option would be to have staff of the Commissioner for Human Rights assist in drafting the claim rather than staff of the Director of Investigation and Mediation. However, that option would result in much duplication of effort, since two members of staff would deal with every claim. It would also create delays as files were passed from one officer to another. The problem is one of perception rather than actual unfairness, and these disadvantages outweigh any advantage of this option.

3-C-5 It is recommended that the Director of Investigation and Mediation continue the practice of assisting claimants to prepare the documents necessary to file a claim.

Assistance of Community Organizations

While access is improved if those responsible for intake provide assistance in filing a claim, that does nothing for those who never get as far as contacting the agency. At consultation meetings, a variety of reasons were given for failing to file a claim. Sometimes there is fear of legal procedures. Sometimes there is distrust of government agencies. Sometimes a person needs moral support as well as technical assistance.

Such deterrents affect many potential applicants coming from many communities. But the consultations suggested that such deterrents are a particularly important factor in discouraging claims from First Nations people, as described in the submission of the United Native Nations. A survey conducted by DAWN B.C. suggests that people with disabilities also are deterred by factors such as these.

Organizations representing the interests of different groups in society are often in a better position to provide the needed support and assistance than any government agency. These organizations frequently are an ongoing part of the lives of members of the group. They may be social centres or provide a range of support services. They are usually physically located in the community. They also are sensitive to cultural considerations because they themselves are part of the culture.

Friendship centres and other First Nations organizations could provide valuable assistance in serving as an intermediary between individuals and

the Human Rights Commission. Transition houses and women's centres could provide similar services to women. Other organizations, including those representing people with disabilities, ethnic and cultural groups, and lesbians and gay men could also play a valuable part.

Such organizations would need training and some resources to carry out this role. A number of organizations, including the Smithers Human Rights Society and the B.C. Education Association of Disabled Students, pointed out that funding and assistance would be needed to support these activities. The Commission could provide short training sessions to acquaint staff or volunteers with the Code and its procedures. It could also provide manuals and informational material for use by staff, volunteers and those thinking of filing a claim. Compensation should be provided to organizations for the costs of this service, including staff time.

In one sense, this represents an additional expense. However, it is a very cost effective way of delivering services. Moreover, the very fact that these organizations are separate from the Commission and from government may give them added credibility in the eyes of many potential claimants. When there is no indication of a violation, a potential claimant may be more likely to accept this opinion if it comes from a member of an organization the person is familiar with and trusts. In those circumstances, community organizations may help to screen cases at a very early stage. They may also assist individuals to find a more promising avenue for dealing with the issue of concern to them. When there are indications of discrimination, such an organization may be able to help a person to organize a claim in a way that brings out the key points, again saving the time of staff of the Commission.

3-C-6 It is recommended that the Commission work with organizations in the community to provide advice and assistance to those considering filing a claim.

3-C-7 It is further recommended that financial assistance, materials and training be provided to these organizations to allow them to carry out this role.

These recommendations do not in any way detract from the functions of the Commission. Those providing assistance would not perform the role of intake and would have no special legal powers under the Code. Instead, they would provide a bridge between individuals and the Commission.

b. **Who Can Make a Claim**

Under the existing Human Rights Act, a claim can be made by the individual affected by discrimination, by someone else on that person's behalf, or by a person or organization filing a claim on behalf of some other person or group or class of persons. The claimant does not have to be a member of the group or class affected. If the claim is filed on behalf of a person other than the claimant, or of a group or class of persons, the Council can dismiss the claim unless it is satisfied that the person affected by the discrimination consents, or the claim is in the interests of the group or class on behalf of whom it is made.

The power to file a claim was expanded significantly by amendments in 1992. Until that time, a claim could be filed only by the person affected or by someone with the consent of the person affected. However, a number of submissions, including that of the Canadian Anti-Racism Education and Research Society and the British Columbia Division of the Canadian Union of Public Employees, recommended that the human rights enforcement agency should itself have the power to file complaints.

If the only purpose of human rights protection were to provide a remedy to the individual affected, it might make sense to allow claims only by the person affected or someone on their behalf. If, however, an important purpose is to eliminate persistent patterns of inequality, different considerations apply. The people directly affected by the inequality may not be in a position to file a claim. Indeed, they may not even realize that they have been affected by discrimination. For example, no particular applicant for a job may know exactly what was taken into account in choosing employees or whether the criteria that were used tend to exclude a particular group. The inequality may become apparent only when the cumulative effect on the group is assessed.

The amendments in 1992 were a step in the direction of recognizing that discriminatory patterns affect groups and that solutions require a move beyond remedies for individuals. The amendments are important as an indication that the Legislative Assembly has adopted this view of equality. However, they do not accomplish all that was intended.

Two factors have made it difficult or impossible to make use of these powers. First, the information needed to detect inequality often is not available. For example, no one outside an organization may know what factors were taken into account in making a decision. Second, no organization may have the resources that would be needed to compile the information and to participate in a claim.

As described in Part I of this Report, a complaints-based system has

inherent limitations in dealing with patterns of inequality. No system that must start with the filing of a claim will be fully effective in detecting and correcting systemic discrimination. There are steps, however, that would make the system more effective than the existing Act.

A key element is to give the Commissioner for Human Rights the power to start proceedings on his or her own initiative, as recognized in the submission of the B.C. Human Rights Coalition. The Commissioner will often have better access to information about patterns of inequality than any single non-governmental organization. The Commissioner should also have the resources to conduct the research that will often be necessary before proceedings can start.

Giving the Commissioner this power furthers the objective of effective protection. Cases concerning systemic issues are usually more complex than other cases. They may require a fairly sophisticated investigation that represents a substantial commitment of resources. The Commissioner can assess whether the potential benefit of proceedings will justify this commitment. The submission of the Ombudsman of British Columbia noted that the Ombudsman has the power to initiate investigations and that this is "an important tool in achieving systemic appreciation of issues and in engaging in preventive work." The submission recommended that there should be a similar power to initiate investigations under the Human Rights Act.

Giving the Commissioner this power also furthers the objective of fair enforcement. In exercising this power, the Commissioner should determine not only whether a pattern of inequality exists, but whether a particular situation is more or less serious than other similar situations. The Commissioner can therefore help to ensure that one organization is not being singled out unfairly.

Giving the Commissioner the power to file a claim can also serve a different purpose. It can be a tool to circumvent fear of retaliation by an individual who has been affected by discriminatory conduct. For example, if the violation concerns a discriminatory advertisement or improper questions on an application form, the Commissioner could file a claim instead of the person who initially brought the matter to the attention of the Commission. This solution to fears of retaliation will not work in all cases, since it is sometimes impossible not to reveal the identity of the person affected.However, where identity is not a crucial aspect of the claim, a claim in the name of the Commissioner may avoid either actual retaliation or fears of retaliation, without jeopardizing the principle of fairness.

Of the thirteen Canadian human rights statutes, six permit the human rights agency to file a claim. Two additional jurisdictions provide for public initiation of an investigation, but the initiative must come from the Lieutenant Governor in Council or the Minister, rather than the commission.Only Alberta, B.C., New Brunswick and the two territories provide no mechanism for public initiation of a claim.

The submission of the Business Council of B.C. said that such a power would give investigators too much discretionary authority and would be unduly intrusive. A claim filed by a public agency does raise issues not raised by a claim brought by a private person or group, and it is appropriate to protect against misuse of this power.

Elsewhere in this Report, it is recommended that the Commissioner for Human Rights be empowered to conduct an inquiry about more general equality issues. Such an inquiry would differ from the process in dealing with claims. It would not be brought against a particular organization, it would not compel the production of evidence and it would not result in a binding remedy. Instead, the purpose would be to monitor larger trends and patterns affecting equality. An inquiry would give the Commissioner a power to gather information about emerging equality issues in a way that is not adversarial.

If the Commissioner decides instead to initiate a claim, it is appropriate to require that the Commissioner have reason to suspect that a violation has occurred. This standard is designed to prevent "fishing expeditions" by the Commissioner. It also takes account of the fact that initiating a claim merely starts an investigation. The Commissioner should not be expected before an investigation to be able to prove that a violation has occurred. The requirement of a reason to suspect a violation would place B.C. in the middle of the range of standards that apply in other jurisdictions.

Other steps are needed to ensure that the power of others to file claims on behalf of a group are turned from a statutory promise into a meaningful reality. Sometimes an organization will require funding to allow it to participate in a meaningful way. Therefore, the budget of the Commission should include funding to organizations for systemic research and, if the claim proceeds, for legal costs. This funding should be allocated by the Commissioner for Human Rights with the advice of the Human Rights Council of Advisors. The Commissioner should consider the potential of such research to help correct persistent patterns of inequality. The Commissioner should also ensure that the terms of this support ensure fairness to all parties, including those who may be the subjects of the research or the respondents to a claim.

In addition, there should be a source of funding to allow participation in claims that may be brought by the Council or by others. Systemic cases can affect groups in significant ways, and those groups should have an opportunity to participate, so that the investigative process and the hearing take account to all points of view. Often, organizations representing groups – particularly disadvantaged groups – will require financial assistance to participate. Research funding could be provided at whatever stage the Commissioner thinks is appropriate. After the case is referred to the Tribunal for a hearing, the Tribunal would have the power to decide whether to allow an intervention at the hearing.

3-C-8 It is recommended that the Human Rights Code empower the Commissioner for Human Rights to file a claim if the Commissioner has reasonable grounds to suspect that a violation has occurred.

3-C-9 It is recommended that the statute permit individuals or groups to intervene in a claim with leave of the Human Rights Tribunal if the Tribunal determines that the intervention would facilitate the representation of all points of view and is fair to all parties.

3-C-10 It is recommended that the Commissioner for Human Rights provide an individual or group with funding for research or for the costs of participating in a claim if the Commissioner determines that such funding would further the purposes of the Human Rights Code and that it is consistent with fairness to all parties.

c. **Assigning Priorities to Cases – Criteria**

At present, most claims are dealt with in the order in which they were made. This "first come, first served" policy is modified in cases of special urgency. For example, a case could be given priority on the ground that an apartment that had been denied was still available or that AIDS or other illness made the matter urgent. However, departing from chronological order is a somewhat unusual event.

It makes sense to give priority to cases when immediate action may allow a claimant to obtain what was wrongly denied or when delay would cause particular hardship to an individual. The only suggestion regarding the current policy, as far as it goes, is that it might be useful to develop specific guidelines to assist those responsible for intake.

A broader policy regarding priorities also deserves consideration. If a primary objective of the statute is to modify persistent patterns of inequality, it would be useful to give priority to claims that have the potential to achieve that objective.

Again, guidelines for making this decision would be appropriate. Among the factors that deserve consideration are the following:

- The cumulative gravity of the harm. For example, cases about ongoing policies affecting significant numbers of people might be given priority over cases about practices that had since been corrected or those affecting a few individuals.
- The benefits to be achieved, including longer run benefits. For example, access to a job that would open new career paths for groups that had traditionally been excluded might be given priority over access to jobs providing more limited opportunities.
- The efficacy and enforceability of a remedy. Factors to consider would include whether the industry is one in which new jobs are being created or is a declining industry, the ability of an organization to implement a remedy and the capacity of the Commission to develop and monitor a remedy.
- The usefulness of the case as a model. If a case is likely to become a model for other organizations, the benefits may be multiplied many fold. The usefulness of the case as a model will depend on many factors, including the number of similar organizations using similar practices, whether there are good communications within an industry and whether the potential respondent plays a leadership role within an industry.
- The usefulness of the case as precedent. Besides serving as a model, a case may be useful as precedent because, for example, it would establish a new legal principle relevant to future cases.

3-C-11 It is recommended that the Commission (and the existing Council) develop guidelines for setting priorities for dealing with cases. These guidelines should take account both of special circumstances of individuals and of the goal of correcting persistent patterns of equality affecting groups.

3. Whether to Proceed With A Claim

Section 13 of the Human Rights Act provides that a complaint can be dismissed before an investigation on one of four grounds:

- it is not within the jurisdiction of the Council;
- it could be more appropriately dealt with under another Act;
- it is trivial, frivolous, vexatious or made in bad faith; or
- it is based on facts that occurred more than six months before the case was filed. If it is over six months old, the Council can accept the complaint if the delay was incurred in good faith and there will be no substantial prejudice to any person.

The dismissal of cases beyond the jurisdiction of the Council is not controversial. Indeed, the rule of law requires that the Council always stay within its jurisdiction. Dismissal under the other grounds requires more careful consideration.

a. Overlap with Other Proceedings

The law often provides alternative mechanisms for dealing with a set of facts. For example, an employer who refuses a woman maternity leave violates both the Human Rights Act and the Employment Standards Act. If an employee is denied a promotion because of a disability, there may be a human rights claim and a right to grieve under a collective agreement. One question is how to deal with multiple proceedings about the same facts. This section of the Report discusses this issue as it applies to the work of the Director of Investigation and Mediation. Overlap at other stages of the process is discussed below.

Business groups and representatives of trade unions expressed frustration because essentially the same facts might be dealt with under several different legal processes. There were criticisms that this duplication is both inefficient and unfair. It is inefficient because the same facts may be considered two or more times. It is said to be unfair because a claimant who has lost in one proceeding can get a second chance before another tribunal. Both business and labour organizations noted that the combined costs of successive hearings can be quite large.

These points deserve careful consideration. Multiple proceedings may cause hardship or unfairness if an organization is forced to defend itself several times. They also undermine effective human rights enforcement and contribute to delays by using resources that could be better be used in dealing with cases for which no alternative is available.

On the other side of the equation, alternative proceedings may be out of the reach of a claimant because of expense or for other reasons. Also, the alternative proceedings will not always reflect human rights principles, even when they deal with the same facts as those of a human rights claim.

Three other Canadian human rights statutes have provisions that are somewhat comparable to the section of the Human Rights Act covering this situation (section 13(1)(b)). The Canadian Human Rights Act provides that the Commission can refuse to deal with a claim if it "could more appropriately be dealt with, initially or completely" under another federal statute. The federal Act also allows a refusal on the ground that the claimant ought to exhaust grievance or review procedures otherwise reasonably available. The Ontario Human Rights Code allows the Commission to refuse to deal with a claim if it "could or should be more appropriately dealt with" under another Act. It does not apply to non-statutory proceedings. The Quebec Charter of Human Rights and Freedoms allows the Commission to refuse or cease to act if the alleged victim of the discrimination has personally pursued another remedy. The remaining statutes give no power to dismiss a claim on the ground that other proceedings are more appropriate.

There are four general strategies for dealing with overlap between legal proceedings:

- Require a claimant always to choose one process at the outset – for example, to choose between a human rights claim and a grievance under a collective agreement.
- Give the Commission discretion to dismiss a claim if it thinks the other proceeding is more appropriate.
- Wait until the other proceeding finishes and take the results into account in deciding whether to continue with the human rights claim.
- Provide a mechanism allowing a single adjudicator to rule on both legal claims.

The Human Rights Act presently incorporates the second strategy. However, the present wording does not cover all other relevant proceedings. The wording refers to the possibility that the claim "*could* be more appropriately dealt with under another *Act*" (my emphasis). This language seems to apply only to statutory proceedings. For example, it may not cover a pending wrongful dismissal action, since such a case is not governed by an "act" but by the common law. There also may be some uncertainty whether a labour grievance is covered. In addition, the word "could" may suggest that it refers only to future proceedings, not to those that have already been completed. Finally, the Act does not explicitly require that the results of the other proceeding be considered if the human rights claim goes forward, though the general power of the Council to decide whether to refer a case to hearing may allow it to do so.

These provisions should be modified to meet the concerns that were expressed during the consultation. The existing power to dismiss a case that could be better dealt with under another Act should be made more flexible. These modifications should be accompanied by safeguards to make sure that this flexibility is not misused.

It would not be appropriate to require a claimant to choose one process at the outset. The two legal mechanisms often will not cover exactly the same matters. For example, a grievance under a collective agreement does not require proof that the adverse treatment was tied to a particular ground of discrimination, while a human rights claim would be more appropriate if the claim concerned discriminatory terms in the collective agreement itself. A person may not have the information or advice at the outset that would make an informed choice possible. Also, the claimant may not have full control over the proceeding, and the proceeding may not cover all the issues that the claimant anticipated.

The second approach – allowing dismissal of a claim – now applies to human rights claims that could be more appropriately brought under another statute. One difficulty with this provision is that it results in a dismissal before it is possible to determine if the other proceeding will in fact adequately deal with the human rights issues raised. It generally seems more appropriate to wait until that proceeding is finished before dismissing the human rights claim.

The proposed modifications most closely reflect the third approach. Where another proceeding seems more appropriate, the Director of Investigation and Mediation should have the power to postpone the human rights claim. Once the proceeding is finished, the Director should be required to consider the nature of the other proceeding in deciding whether a human rights claim should go forward.

It is also worth investigating further the development of a mechanism for combining different legal proceedings in appropriate circumstances. The possibility of combining of proceedings is discussed later in this Report, where it is suggested that such a step deserves consideration but requires further study.

The wording of the statute should be extended to all proceedings, whether or not they are brought under a statute. This change was recommended in the submissions of the B.C. Council of Human Rights and the Business Council of B.C. The new provision should also remove any doubt the application of the section to proceedings that have already taken place as well as to future proceedings.

The proposed process for considering the consequences of other proceedings is as follows:

- After a claim is received, the Director of Investigation would determine whether other proceedings had taken place concerning the same facts and if not, whether other proceedings were available. The Director would consider both proceedings under a statute and those that are under some other authority.
- If other proceedings had already been completed, the Director would determine whether those proceedings had fully and adequately considered the human rights aspects of the claim, including any appropriate remedies. If they had, the Director would dismiss the claim without re-investigating the merits of the claim. This determination would take account of the subject matter of the other proceeding, the expertise of the tribunal or decision-maker, the fairness and effectiveness of the other process and whether the parties had been adequately represented in the process. It would also take account of whether the other proceeding offered a range of remedies comparable to those that might reasonably be anticipated under the Human Rights Code in the circumstances.
- While the Director would examine whether the other proceeding had fully and adequately *considered* the human rights aspects, the Director would not reconsider the ultimate findings of the other body. The assessment would be of the process rather than the result.
- If the Director were not satisfied that the other proceedings had adequately dealt with the human rights issues, the Director would proceed with the claim. However, the Director would have the discretion not to proceed with parts of the claim if they had been fully considered. For example, if a claim alleged violations of both the equal pay provisions and of sex discrimination, it would be open to the director to dismiss the equal pay claim on the ground that it had been fully considered but to proceed with an investigation of the sex discrimination claim.
- If the other proceeding had not yet started or were underway, the Director of Investigation and Mediation should consider deferring the human rights claim until after the other proceeding has finished if it is likely to properly deal with the human rights aspects of the dispute. The Director should use the standards just described in making this decision. This step will avoid the cost of needless duplicate proceedings without forcing the Director to speculate on the adequacy of proceedings that have not yet taken place. Again, the Director would have the power to restrict the scope of the claim or of the investigation in light of the other proceedings,

avoiding an "all or nothing" approach.

A later section of this Report recommends that the statute prescribe time limits for an investigation. The power to defer proceedings would constitute a partial exception to these time limits, in the sense that the time that the proceedings were deferred would not count in calculating how long the Director had to complete an investigation. However, there should be limits on how long the claim can be deferred so that it does not become a new source of delay instead of a way to resolve the dispute more easily and quickly. The proposed maximum time limit is 100 working days, which should be sufficient to complete a labour grievance or most statutory proceedings. If a case were deferred until the conclusion of another proceeding but the Director decided at that time to continue with the human rights claim, the total time to process the claim would be extended beyond the normal time limits. Overall, however, time and resources would be saved, since many of the cases that were deferred would be adequately considered in the other proceeding and never would go through the process under the Human Rights Code.

Normally, the Director would consider whether to dismiss or defer a claim soon after it was filed. However, occasionally new information may be revealed during the investigation that would justify a decision to dismiss or defer a claim. Therefore, the Director should continue to have the power to take either of these steps after the investigation has started.

3-C-12 It is recommended that the Human Rights Code require the Director of Investigation and Mediation to consider whether the substance of the human rights claim has been fully and adequately considered in another proceeding.

3-C-13 It is recommended that in making this determination, the Director should take account of all relevant factors, including:

- **the subject matter of the other proceedings, and whether those proceedings had fully and adequately considered the human rights aspects of the dispute;**
- **the expertise of the tribunal or decision-maker in human rights;**
- **the fairness and effectiveness of the other process and whether or not the parties had been adequately represented in the process; and**
- **whether the other proceeding offered a range of remedies comparable to those available under the**

Human Rights Code in the circumstances.

3-C-14 It is recommended that the statute authorize the Director to dismiss a human rights claim that has been fully and adequately considered in another proceeding or to limit the claim to matters not fully and adequately dealt with. The Director would not reassess the ultimate result in the other proceeding if it had met the criteria just outlined.

3-C-15 It is further recommended that the Director of Investigation and Mediation be authorized to defer further consideration of a human rights claim, pending the outcome of another proceeding that appeared to the director capable of fully and adequately dealing with the substance of the claim. After that proceeding finished, the director would determine whether, in light of the other proceeding, the human rights claim should be dismissed or should continue, applying the same standards as set out in the preceding recommendations.

3-C-16 It is recommended in no event, should the claim be deferred for more than 100 working days or such other time as is specified in regulations under the Code.

3-C-17 It is recommended that the Director of Investigation and Mediation have the power to dismiss or defer a human rights claim as described in the previous recommendations at any time between the filing of the claim and the decision whether the claim should be referred to the Human Rights Tribunal for hearing.

3-C-18 It is recommended that the Commissioner for Human Rights and the parties to a claim have the opportunity to submit comments before a final decision is made to dismiss a claim.

Later recommendations in this Report deal with other measures to avoid overlap and duplication at the hearing stage of the process. They also discuss in greater detail the possible overlap between labour grievances and human rights claims. The power to review a decision to dismiss a claim is discussed in below.

b. **Cases Unlikely to Succeed**

Section 13 of the Human Rights Act allows the B.C. Council of Human

Rights to dismiss a claim before investigation if it is "trivial, frivolous, vexatious or made in bad faith." Some variation on this language is used in five other jurisdictions. Three statutes allow dismissal if a claim is "without merit." Four statutes make no reference to dismissal of a claim before investigation.

The B.C. wording has few supporters. Submissions from a variety of organizations proposed that it be deleted and offered various substitutes. Human rights organizations noted the somewhat insulting tone of the language, especially if the words are used to dismiss those cases that concern serious matters but that present no evidence of discrimination. For example, losing a job is not a trivial or frivolous event. A person cannot usually be described as vexatious in challenging the dismissal, even if the dismissal was justified or if the cause of the dismissal was not covered by the Human Rights Act.

Other groups, including the Business Council of B.C., said that the language is too narrow to be effective in dismissing groundless claims at an early stage. They suggested that the absence of an effective power to dismiss such claims contributes to delays. They said that it also causes needless expense both to the B.C. Council of Human Rights and to organizations that must defend themselves at an investigation. It seems true that under the present wording, the Council sometimes must send a case to investigation even though the members of Council may be convinced that it has no realistic chance of success.

Both the B.C. Human Rights Coalition and the Business Council of B.C. proposed that the Act allow a dismissal if a claim is "without merit." The B.C. Council of Human Rights suggested the phrase "no further proceedings are warranted."

The standard to be applied in declining to proceed further with a claim should achieve several objectives. The new standard should make it possible to dismiss a claim at the point at which it becomes apparent that the claim could not succeed even if further investigation and litigation took place. It should also allow the dismissal of cases that would not further the purposes of the statute, keeping in mind that one purpose is to provide a remedy to individual claimants who have experienced significant discrimination. However, it is also essential to take account of the fact that the dismissal may occur before any investigation or after only a cursory investigation. The chance that further investigation would reveal that the claim has merit must also be taken into account.

3-C-19 It is recommended that the Director of Investigation

and Mediation have the statutory power to dismiss a claim at any time prior to a reference to the Human Rights Tribunal if the Director concludes that the claim is without merit and there is no reasonable likelihood that the results of further proceedings would affect the validity of this conclusion.

3-C-20 It is further recommended that the Director of Investigation and Mediation have the power to dismiss a claim at any time prior to a reference to the Human Rights Tribunal if the director concludes that proceeding with the claim would not further the purposes of the Act because it raises no significant issue of discrimination or because it was filed for improper motives.

3-C-21 It is recommended that the Commissioner for Human Rights and the parties to a claim have the opportunity to submit comments before a final decision is made not to proceed.

3-C-22 It is recommended that if the Director of Investigation and Mediation decides to dismiss a claim, the Director shall inform the claimant (and the respondent, if the respondent has been notified of the claim) in writing, giving reasons for this decision.

The last recommendation reaffirms the present statutory language requiring notice in writing. It also adopts the present practice of the B.C. Council of Human Rights of providing reasons for the decision to dismiss. The power to review a dismissal is discussed below.

c. **Time Limit for Filing a Claim**

Section 13 of the Human Rights Act presently allows the council to dismiss a complaint that is based on facts that occurred more than six months before the complaint was filed, unless the delay was incurred in good faith and no substantial prejudice will result to anyone affected by the delay.

A significant number of participants at consultation meetings suggested that the six month period should be extended. The proposed time limits varied. For example, the federated anti-poverty groups of B.C. recommended an extension of not less than one year, and the Victoria Status of Women Action Group and DAWN Vancouver proposed two years.

Some extension of the time limit seems justified, even though the Council can accept older claims. Participants at consultation meetings explained how the emotional impact of discriminatory treatment can make it difficult to file a claim shortly after the event. When discrimination takes more subtle forms, a person may realize that a violation has occurred only after receiving advice from a community group or other source.

A longer time limit would also help to reduce the administrative burden. The policy of the B.C. Council of Human Rights is to request submissions from the parties if a claim is filed more than six months after the events in question. In many of these cases, an extension is granted, particularly if the claim is only a few months over the six month period. If the period for filing a claim were extended, the exercise of the discretion would become a more meaningful process when it did take place.

The time for filing a human rights claim is very short in comparison to most other legal proceedings. For example, the normal time to file most negligence cases is two years. The limit for a wrongful dismissal case is six years.

It is true, however, that older cases can be more difficult to investigate and litigate than cases in which the evidence is fresher. Memories fade, witnesses move away and documents are lost. Therefore, a balance must be struck between accessibility and efficiency.

3-C-23 It is recommended that the statute provide that claims must be filed within one year of the alleged contravention. Where a continuing contravention is alleged, the period would be within one year of the last alleged instance of the contravention.

3-C-24 It is recommended that the Director of Investigation and Mediation be authorized to extend this period if the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay.

3-C-25 It is recommended that regulations under the statute set out a procedure for notifying the parties that an extension is being considered and allowing them to make submissions on this matter.

d. **Procedure for Making Determinations About a Claim**

At present, the decisions about how a case will proceed are made by one or more members of the B.C. Council of Human Rights. The Chair of the Council or a single delegate has the power to send a case to investigation or to hearing. The dismissal of a case before investigation or hearing requires the decision of a panel of three members of the Council.

This arrangement works well when the decision is to send a case to investigation or to hearing. That decision can be delegated by the Chair of the Council to any member or staff. Decisions can be made speedily without undermining fairness because a decision to send a case forward does not finally decide the rights or obligations of any of the parties.

The arrangement is more problematic when the decision is to dismiss a case. While the process is fair, it is not as fast as it should be, and it consumes a considerable percentage of the time of the members of the Council. The decision must be made by a panel of three members of Council. They must all review the file, and arranging a meeting of the panel inevitably takes some time.

Under the proposed procedure, it is the Director of Investigation and Mediation who would decide if a claim should be dismissed for one of the reasons described previously. The Commissioner of Human Rights would not be allowed to participate in this decision. This division of authority is designed to promote confidence in the impartiality of the enforcement system. The Commissioner sometimes will have initiated the claim or will appear as a party to the claim. The division of responsibility avoids any perception that the process is one-sided.

In most other Canadian jurisdictions, it is the human rights commission that decides whether to dismiss a case before an investigation. The commission has this power even if the commission itself initiated the compliant. The procedure proposed here gives an additional guarantee of impartiality that does not exist in those jurisdictions. The proposed division of authority may make coordination of enforcement efforts slightly more difficult, but that risk is outweighed by the need to promote confidence in the process by taking special efforts to guarantee impartiality.

The Director would have the power to dismiss a case at any time before it is referred to the Human Rights Tribunal for a hearing. At present, the B.C. Council of Human Rights makes this decision before the investigation starts and does not reconsider it during the investigation. The sharp distinction between each phase of the process is due in part to the wording of the statute. A second cause is that the Council does not

have its own investigators and must transfer the file to the Employment Standards Branch for an investigation. Another consequence of this division of responsibility is that the Council does not carry out any preliminary investigation before the case is transferred.

The proposed change is designed to provide more flexibility in the interests of making the process quicker and more effective. A preliminary inquiry could begin as soon as the claim was filed, and the nature and scope of further investigation could be adjusted to meet the needs of the particular case. Some claims could be resolved at the outset, freeing up resources that could be better used to deal with other claims. In other situations, the person who had received the claim could also be assigned to carry out a more extensive investigation. There would be no necessity to pass it on to someone else. On the other hand, if different skills were needed for a full investigation or if the intake process had created the perception that the person who received the claim had sided with the claimant, a second person could take over the file.

Since there would no longer always be a sharp distinction between the intake phase and the investigation phase, the Director of Investigation and Research should have the power to dismiss the claim after an investigation has begun, as proposed in earlier recommendations.

One consequence of these changes is that the decision to dismiss a claim will be made by one person rather than a panel of three persons. That change calls for safeguards, which are discussed below.

4. The Investigation

An important feature of human rights legislation in Canada has been that a human rights agency is responsible for investigating claims of discrimination. People who experience discrimination often do not have the resources to gather the evidence needed, and the law has not given them the legal power to do so. Assigning responsibility for investigations to human rights agencies was an important step in making human rights protection accessible. It also was a recognition that discrimination harms society in general and that eliminating discrimination is a public function.

Unfortunately, the investigatory process often has not lived up to expectations. It has been a source of delay in many jurisdictions, including B.C. There also have been complaints that it takes the process out of the hands of the parties and gives them no control over it. There have been doubts about the purposes of the process – in particular, its relation to settlement efforts. Therefore, this part of the process deserves re-examination.

This Report recommends several changes to the present system. One recommendation discussed earlier is to assign responsibility for investigations to the Director of Investigation and Mediation and to give that director the staff necessary to carry out this function. Investigations would be carried out within the Commission itself except in special circumstances. This change should help to avoid delay and should make it easier to coordinate human rights investigations.

A second change would give the parties themselves the legal power to demand disclosure of evidence by the other party before the hearing. This change should give the parties more power to ensure the proceedings cover all matters they think are relevant. It also should speed up the hearing process by allowing better preparation and by avoiding surprises at the hearing that lead to adjournments.

Another change is to make the process of investigation more flexible, so that it can be adjusted to meet the needs of a particular case. For example, in some cases the investigation might be conducted by the same member of staff who received the claim. It might take place in less than a day because the facts are straightforward and easy to ascertain. Indeed, some cases might be sent straight to a hearing because there was no dispute about the facts and the dispute turned on a question of law that only the Tribunal can determine. Other cases involving inequality arising from systems of operation would call for an extensive investigation incorporating techniques such as statistical analysis.

Giving the Director of Investigation and Mediation the staff to carry out investigations is a key part of making the system more flexible. Another change is to allow the Director of Investigation and Mediation to make the decision to dismiss the claim or to send it directly to a hearing at any stage of the process rather than to require these determinations at set points in the process, as discussed later in this Report.

Investigation is closely related to mediation and settlement. A detailed discussion of mediation and settlement appears later in this Report.

a. Purposes of an Investigation

The obvious purpose of an investigation is to gather facts, but it is useful to consider how those facts will be used. Also, the investigative process can have secondary benefits that should not be ignored. Among the purposes are the following:

- To gather the facts needed to allow the Director of Investigation and Mediation to decide whether to continue with the claim and

whether to refer it to the Human Rights Tribunal for a hearing.

- To provide information that will allow the parties to make an informed decision about a possible settlement prior to the hearing.
- To gather the information that will be needed by the parties to prepare for a hearing.
- To assist the Commissioner for Human Rights to decide whether to intervene on the ground that the claim involves issues going beyond the interests of the individual claimant.

Which purpose is most important will determine how to plan the investigation. For example, if the primary purpose is to decide whether to hold a hearing, the investigation should stop when the investigator has determined that there is enough evidence to justify a hearing, even though other evidence has not been examined. On the other hand, if the primary purpose is to assist legal counsel to prepare for the hearing, the investigation should continue until all relevant information has been gathered.

Today, the most important purposes are to set the foundation for a settlement and to allow the B.C. Council of Human Rights to decide whether to hold a hearing. A third purpose is to assist legal counsel to prepare for the hearing.

Under the proposed process, it would remain an important purpose of the investigation to assist the Director of Investigation and Mediation to decide whether to hold a hearing. The investigation would also continue to contribute to settlement efforts, though the distinction between the investigation and mediation process would be clarified. The process would also assist the Commissioner for Human Rights to decide whether to take part in the proceedings. The role of the investigation in assisting counsel to prepare for the hearing would be diminished somewhat, since a new disclosure process would also be available.

b. Areas of Improvement

The present system for conducting investigations has significant weaknesses. Many are related to the division of responsibility for investigations between the B.C. Council of Human Rights and the Employment Standards Branch. Some are due to the lack of adequate training programs. Some are due to the wording of the existing Human Rights Act.

Investigations make a major contribution to the delays that occur in the system. The figures for the latest fiscal year to date show that the average

investigation took 283 days. This is well above the six month maximum set as an internal target. While this figure is better than some jurisdictions, it is not acceptable. It denies claimants a timely remedy. It denies respondents a timely chance to show they committed no wrong. Evidence disappears and witnesses move. In addition, a long delay tends to make a resolution more difficult, since both parties are less likely to compromise after they have invested a large amount of time in the proceedings.

There is no single cause of this delay. Part of the delay is due to a growing caseload, which has more than tripled since the 1990-1991 fiscal year. Part is due to the need to transfer a file to a different branch in a different ministry. Part is due to the fact that human rights investigations are only one part of the duties of Industrial Relations Officers, and sometimes other duties take precedence. That is especially true of other duties that must, by statute, be carried out within a set time. Industrial Relations Officers feel that the recent trend for lawyers to become involved at this stage has hardened positions of the parties and has made settlements more difficult. Lack of adequate staff training and the need for Industrial Relations Officers to keep abreast of many different areas of law also plays a part.

The difficulty of maintaining close communications between two agencies not only tends to contribute to delays but also makes it more difficult to shape the investigation to the needs of the particular case. Both agencies complained of a "one size fits all" approach. One cause seems to be that the two agencies tend not to discuss specific cases. As a result, there is a resulting tendency to investigate each case in the same detail, regardless of the significance or complexity of the case.

At present, the great majority of cases are claims by individuals of conduct affecting only that person. Cases concerning the ongoing effects of systems of operation are rare. Such systemic cases will become more frequent if, as proposed, the Code places greater emphasis on modifying persistent patterns of inequality affecting groups. The present system of investigation does not have the capacity to deal with such cases, especially if they become a regular part of the process rather than a rare aberration.

There is also uncertainty about the statutory powers to carry out the investigation. Section 12 of the Human Rights Act authorizes an examination and inquiry considered necessary to determine whether the Act has been complied with. It also says that a party to a complaint can be required to disclose, orally or in writing, information respecting the subject matter of the complaint and that the investigator can require the

production of records or things relating to the subject matter of the complaint. But the statutory language is ambiguous, creating doubt about the scope of the powers it gives. There does not appear to be an adequate enforcement mechanism if a person refuses to supply the information requested.

c. When Should There Be an Investigation?

The wording of the Human Rights Act requires that there be an investigation of every complaint except those that the Council dismisses before investigation. The statute authorizes the Chairperson of the Council to refer a case to hearing only after the completion of an investigation.

This requirement can needlessly lengthen some cases. The parties may agree about what has happened, and the only dispute may be about whether the statute covers these events. For example, the parties might agree that the claimant's religion was the basis for denying a service but might disagree about whether the particular service was covered by the wording of the statute. An investigation in such circumstances would serve little or no purpose.

An investigation also may not always be warranted if one party alleges certain events occurred and the other party denies that they occurred. If both parties agree that there were no other witnesses to the event, again an investigation would often be fruitless. In the end, the issue will likely turn on the credibility of the two parties, and only the Tribunal can decide which version is correct.

In neither of these situations would an investigation serve any of the purposes described earlier. It certainly would not help the Director decide whether to refer a case to hearing, nor would it help the lawyers to prepare for hearing. It also would be very unlikely to assist the Commissioner for Human Rights in deciding whether to intervene. The only possible purpose would be to provide an occasion for mediation, but mediation efforts can take place after a case is referred for hearing.

3-C-26 It is recommended that the statute give the Director of Investigation and Mediation the discretion to decide whether an investigation will assist with the resolution of a claim or whether the claim can proceed in a fair and effective manner without an investigation.

The recommendation later in this Report that the parties be given

disclosure powers provides further justification for this change. It provides the opportunity for each party to obtain specific items of information that may turn out to be relevant to the hearing, without requiring a full investigation. Since the disclosure process would occur after the case is referred to hearing, its use would often help avoid delay.

In some cases, both parties will prefer to skip the investigation and to rely on the disclosure process to bring out the relevant information. The Director of Investigation should give such a request very serious consideration. However, the request should not be granted automatically. For example, the Director might carry out an investigation if the claim raised issues concerning ongoing barriers that might not be fully canvassed by a disclosure process.

d. Who Should Investigate

A major defect in the existing investigative process is the division of responsibility between the B.C. Council of Human Rights and the Employment Standards Branch. To avoid the problems created by this division of authority, it is essential that the Director of Investigation have sufficient staff to carry out investigations promptly, as discussed earlier in this Report.

The one exception to this arrangement is that it may be useful for the Director of Investigation and Mediation to contract with another government agency to carry out some investigations in less populated parts of the Province where it is not feasible to station a human rights investigator. Such an arrangement would have some of the disadvantages of the current arrangement. However, the advantages of local personnel sometimes might outweigh these disadvantages. Also, coordination and communication might be more easily organized if such contracts were the exception and most investigations were carried out by the staff of the Director.

It should be emphasized that contracts with other agencies to conduct investigations should be made in the interests of better service. They should not be forced by the fact that the Director of Investigation and Mediation does not have sufficient staff to investigate all claims. The decision whether to enter into such contracts should be that of the Director of Investigation and Mediation.

Consolidating investigations in the office of the Director of Investigation and Mediation should also allow quicker response to urgent circumstances and to those that can be resolved quickly. A completely

adequate investigation can be accomplished in some circumstances with a few telephone calls, while other cases will require a sophisticated systemic analysis. Because the Director of Investigation and Mediation would have full responsibility for both intake and investigation, it would be relatively easy to have the intake officer immediately start the investigative process when that was appropriate. The result would be both to speed the process and to conserve resources, since the person who had received the claim would not have to acquaint another officer with the facts.

e. Powers of Investigation

It is essential that investigators have the tools to carry out investigations effectively. In the great majority of cases, the parties will cooperate and no special measures to obtain evidence will be needed. However, it is not always possible to rely on the goodwill of the parties. Investigators must have the legal power to obtain the information necessary to evaluate a claim. Also, there should be effective sanctions and means of enforcement in the rare event that one of the parties refuses to supply the information.

It is crucial that investigators have the power to obtain relevant documents and other tangible evidence. Most of the time, it will be possible to obtain this evidence without physically entering the premises occupied by any of the parties. However, sometimes it will be essential for the investigator to enter the premises. For example, if the claim concerns the fact that a person with a disability could not physically enter a certain building, an investigation may require the investigator to examine the alleged barrier and to take measurements or pictures to assist in evaluating the claim.

It is also essential that the investigator have the power to interview parties and witnesses who have knowledge of facts relevant to the claim. That should include, for example, the power to interview employees and former employees of any of the parties to the claim.

There should be safeguards to ensure that these powers are not misused. These safeguards are not the same as those that apply to a criminal proceeding, however. The Supreme Court of Canada has drawn a distinction between criminal investigations and investigations carried out by administrative agencies performing regulatory functions. Human rights investigations fall into the latter category. One consequence of this distinction is that the courts have not demanded that an agency seek advance authorization for using one of the investigation techniques under discussion. Also, the agency does not have to show in advance that it has

reasonable and probable cause to believe that there has been a breach of the statute. (Of course, evidence of a violation is essential at the hearing stage of the process.)

The Supreme Court has cited several reasons for the distinction between administrative and criminal investigations. An important difference is that the purpose of the human rights process is not to punish a person but rather to prevent future discrimination and to compensate for past discrimination. Among the other reasons are the importance of regulatory legislation, the need for powers of inspection by administrative agencies and the lower privacy expectations associated with business operations and records. The Court has said that to demand advance authorization based on a showing of reasonable grounds would defeat the objectives of regulatory legislation.

The normal legal privileges, such as the privilege for communications between a lawyer and client, would apply to this process. It also may be prudent to include a power to enact regulations concerning the procedures for conducting investigations.

It is crucial that there be a mechanism to enforce these provisions. The recommendations that follow provide for different enforcement measures. One measure would be to allow the Director of Investigation and Mediation to draw an inference that any material that is wrongly withheld would be adverse to the person withholding it. In this way, no party could profit unfairly by withholding information. A second measure would be to apply to the Supreme Court of B.C. for an order to produce the evidence. This process would make use of the powers of the court while providing a safeguard to the parties.

3-C-27 It is recommended that the Director of Investigation and Mediation and any other officer investigating a case be empowered, for purposes relevant to any investigation under the Act:

- **to demand the production of documents and things;**
- **to examine a party to the claim or any other person with knowledge relevant to the claim, including an examination on oath or affirmation;**
- **with the authorization of the Director of Investigation and Mediation, to enter and inspect any business premises at any reasonable time.**

3-C-28 It is recommended that if any person refuses to

produce what was demanded, to take part in an investigation or to provide entry into premises, the Director of Investigation should be authorized to apply to a judge of the Supreme Court of B.C. for an order enforcing these provisions.

3-C-29 It is further recommended that if a party to a claim improperly withholds access to a document or other evidence, or improperly refuses to respond to a request for information, the Director of Investigation and Mediation and the Tribunal shall be entitled to assume that the document or information withheld would be adverse to the party withholding it.

3-C-30 It is recommended that the Code authorize regulations governing investigations.

f. **Process at the End of an Investigation**

At present, both parties are given the report and have the opportunity to submit their views about it. This procedure should be retained. The decision whether to proceed to hearing will be based on the report, and the parties should have an opportunity to present their views in writing.

This process seems to be a source of considerable delay, however. The most recent statistics show that it took 200 days on average for the parties to respond and for the B.C. Council of Human Rights to decide whether the case should go to hearing. Since the parties have taken part in the investigation at this stage, they should be able to respond more quickly.

3-C-31 It is recommended that regulations establish time limits for the parties to respond to an investigation report, The Director of Investigation and Mediation should have the discretion to extend the period if there is a legitimate reason why more time is needed.

This recommendation assumes that both parties will have access to advice as to how to respond. That advice may come from a lawyer or from a non-lawyer trained to analyze human rights issues. Representation of the parties is discussed more fully later in this Report.

Once the report and the responses are available, the Director of Investigation and Mediation should decide upon the most appropriate course of action.

In some cases, the report and responses may reveal that the claim has the

potential for immediate mediation, and it could be assigned to a member of staff with expertise in mediation. Again, there should be time limits on this process.

In other cases, probably the majority, the decision will be whether to refer a case to the Human Rights Tribunal for a hearing, though mediation services should remain available after the referral, as described in the next section of this Report.

The majority of Canadian statutes do not specify any specific criteria for sending a case to hearing; the decision is entirely discretionary. The B.C. Human Rights Act gives the Chairperson of the Council discretion to refer a claim to a member of the Council for a hearing. The Council also has discretion to discontinue the case. The Quebec Charter specifies that the referral should be in the public interest. The Manitoba Human Rights Code provides general guidance without unduly restricting a decision that cannot sensibly be reduced to specific rules. This language is worth emulating.

3-C-32 It is recommended that the Director of Investigation and Mediation be authorized to refer a case to the Human Rights Tribunal for hearing if, in the opinion of the Director, a hearing would further the objectives of the Code or assist the Commission in discharging its responsibilities under the Code.

To ensure the independence of the process, the decision whether to refer a case for hearing should be made by the Director of Investigation and Mediation without direction or interference from any person. Therefore, neither any government official nor the Commissioner for Human Rights should give directions or participate in this decision. However, the Commissioner for Human Rights, as well as the parties to the claim, should have the power to make representations regarding this decision as described below. The Commissioner should have this power whether or not she or he is a party to the claim. This power would allow the Commissioner to represent the public interest.

g. Review of the Director's Decision and Other Safeguards

At present, a decision not to proceed with an investigation or not to refer a claim for a hearing is made by a panel of three members of the B.C. Council of Human Rights. That process is relatively time consuming and contributes to delay.

Under the procedure that is proposed here, these decisions would be made by one person, the Director of Investigation and Mediation. That change should streamline the process, but it also places a great deal of responsibility on one person. The change calls for safeguards to ensure that this power is used appropriately.

There is an important difference between a decision to proceed and a decision to dismiss. If the decision is to proceed, no one wins or loses the case. The parties will bear the burden of further proceedings, but the final decision will only be made after those proceedings have come to a close. In contrast, if the decision is to dismiss, the respondent has won the case and the claimant has lost. Therefore, it is appropriate to surround a decision to dismiss with greater safeguards than a decision to proceed.

Requiring that the decision be made by several people is one way to provide appropriate safeguards. However, a panel of people represents a considerable commitment of resources, as well as causing delay. Also, if the Tribunal hearing can be conducted by a single adjudicator, it seems somewhat anomalous to require a panel of people to make decisions earlier in the process.

One safeguard is to require that the Director of Investigation and Mediation or other senior official should personally make a decision not to proceed with a claim. The statute should permit a decision to proceed with a claim to be delegated to an appropriate member of staff, as at present. However, the final decision to dismiss a claim should be made by the Director if possible. If experience demonstrates that the workload is too heavy for a single person, not more than two other officials should be authorized to make the decision. Also, those officials should be given this power by a regulation of the Lieutenant Governor in Council rather than by means of an internal delegation. This proposal helps ensure that a decision not to proceed will be made by a highly qualified person. In effect, it also provides for an automatic review, since the initial consideration of the matter will usually be made by another member of staff.

3-C-33 It is recommended that the Human Rights Code authorize the Director of Investigation and Mediation to delegate the power to decide to proceed with a claim or to refer a claim to the Tribunal to an appropriate member of staff. The Code should require the Director or another person authorized by regulation to personally make the decision not to proceed with a claim or not to refer a claim to the Tribunal. Not more than two additional persons should be permitted to

carry out this function.

A second safeguard is that the parties and Commissioner for Human Rights should be permitted to make representations before a final decision is made to dismiss a claim. These representations would be made in writing and would be sent to all parties. The parties would be given an opportunity to respond.

3-C-34 It is recommended that the Commissioner for Human Rights, as well as the parties to a claim, should have the power to make representations regarding the decision whether to dismiss a case prior to full investigation and whether refer a case for hearing. Those representations should be made on the record and should be communicated to all the parties.

The Human Rights Act requires that a determination to discontinue proceedings should be communicated in writing. The practice is to give reasons for this decision. These safeguards should be preserved.

3-C-35 It is recommended that the Director of Investigation and Mediation be required to notify the parties in writing of a decision not to refer a claim to the Human Rights Tribunal for hearing and to set out the reasons for that decision.

A third safeguard available to both parties is judicial review of the decision. All such decisions have to comply with the principles of fairness, and courts will intervene if this standard is not met. This safeguard already exists and requires no change.

A fourth safeguard would be that the decision to dismiss would be subject to review by the Human Rights Tribunal. If the Director of Investigation and Mediation decides to dismiss a case before a full investigation or decides not to refer a case for hearing, any party affected by this decision should be able to ask the Human Rights Tribunal to reconsider the decision. The reconsideration should be made by one member of the Tribunal.

Regulations should specify the criteria that would be used by the Tribunal. If every case were reviewed by the Tribunal, the process would become a significant source of delay. Therefore, the decision of the Director should be overturned only if the Director has made a legal error or if there was a clear departure from the purposes of the Code.

The procedure should also be set out in regulations. It should be somewhat similar to an application for leave to appeal in court. The member of the Tribunal assigned to the case would not review the file. Instead, the review would be limited to the written decision of the Director of Investigation and Mediation and short written submissions of the parties. The member might be given discretion to allow short oral argument in unusual cases, but the decision would normally be made on the basis of the written material. The goal would be to ensure that there is an opportunity to present the positions of the parties while making the process quick and inexpensive. It should be designed not to interfere with the Tribunal's other functions.

There will be situations in which the discontinuance of a case will affect the public interest, as well as the interests of the parties. Therefore, the Commissioner for Human Rights should be authorized to make a submission to the Tribunal, whether or not the Commissioner is a party to the claim.

3-C-36 It is recommended that if the Director of Investigation and Mediation decides to dismiss a case prior to a full investigation or decides not to refer a claim to the Human Rights Tribunal for hearing, any party adversely affected by this decision should have the right to seek review of the decision by a member of the Tribunal designated by the Chair. The review would be based on the written record and would be a quick process similar to the process for seeking leave to appeal before the courts.

3-C-37 It is recommended that the procedure for reconsideration and the criteria for the decision be set out in regulations.

3-C-38 It is further recommended that the Commissioner for Human Rights should have the power to make a submission regarding the review of the decision, whether or not the Commissioner is a party to the claim.

5. **Mediation and Settlement**

Mediation has been an important part of the human rights process since comprehensive human rights statutes were first adopted. It remains important. The latest Annual Report of the B.C. Council of Human Rights says, "The B.C. Council of Human Rights is committed to settling cases through mediation whenever possible." Almost one third of cases result in a settlement. Even that

figure understates the importance of settlements, since cases that are withdrawn or not pursued by claimants may sometimes be the result of a settlement process.

a. Purposes of Mediation and Settlement

A cornerstone of the comprehensive human rights statutes enacted in the 1960s and 1970s was the belief that discrimination could only be corrected by changing the attitudes that caused it. It was felt that mediation was more likely to change attitudes than punishment, which had been the central feature of earlier statutes. The ideal was to achieve a reconciliation between the parties, once discriminatory attitudes were changed.

Reconciliation is still an objective of the process. Realistically, however, this goal is not as prominent now as it was at the beginning. Many human rights cases are mediated after the relationship between the parties has been severed. In such cases, there often is not a strong motive on either side to discuss changes in attitude. Other cases involve policies that have the unintended effect of causing inequality. In those cases, mediation can be useful in finding an arrangement acceptable to all parties. But this represents a change in purpose in the sense that education about the consequences of policies is the goal rather than eliminating discriminatory attitudes.

As time progressed, the emphasis shifted from a goal of reconciliation to a goal of processing cases quickly in the interests of efficiency. The enforcement process is dependent on settlements because it would be hopelessly overloaded if all cases that are now settled went to hearing. Therefore, case management sometimes is the primary goal of the settlement process. This objective can create undue pressure on the parties to settle, as well as undermining true efforts at reconciliation.

Both claimants and respondents expressed dissatisfaction with the process during consultation meetings. In addition, a survey of people who had been parties to human rights claims revealed significant dissatisfaction with the settlement process and a feeling that there is too much pressure to settle.

The goal must be to provide a process that fairly considers the interests of the parties while avoiding additional delay. One of the strongest criticisms of the present system is that it takes too long, and settlements can help shorten the process. Settlements are also less expensive than a full hearing for all concerned, including the parties and the enforcing agency.

It is important, however, to guard against letting case management overwhelm the other goals of human rights protection. If undue pressure leads to a settlement that both sides resent, as too frequently happens, the claimant may feel re-victimized, and there is almost no chance that the causes of the discrimination will be eliminated.

Even when mediation works well for the parties to a claim, there is little or no attention to protecting the public from similar inequality in the future. It may even be worthwhile for an organization to offer a generous settlement to an individual to avoid litigation that would require broader changes. A new Human Rights Code should strike a more appropriate balance between providing a remedy to individuals and changing policies and practices that will affect others in the future.

b. Who Should Carry Out Mediation

Mediation should be the responsibility of the Director of Investigation and Mediation. This role fits well with the investigative duties of the Director. Both roles require impartiality as between the parties, though the Director should of course try to achieve the purposes of the statute. Also, making one office responsible for intake, investigation and mediation can facilitate a smooth transition from one function to the other.

Mediation will be simple in some cases and fairly arduous in others. For example, when a violation of the statute has occurred because the person responsible for the conduct was unaware that the conduct was improper, mediation may be a very quick process that can be carried out immediately after the claim is received. In other situations, complex negotiations over a period of time may be needed. The Director of Investigation and Mediation is in the best position to adjust the process to meet the needs of the case.

One issue is whether there should be separate staff for investigation and for mediation. Under the Canadian Human Rights Act, there is a sharp separation between the two functions. The two functions are carried out by different people. The conciliator is not allowed to testify at a hearing, while the investigator is allowed to do so. Conciliation generally takes place after the investigation has been completed.

This division of functions has certain advantages. The investigative process may create a certain amount of hostility in the person being investigated, and that person may be more open to mediation by someone other than the investigator. Investigation and mediation involve somewhat

different skills. If mediation is postponed until after an investigation is complete, all parties will know the nature and strength of the case and will be able to make a more informed decision about mediation and settlement.

There are also disadvantages to this division of roles. Sometimes, it becomes apparent in the middle of an investigation that both parties are willing to settle immediately. Suspending proceedings so that another person can take over the file will almost inevitably cause delay, and sometimes consensus will disappear during that period. A strict division of staff into investigators and conciliators also can make it harder to adjust assignments to meet urgent needs.

On balance, the disadvantages of adding a requirement to the statute that these functions be kept strictly separate outweigh the advantages. The rigidities created by a mandatory division of roles would make the system too cumbersome and time consuming.

The Director of Investigation and Mediation should, however, take account of the dangers of mixing the functions and take appropriate steps to avoid those dangers. Among the considerations that the Director should take into account are:

- The need for the parties to be informed clearly about the objectives of each part of the process. For example, if a meeting or interview is part of the investigation, the parties should be aware that what they say is evidence that could be admitted at a later hearing. If the purpose of the meeting is to mediate, they should know that what they say will not be admissible. If a meeting changes from investigation into mediation, special care should be taken to make sure that the parties fully understand this change and its significance.
- The need to ensure that the parties have the information needed to make informed decisions about settlement proposals. Sometimes, this may require postponement of mediation until after an investigation. In other cases, all the information will be immediately available to the parties. The choice should be dictated by the needs of the particular case, and the Director of Investigation and Mediation should have sufficient leeway to choose the most appropriate option.
- The need for an internal procedure to assign the file to another person for mediation if the investigation has created animosity that would make it difficult for the investigator to act as a mediator between those parties.

The Director also needs to consider that not all good investigators make good mediators, and vice versa. While no strict division of duties is warranted, the Director of Investigation and Mediation may determine that some degree of specialization of staff would be helpful.

Mediation sometimes involves giving encouragement to the parties or deflating unreasonable expectations about the outcome. Those carrying out mediation should take care, however, to ensure that the settlement is one that respects the interests of the parties and is not designed simply to meet the need of the Commission to conserve resources.

The Business Council of B.C. submitted that the Act should include a provision for the appointment of a special mediator in appropriate circumstances. An outside mediator would sometimes be in a better position than regular staff of the Director to carry out a mediation. For example, sometimes knowledge of a particular industry might be useful, or an outside person might have already mediated related issues under other legislation or under a collective agreement.

This proposal would provide a valuable tool that would strengthen the mediation process. It is proposed that the Director be given a statutory power of delegation that would cover the appointment of such a mediator. Such a power of delegation could also cover mediation by someone outside the staff of the Director when there was a need to quickly provide mediation services in a less populated area of the Province.

The only significant disadvantage of the proposal for special mediators is that it might be costly. It might be appropriate in some circumstances to arrange for the parties to share the cost of such a mediator, as long as this step would not create hardship for any party.

3-C-39 It is recommended that responsibility for mediation be assigned to the Director of Investigation and Mediation. The Director should be provided with adequate staff and resources to carry out this function.

3-C-40 It is recommended that the Director of Investigation and Mediation take steps to ensure that the parties at all times know the nature and purpose of each stage of the proceedings and that they have the information needed to make informed decisions about mediation. Internal procedures should make it possible to assign a person other than the investigator to mediate if the investigator cannot act

effectively as a mediator in that case. However, it is not recommended that the statute require that mediation be strictly separated from investigation or that separate personnel carry out these two roles.

3-C-41 It is recommended that the Director of Investigation and Mediation be granted a statutory power of delegation broad enough to allow the appointment of special outside mediators in appropriate circumstances.

c. **Should Mediation be Mandatory?**

In some jurisdictions, the parties are required to take part in some form of settlement meeting. It is not the current policy of the B.C. Council of Human Rights to require participation in such a meeting. However, the statutory wording may make it appear that some attempt at mediation is required, since it says that the Chair should "endeavour to assist the parties to the complaint to achieve a settlement" unless the complaint is dismissed before investigation. The ambiguity should be cleared up.

The present policy of the Council not to require participation in mediation is sound. Under the new structure, it is proposed that the decision whether to mediate be left to the Director of Investigation and Mediation.

Sometimes, it is obvious that mediation would be a wasted effort because of the nature of the case or because of animosity between the parties. For example, the Canadian Jewish Congress noted that claims regarding hate messages are unlikely to result in an amicable settlement. In other situations, including many cases of sexual harassment, the emotional effect of the discrimination would make a claimant justifiably reluctant to engage in forms of mediation that involved personal interaction between the parties. Sometimes, both parties will be interested in a definitive decision about an ongoing practice and it will be best to proceed to hearing without attempting mediation. Unless the parties enter into mediation willingly, it is unlikely to succeed.

3-C-42 It is recommended that the Director of Investigation and Mediation have the statutory power to engage in mediation efforts but that there be no obligation to attempt mediation.

d. **Should Settlements be Reported to the Director?**

In some jurisdictions, settlements have to be submitted to the human

rights commission and the commission has the power to approve or reject them. Some submissions to the Review, including that of the December 9 Coalition, proposed that settlements be reported. That process raises three questions:

Should settlements be reported to the Director of Investigation and Mediation? Should settlements be public? Should the Director have the power to approve or reject settlements?

It is proposed that the statute require that all settlements be reported, but the Director should not have the power to approve or reject them. The parties would have the right to request that no information be released that would reveal their identity, but the Director should be allowed to provide the public with information about settlements as long as the request for anonymity is respected.

At present, settlements do not have to be reported to the B.C. Council of Human Rights. It is not at all uncommon for respondents to insist on confidentiality as a term of settlement. Indeed, lack of publicity may be a significant motive for agreeing to a settlement. Where settlements are arranged directly between the parties, the only notice to Council may be a request by the claimant to withdraw the claim. Even when the settlement is arranged by an Industrial Relations Officer, the Council may not be notified of the exact terms of settlement.

That arrangement often serves the interests of the parties themselves, though it does not always do so. Sometimes, a power imbalance between the parties can lead to settlements that are unfair to a claimant, and the lack of monitoring may mean that there is no way to correct the situation. Where claimants are adequately represented, however, the incentive of confidentiality may serve the interests of both parties. Therefore, it is arguable that the present system should be maintained and that any problems due to power imbalances should be corrected by providing adequate legal representation.

The present system fails more seriously, however, in preventing future discrimination, since confidential settlements usually are limited to compensation for past discrimination. Also, they deny the B.C. Council of Human Rights the information needed to determine how well the system is working. They do not educate other organizations about their duties under the Human Rights Act or about the cost of violating the Act. They do not provide claimants, respondents or lawyers with information that would assist in resolving future cases. They do not demonstrate to others that a remedy is available. They do nothing to develop human rights

precedent. In light of these consequences, some change is needed.

The statutes of other jurisdictions present a range of possibilities. Under five Canadian statutes, terms of settlement must be reported to the human rights commission and approved by the commission.Two statutes explicitly provide for confidentiality, while one explicitly gives discretion to publicize the settlement.

It is proposed that the Code require that the terms of all settlements be reported to the Director of Investigation and Mediation. The slight added cost of communicating and collecting such data is far outweighed by the benefits of providing this information.

There was some disagreement in the submissions made to this Review as to whether the settlements should be released publicly. Some submissions opposed even the reporting of settlements, some suggested that the parties should have the option of requiring confidentiality and some thought that a duty of confidentiality should only apply during the negotiations and that the final terms of settlement should be public.

It is proposed that if the parties to a settlement request confidentiality, the Director of Investigation and Mediation would be required not to reveal any information that would identify the parties. However, the Director could release the general terms of settlement or could include information about the settlement in statistical summaries. For example, the Director could describe the way that the holy days of a religious minority had been accommodated or state the amount of money paid to the claimant, as long as the information did not reveal the identity of the parties. This proposal is designed to take advantage of the educational effect of settlements, while respecting the request of the parties for confidentiality.

There should not be a requirement that the Director approve settlements. Such a power takes control over the case from the parties. This kind of provision has been difficult to administer in those jurisdictions in which approval is required.

Requiring approval of settlements has one big advantage. It would allow the Director to insist that the settlement include terms that would protect others from similar discrimination in the future. If the terms of settlement are entirely in the hands of the parties to the claim, there is little incentive to include terms that will protect others. That is particularly true if the relationship between the parties no longer exists – for example, if the claimant is no longer an employee of an organization.

It is possible to protect others from similar discrimination without holding up the settlement between the parties. Under the structure and process proposed in this Report, the investigation would be carried out within the Human Rights Commission rather than by a separate agency. When it appears to the investigator that a claim concerns an ongoing policy that is likely to cause future discrimination, there should be an internal procedure for informing the Commissioner for Human Rights of this fact. The Commissioner could then file a separate claim concerning the broader policy.

3-C-43 It is recommended that the terms of all settlements be reported to the Director of Investigation and Mediation and be available to the Commissioner for Human Rights.

3-C-44 It is recommended that where there is a demand for confidentiality, the Director and Commissioner would not release information that would identify the parties. However, they would be permitted and encouraged to publicize settlements in a way that does not identify the parties, in order to assist other settlement negotiations and to educate the public.

e. Enforcement of Settlements

There should be an easy and effective way to enforce settlements. Most of the time, enforcement is not a problem. Many settlements simply require that the respondent pay a sum of money to the claimant. That kind of settlement can be enforced by including a term in the settlement providing that it does not become final until the money is paid.

In other cases, however, the terms of settlement cannot be carried out immediately. Systemic settlements may require the modification of systems of operation over time. Settlements may also require that a claimant be offered the next available apartment, or there may be an agreement to re-hire a claimant when there is an opening. Such settlements require an ongoing enforcement mechanism.

One way to enforce a settlement would be to file a breach of contract action in court, but that process could take even longer than the human rights claim itself. A second option is for the parties to request the Human Rights Tribunal to issue a consent order based on the terms contained in the settlement agreement. That option should be available to the parties, and a provision similar to that in section 43(5) of the Manitoba Human Rights Code should be included in the Code. Such an order could be

given even if the claim had already been referred to the Tribunal and the hearing had begun. However, a consent order would normally be a public document, and parties who desired to maintain confidentiality may be hesitant to use this mechanism.

Other statutes provide two other approaches to a settlement. The Canadian Human Rights Act provides that failure to comply with a settlement is an offence and can be punished. However, punishing a person for a penal offence may not implement all the terms of the settlement. For example, it may not provide a person with the reinstatement that was agreed to. The Manitoba and Newfoundland statutes allow the claim to be reopened by the Commission. It can then go to hearing as if the settlement had never existed. This procedure is superior to making non-compliance an offence, but it could delay implementation of the settlement until after the process was complete.

The Human Rights Code should provide a range of options to deal with the different circumstances that can arise.

The statute should allow the parties to file a consent order with the Human Rights Tribunal, which would become a public order of the Tribunal unless the Tribunal concluded that the terms of the agreement were inconsistent with the purposes of the statute.

The statute should provide for enforcement of orders that are not filed publicly with the Tribunal. If a settlement agreement was breached, any party could apply to the Human Rights Tribunal for a determination that there had been a breach. The Tribunal would then have the power to order that the settlement be enforced as an order of the Tribunal. Until such an order was made, any provisions regarding confidentiality would remain effective. The Tribunal would also have the power to ensure that its own proceedings remained confidential until it made an enforcement order.

The Director of Investigation and Mediation should be empowered to reopen any claim at the request of any party and to proceed with the claim as if there had been no settlement. This last option would be useful when it was clear that there was no chance of enforcing the original settlement, for example, when an employer has agreed to reinstate the claimant but subsequently ceased to operate in the region.

3-C-45 It is recommended that the Human Rights Code permit a settlement to be filed with the Human Rights Tribunal and to be enforced as an order of the Tribunal, unless the Tribunal concludes that the terms of settlement are contrary to the

purposes of the Code.

3-C-46 It is recommended that the Human Rights Code permit any party to apply to the Human Rights Tribunal for a determination that there has been a breach of the terms of a settlement agreement that has been filed with the Director of Investigation and Mediation.

3-C-47 It is recommended that the Tribunal should be empowered to make the settlement agreement an order of the Tribunal if it finds that there has been a breach. Until such a finding, any terms of the agreement regarding confidentiality should be respected.

3-C-48 The Director of Investigation and Mediation should have the power to reopen any claim that has been settled if the Director concludes that there has been a breach of the settlement agreement. The claim would then proceed in the same manner as if there had been no settlement. The Director's determination should be subject to review by the Tribunal.

Refusal to Accept a Reasonable Offer of Settlement

One issue raised by the B.C. Council of Human Rights, as well as during consultation meetings, is whether the present system provides adequate incentive to agree to a reasonable settlement proposed by the other side. In court actions, the failure to agree to a reasonable settlement can result in an order that a party pay the other side for some portion of litigation costs. Since costs are not awarded under the Human Rights Act, this incentive is not present.

The only statute to deal explicitly with this issue is the Manitoba Human Rights Code. It provides that if a claimant refuses a reasonable offer of settlement, the Commission shall terminate the proceedings. While there is no statutory provision, the Canadian Human Rights Commission uses its discretionary powers to refuse to send a case to the Tribunal for hearing if a claimant has refused a reasonable offer of settlement. Under neither Act is there a comparable sanction against the refusal of a respondent to accept a reasonable offer of a claimant.

It would be inappropriate to resolve this issue by adding a provision allowing the Tribunal to impose costs against a claimant. Such a step would create a financial risk of loss for every claimant. Not only would it

discourage claims, but it would have the biggest effect on those who are closest to the poverty line and who experience persistent inequality.

The Manitoba provision also should be rejected because it is too severe. Claimants should be encouraged to fairly consider offers of settlement, but a claimant who has a legitimate case should not be denied any remedy at all because of unrealistic expectations about the result.

It is proposed that regulations under the Code set out the consequences of either party refusing a reasonable offer of settlement. The process should take account of the purposes of the statute and of the power and financial imbalance that frequently exists between the parties.

The regulation should allow a respondent to make an offer of settlement and to make a deposit with the Tribunal to prove the seriousness of the offer. If the award of the Tribunal is for less than the offer that had been made, the award would be reduced according to a formula set out in the regulations. This formula should take account of the nature of human rights cases and the situation of the parties. Further study is necessary to devise the exact formula, and a number of options may deserve consideration. For example, the formula might allow a deduction from certain categories of damages but not others, or it might provide that an award for less than a specified amount is not subject to the deduction. For example, it might allow full damages for out-of-pocket loss but a deduction against other categories of damage. The formula would be designed to encourage reasonableness during mediation without creating any risk that the complainant would suffer a net monetary loss as a result of filing a claim.

When a respondent has rejected a reasonable offer of settlement by a claimant, the regulation might specify that a special award of costs be imposed even though costs would not normally be awarded in the circumstances. This amount might be allocated in part to the claimant and in part to cover the costs of the Tribunal or of legal assistance the claimant had received. Again, the details need further study.

3-C-49 It is recommended that regulations under the Human Rights Code provide a mechanism for both parties to make formal offers of settlement and a formula for a monetary adjustment if a party refuses a reasonable offer of settlement. Any adjustment affecting a claimant should be limited to a reduction of the amount awarded the claimant and should never result in a net loss to the claimant.

6. Hearings

The hearing process under the existing Human Rights Act compares favourably with that of other Canadian jurisdictions. However, delays and inadequate legal representation were raised frequently as matters of concern. In addition, the process leading up to the hearing requires consideration.

During the 1993-1994 fiscal year, the average time between the decision to send a case to hearing and the completion of the hearing or other resolution of the case was 294 days – almost ten months. There is no single cause for this delay. Some of the delay is due to tardiness of the parties and some to the time needed to obtain legal representation. Some appears to be due to the time it takes to make arrangements for the hearings.

On average, a further 140 days elapsed between the end of the hearing and the release of the decision. Therefore, the total number of days between referring a case to hearing and the release of a decision is over thirteen months. Moreover, the average time from the filing of a claim to a decision after a hearing is 1,065 days, or almost three years. Since these are average figures, some cases take significantly longer.

It is essential to find ways to speed up this process. One of the purposes of establishing human rights agencies was to make the process quicker and more accessible than a case filed in court. These figures show that this goal is not presently being achieved. It is true that the great majority of claims under the Human Rights Act are resolved before a hearing. However, those resolutions are sometimes motivated by a desire to avoid further delay rather than as a result of a truly satisfactory settlement of the matter.

The changes designed to speed up the proceedings should not make the process less thorough in uncovering the facts. They should also be consistent with the principles of fairness. We should not trade one problem for another.

A second issue needing consideration is the adequacy of legal representation. The present system seems to be inconsistent at best. Both the goals of an effective remedy and a fair process require reconsideration of the existing arrangements. This issue is discussed in greater detail later in this Report.

A third issue is whether the pre-hearing process could better assist the parties in preparing for the hearing. Measures to facilitate settlements at this stage also deserve consideration.

A final issue goes beyond the hearing process itself. A number of participants at consultation meetings expressed frustration with the fact that human rights

claims sometimes cover the same grounds as other proceedings such as labour arbitration. This is a legitimate concern, but solutions must not sacrifice the protection afforded by the human rights process. Earlier sections of this Report discussed how the Director of Investigation and Mediation should deal with this issue prior to hearing, and the implications of possible overlap of proceedings at the hearing stage is discussed below.

a. **Referral to Hearing**

Earlier in this Report, it was recommended that the Director of Investigation and Mediation should have the power to dismiss a claim without referring it to the Human Rights Tribunal in certain circumstances. The Director could do so if the claim was outside the jurisdiction of the Commission, if it was not filed within one year, if it had been fully and adequately dealt with in another proceeding or if it was without merit and there was no reasonable likelihood that further proceedings would change this conclusion. This decision could be made before an investigation or during an investigation.

In addition, it was recommended that after any investigation is completed, the Director of Investigation and Mediation should have the power to decide whether a claim should be referred to the Human Rights Tribunal for hearing. The Director would assess whether the hearing would further the objectives of the Code or assist the Human Rights Commission in discharging its responsibilities under the Code. If the Director decided not to refer the claim to hearing, a party could request the Human Rights Tribunal to review this decision, using a summary process specified in regulations.

The standards and procedures for deciding whether to refer a case to the Tribunal for hearing are discussed in greater detail elsewhere in this Report.

b. **Number of Adjudicators**

It is proposed that most cases be heard by a single member of the Human Rights Tribunal designated by the Chair of the Tribunal. If there were any legitimate concern that a member of the Tribunal may have pre-judged the claim because of earlier involvement in the proceedings, the Chair would not select that member to conduct the hearing.

The submission of the B.C. Human Rights Coalition recommended that all cases be heard by a tribunal of three members. Not all submissions agreed, however. For example, the submission of the West Coast

Domestic Workers Association suggested that it would be more useful to allocate additional funds to other functions such as assistance to a claimant.

The advantage of the Coalition proposal is that it ensures more diversity in the decision making process. It also makes an error somewhat less likely. One disadvantage is that a panel of three persons is significantly more expensive than a hearing before one adjudicator. Also, the proposal of the Coalition contemplates the selection of the adjudicators from a panel of people. Experience under the federal Human Rights Act suggests that the selection process and the fact that it is more difficult to schedule the hearing if more adjudicators are involved would increase the risk of delay.

Balancing the advantages and disadvantages of more than one adjudicator, it is proposed that the norm would be a hearing before a single member of the Tribunal. However, the Chair should have the power to refer the claim to a panel of three members if the claim raises matters of unusual importance. A panel of three members might be designated if the claim concerned a key interpretation of the Code that would affect many future cases, for example. If there were not three full-time members of the Tribunal in a position to hear the claim, one of the part-time members of the panel could be designated to sit on the panel.

The power to designate a panel of three members would be a change from the existing Human Rights Act, which specifically states that the Chair can designate one member of the B.C. Council of Human Rights to hear the case.

3-C-50 It is recommended that the Chair of the Human Rights Tribunal designate a member of the Tribunal to hear a claim that is referred to the Tribunal.

3-C-51 It is further recommended that the Chair of the Tribunal have the discretion to designate a panel of three persons to hear claims of particular importance.

c. Rules of Procedure

At present, there are no published rules regarding the procedures to be used during the hearing process. Such regulations existed until 1983 but were repealed along with the Human Rights Code then in effect. The B.C. Council of Human Rights has prepared a hearing checklist that has received praise. It provides useful information to legal counsel. However,

this checklist serves a somewhat different purpose than binding rules of procedure.

Rules of procedure would assist all parties to a claim to understand the nature of the proceedings and to prepare adequately for the hearing. They would help speed up the process by making it less likely that the hearing would be delayed because the parties had not anticipated some aspect of the process or due to disputes about the process. Several human rights statutes have regulations concerning different procedural matters. The B.C. Labour Relations Code gives the Labour Relations Board the power to make rules governing its practice and procedure, subject to the approval of the Minister.

3-C-52 It is recommended that the Human Rights Code empower the Human Rights Tribunal to issue binding rules of procedure.

d. Pre-hearing Procedure

Changes to the process leading up to the hearing have the potential to accomplish a number of objectives. They can speed up the process by providing for an exchange of information before the hearing. They also can provide a mechanism to narrow and clarify the issues that must be considered at the hearing. In addition, they can facilitate settlements that may make it unnecessary to hold a hearing.

Disclosure of Documents

One factor that slows down proceedings under the existing Human Rights Act is that the parties have no way to demand that the other party produce relevant information before the hearing. As a result, the parties too frequently have to litigate with inadequate information or must use the hearing itself to obtain the information. The parties do both have access to the report of the investigator, but this report frequently does not contain all the information that would be relevant in preparing for the hearing.

In court proceedings, there is a process called "discovery" that allows each party to demand that the other party identify and produce relevant material before the trial. It would be useful to have a somewhat similar process prior to human rights hearings. Not only would the exchange of information facilitate the hearing itself, but it can provide each party with a factual foundation to realistically evaluate the chances of success. Therefore, it will sometimes help the parties to reach a settlement before the hearing.

Another advantage of a disclosure process is that it can take some of the pressure off the investigative process. Some cases will demand a full investigation because of the nature of the facts at issue. That is particularly true when a claim involves an allegation of systemic discrimination or of conduct affecting a group of people. However, in some cases, the facts are relatively simple and can be gathered without difficulty through a discovery process. That can occur if the facts are primarily contained in documentary evidence. In such cases, the Director of Investigation and Mediation might determine either that no investigation was required or that an abbreviated investigation could be conducted, knowing that the relevant material would be disclosed after the case was referred to the Tribunal for hearing.

The primary disadvantage of disclosure is that this process itself takes some time and effort. This process could itself contribute to delay if no limits are placed upon it. However, it should be possible to draft rules that would avoid excessive demands for disclosure or the use of disclosure as a delaying tactic.

Of course, disclosure would be subject to legal privileges such as the privilege for communications between lawyers and clients and to other laws such and the Freedom of Information and Protection of Privacy Act. In addition, it may be appropriate to enact rules specifying that certain matters are not subject to disclosure in the interests of protecting a party from undue intrusion or demands for irrelevant material.

3-C-53 It is recommended that the Human Rights Code provide for a process for the disclosure of documents prior to the hearing.

3-C-54 It is further recommended that the Human Rights Tribunal formulate binding rules to regulate this process.

Oral Disclosure with Leave of Tribunal

In court proceedings, there is also a procedure called "examination for discovery." This process allows each side to question the other party outside the courtroom before the trial. It can provide additional information that is useful in preparing for a hearing, particularly when the key evidence is not contained in documents. However, it can also be relatively costly and time consuming.

In the human rights context, oral examination of a party also could affect

the accessibility of human rights protection by discouraging some claimants from filing a claim. Discrimination can cause a great deal of emotional trauma, and some claimants would likely choose to forego a remedy rather than be subjected to oral cross examination. It is true that a claimant may be required to give information orally to an investigator earlier in the process. But that process is less threatening than an adversary proceeding just before a hearing. Such an examination could reinforce power imbalances between the parties. For example, a woman who had experienced harassment might very well feel that this it recreated some of the dynamics that had caused the harassment in the first place.

In most cases, the cost and other disadvantages of an oral examination of the parties would outweigh the advantages. Often, information that might be revealed during such an examination can be obtained in a more satisfactory manner during the investigation of the claim. However, in some situations, oral examination of a party may be the best way to collect relevant evidence, and the circumstances may be such that many of the other disadvantages do not arise. In those situations, it would be helpful to have a power to examine the parties.

3-C-55 It is recommended that the Human Rights Code permit one party to orally examine other parties to the proceedings. However, such an examination should be permitted only upon application to the Human Rights Tribunal. The Tribunal should authorize such an examination only if special circumstances make other means of gathering information inadequate and only if the examination can be carried out without undue emotional or financial cost to the party being examined. The Tribunal should be authorized to place any restrictions on the examination that it thinks are appropriate.

Pre-hearing Conference

The Human Rights Code should specifically authorize the Human Rights Tribunal to formulate rules regarding pre-hearing conferences. Such conferences probably would come within the more general power of the Tribunal to control its proceedings. In certain circumstances, the B.C. Council of Human Rights presently arranges for a pre-hearing conference along similar lines to that proposed. However, a specific statutory authorization would avoid any doubt and would encourage the adoption of such rules.

Pre-hearing conferences could serve several purposes. They would provide an opportunity for settlement of a claim without holding a

hearing, speeding the process for the parties to that claim and reducing the workload of the Tribunal and the Commission. It is true that there will have been opportunities for settlement earlier in the process, but the experience of human rights agencies and other administrative agencies is that the parties may take settlement negotiations more seriously as the time for a hearing approaches.

The second purpose of the pre-hearing conference would be to narrow the issues to be considered at the hearing and to resolve any procedural matters that might otherwise slow down the hearing. For example, they could resolve any problems that had arisen concerning the exchange of information between the parties and deal with procedural issues such as special arrangements regarding witnesses (particularly expert witnesses).

A third function of the pre-hearing conference would be to decide cases without a full hearing in certain circumstances. This would be somewhat similar to a summary judgment process in court.

The pre-hearing conference would be conducted by a member of the Tribunal in order to promote confidence in the process and to allow the person presiding to make rulings concerning the claim. There would be strict time limits on the pre-hearing conference to ensure that it did not itself become a cause of delay.

A similar pre-trial conference is now used in Small Claims Court. That experience suggests that the primary advantage of the process is that it provides better service to the parties to a case. Its effect in shortening the process is more difficult to assess, since these conferences were instituted at the same time that the jurisdiction of the Court was extended from claims under $3,000 to those under $10,000, making comparisons difficult. However, a number of people familiar with the process thought that it did tend to shorten trials even when it did not result in a settlement before trial.

A somewhat similar process was recommended by the Ontario Human Rights Code Review Task Force. Again, the purpose was both to expedite matters and to provide more effective service.

The details of the rules concerning pre-hearing conferences should be developed by the Human Rights Tribunal after further research and consultation. However, it is proposed that the following elements be included in the rules:

- A member of the Tribunal would have the power to decide

whether a pre-hearing conference would be productive and fair to all parties, taking account of the circumstances of the claim. If the member concluded that a conference was warranted, it would be mandatory, but the rules would not require a pre-hearing conference in every case. For example, such a conference might not be warranted if there were no chance of settlement and no procedural issues needed to be decided before the hearing. Also, a pre-hearing conference would not be held if there was undue risk that it would cause an undue emotional burden on a party. The rules might specify more detailed guidelines for determining whether a conference was warranted.

- The admissibility at the full hearing of statements made at the pre-hearing conference would be specified in the rules. In most circumstances, statements should be inadmissible in order to encourage a free discussion during settlement discussions. However, the rules might provide, for example, for an agreed statement of facts to be drafted at the conference.
- The rules would specify whether the member of the Tribunal was eligible to conduct the full hearing if the claim went on to hearing. If the pre-hearing conference included a discussion of settlement, the presiding member of the Tribunal should not be eligible to conduct the full hearing. On the other hand, if the conference was limited to procedural rulings about how the full hearing would be conducted, it would be both fair and efficient to assign the same person to conduct the full hearing.
- The rules should specify the circumstances in which it would be permissible to make a final ruling on the claim without holding a full hearing. For example, if the pre-hearing conference produced an agreed statement of facts and the case turned on a well defined question of law, it might be appropriate to make a ruling on the basis of the positions stated by the parties at the conference or on the basis of written submissions after the conference.

It is important that all parties be on an equal footing at a pre-hearing conference. Since most respondents are likely to be represented by counsel at this stage of the proceedings, the claimant should also have access to legal counsel or to a trained advisor.

3-C-56 It is recommended that the Human Rights Code specifically authorize the Human Rights Tribunal to include in its Rules of Procedure a provision for a pre-hearing conference. The Code should authorize the Tribunal to make rulings at the conference both about the substance of the claim and about procedural issues. The details concerning the

exercise of these powers would be specified in the rules of procedure.

e. Hearing Procedure

The hearing procedures do not need detailed discussion. Except for a few matters, most participants at the consultation meetings were satisfied with the way hearings are presently conducted. Therefore, the Human Rights Tribunal should adopt many of the same procedures now used. For example, the practice of issuing an oral decision at the close of a hearing when feasible has speeded up the process significantly and should be continued.

Other points that were raised in the submissions and during the consultation meetings are discussed elsewhere in this Report. For example, it is recommended that there should be a power to order that a claim will be heard by a panel of three persons. Also, there should be a power to allow an individual or group to appear at the hearing as an intervenor, and funding should be available to make this possible.

The point that received the most attention at the meetings was that the hearing process, like other parts of the process, takes too long. This is a matter of serious concern, since it affects both the effectiveness and fairness of the process. It is proposed that the statute impose time limits on the consideration of a claim to help deal with this issue.

A second point that was raised in several submissions was the absence of any published rules of procedure. It was recommended earlier in this Report that the Tribunal have the power to make such rules. They should be published and distributed so that they are readily available to all parties. Such rules would help make the process fairer. It also would help avoid delays because it would be less likely that a party would be surprised by a turn of events and would request an adjournment.

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7. Legal Representation and Other Assistance

Under most Canadian human rights statutes, the Human Rights Commission provides a lawyer to represent both the Commission itself and the claimant. In the relatively unusual case in which the position of the Commission differs from that of the claimant, the Commission is represented by a lawyer and supplies a second lawyer for the claimant.

This kind of Commission support for a claimant is a recognition of the fact that discrimination is a wrong to the public as well as to the claimant. In the words of Walter Tarnopolsky, it "ensures community vindication of the person discriminated against." He adds that this is as important for the community itself as for the person who experienced the discrimination.

The B.C. Council of Human Rights cannot appear at the hearing or represent the claimant. It is a member of the Council who conducts the hearing, and the Council could not be both a party to the hearing and the adjudicator. Instead, special arrangements have been made through the Legal Services Society for legal aid to be supplied to claimants. Claimants do not have to meet the normal financial criteria for legal aid, in partial recognition of the fact that legal representation serves a public as well as a private purpose. The costs of this legal representation come out of the budget of the Council.

Both in B.C. and elsewhere, respondents usually provide their lawyer at their own expense. Respondents are eligible for legal aid if they meet certain financial tests, though that fact was not widely known or advertised and different officers may apply somewhat different standards in deciding whether to grant legal aid to a respondent.

a. Assessment of the Existing System of Legal Representation

This existing system does not work as well as it should. While individual lawyers have provided excellent representation beyond the call of duty, the system does not provide adequate safeguards to ensure that the lawyer will have the necessary knowledge of the field of human rights. This assessment is based on the opinions of community organizations who work with claimants, law students who have monitored the hearings, lawyers who are familiar with the system and comments of members of the B.C. Council of Human Rights.

The Legal Services Society has prepared a list of lawyers who practice in the area of human rights, but lawyers nominate themselves for the list, and there is very little monitoring to ensure that they have the necessary

knowledge or experience. Because human rights is not an area of law with anything like the caseload in areas such as criminal law, family law or civil litigation, it is almost impossible for any single lawyer in private practice to specialize primarily or exclusively in this field. As a result, it is not easy to keep up with the current state of the law.

The legal aid system is especially inadequate in dealing with larger systemic discrimination cases. The system is entirely geared to dealing with individual cases of discrimination involving relatively straightforward issues. The rules place severe limits on the number of hours that a lawyer can charge for in dealing with a human rights claim. Many of the lawyers and other knowledgeable people consulted during this Review thought that the time allowed was not even adequate to deal with cases of individual discrimination, and it is completely inadequate for preparing for a hearing concerning systemic discrimination.

A significant modification in the system for providing legal representation is needed. The new system should be capable of dealing with larger systemic cases and with other complex cases, as noted by the Canadian Jewish Congress (Pacific Region).

b. Representation of the Claimant

The system of representation should recognize that the purpose of the human rights enforcement process is to protect the public as well as the claimant. Therefore, a claimant should continue to receive legal assistance to present the claim in all cases, and there should be no financial eligibility test. This is consistent with the policy that has existed generally in Canada since comprehensive human rights statutes were first enacted.

One option for providing legal representation would be the arrangement used in most jurisdictions in which the new Human Rights Commission would represent claimants in all cases. In some jurisdictions, legal staff within the Commission performs this role. In others, a lawyer is retained to represent both the Commission and the individual.

This option has the advantage that lawyers working within the Commission will have expertise in human rights and also will have the expertise of the rest of the Commission readily at hand. This may also be an efficient option, since staff lawyers could also advise the Commissioner for Human Rights, the Director of Investigation and Mediation and their staff about other matters.

There was some opposition to this option in the submissions to the Review. Several organizations representing claimants, including the B.C. Human

Rights Coalition, DAWN Vancouver and the Canadian Anti-racism Education and Research Society (CAERS), recommended a system in which legal counsel would continue to be provided through the Legal Services Society. Those submissions echoed recommendations in the Ontario Task Force Report, which recommended that control over cases be placed in the hands of the parties rather than the Ontario Human Rights Commission. Representation of the claimant at the hearing might, in the eyes of some, cast doubt on the impartiality of the process, though this risk is minimized by the division of functions between the Commissioner for Human Rights and the Director of Investigation and Mediation and by the fact that hearings will be before a separate Human Rights Tribunal.

A second option is to establish a Human Rights Legal Clinic that would be the focus of these services. This clinic could be a new entity, or it could be connected with an existing organization providing similar services. Because the majority of cases come from the Lower Mainland, it would be most productive to locate the Clinic in this region. The Clinic might be administered through the Legal Services Society.

Lawyers in the Clinic could serve a dual role. They could directly represent claimants, particularly in the geographical area in which the Clinic was located. The Clinic could also serve as a resource for other lawyers representing claimants. The Clinic could supply information and the results of research to other lawyers so that they could prepare more quickly for the proceedings.

In addition to the Clinic, the arrangements might provide for the participation of staff lawyers of the branch offices and community law offices of the Legal Services Society to assist the Human Rights Legal Clinic both in representing clients and in providing information and research. It would be particularly useful to have the participation of the community law offices serving First Nations people.

An advantage of this option is that it would give claimants more control over their cases than if representation was through the Human Rights Commission. It also would be easier to provide services regionally through such a system. In addition, it would reduce any perception that the Commission’s ability to represent the public interest was undermined by the fact that it also represented a specific claimant. At the same time, it would provide a check against any tendency by the Commission to subordinate the interests of the claimant to the broader public interest.

One possible disadvantage of this arrangement is the risk that the claimant’s interests would prevail over the broader public interest in preventing future discrimination. The power of the Commissioner for Human Rights to

intervene in a claim would, however, minimize this risk. Indeed, allowing the Commissioner to concentrate on cases of special significance, and freeing the Commissioner from the duty to represent every claimant, might make it easier to concentrate on those claims that raise matters of public importance. The Commission would not be as likely to become bogged down in individual claims.

One factor that makes the choice between these options more difficult is that the Legal Services Society is presently in the midst of changes, the outcome of which is difficult to predict. The present arrangements for legal representation are clearly deficient, and some form of specialized clinic or agency would be an essential component of an adequate system of legal representation. However, it is difficult to say at this time whether such a clinic would fit within the plans of the Legal Services Society. If it did not, further work would be needed to identify alternative arrangements.

If it is feasible to establish such an arrangement for providing legal services, it is the preferred option. If the proposed system cannot be put in place, the Commissioner for Human Rights should assume responsibility for representing claimants.

3-C-57 It is recommended that legal representation of claimants be provided through the Legal Services Society. An essential component of these services is the establishment of a Human Rights Law Clinic, either by establishing a new facility or by providing an existing organization delivering similar services with the resources necessary to undertake this role. Claimants would be represented by staff of the clinic, by staff lawyers of the Legal Services Society Community Law Offices, by Native Community Law Offices and by private counsel, as appropriate. The Human Rights Law Clinic would serve as a resource and research facility for all lawyers representing claimants.

3-C-58 It is recommended that if it is not possible to establish a Human Rights Law Clinic and to give it the resources necessary to provide adequate support to all lawyers representing claimants, the Commissioner for Human Rights should be assigned the responsibility of representing claimants at hearing.

If private lawyers continue to represent claimants, one matter needing attention is the tariff that has been established. This tariff provides an hourly rate comparable to that of other types of cases. In many circumstances, however, the formula for payment does not allow enough hours for adequate preparation. In addition, the tariff does not cover the enforcement of orders in court after the decision has been made. It should be extended to cover

such actions. The present tariff also makes no allowance for systemic cases raising larger interests and often affecting significant numbers of people.

3-C-59 It is recommended that the terms of the legal aid tariff for human rights be reviewed and modified as appropriate.

c. Legal Representation of Respondents

Legal aid for a respondent must be justified on a somewhat different basis than legal aid for a claimant. It cannot be justified as vindication of a wrong to the community as well as the individual nor as a way to prevent future harm to others. However, it can be justified if it is needed to comply with the principles of fairness. Many human rights claims involve issues of law or complex issues of fact. A person without knowledge of this area of law could not effectively present a legal defence concerning those issues. Therefore, it would violate the principles of fairness to require a person to defend themselves at a hearing because they could not afford a lawyer.

Most respondents have the resources to retain a lawyer and would not want to rely on the legal aid system to obtain legal assistance. However, some claims are brought against individuals or small businesses who cannot afford a lawyer. For example, a claim might be filed against a fellow employee, a person renting out a basement suite or a one or two person business. These people should be eligible for legal aid if they meet the normal financial eligibility requirements.

3-C-60 It is recommended that clear guidelines be established making respondents eligible for legal aid if they meet the financial criteria used in other similar cases. It is further recommended that all respondents be informed of the availability of legal aid and of how to apply for it.

d. Process for Dealing with Applications for Legal Assistance

It has been somewhat unclear when a claimant becomes eligible for legal aid. To some extent, the decision has been delegated to the different offices of the Legal Services Society, and there are indications that the decisions are not completely consistent. It does not appear that claimants are generally informed about the possibility of legal aid until the process is well underway. As a result, one applicant may be granted legal aid before a claim is filed, while others may not receive legal aid until the case has been referred to hearing. Steps should be taken to make sure that the rules are clear and are applied uniformly.

As noted earlier, there is even greater uncertainty about the procedures for

considering applications by respondents for legal assistance. Again, a uniform and fair process is essential.

e. Other Assistance and Advice

One issue is whether advice should be provided by a lawyer or by an advisor who need not be a lawyer at each stage of the process. This question is particularly pertinent to earlier stages of a claim.

Lawyers do not always provide the best or most accessible service. A person thinking of filing a claim may be more comfortable talking to the staff of a community organization serving a particular community. For example, a First Nations claimant may prefer to talk to a member of staff of a Friendship Centre or some other First Nations organization rather than to a lawyer. Even later in the process, lay advisors who have been trained in human rights law and procedure often will provide assistance that is fully competent and is more accessible than a law office. For example, a trained lay advisor may be the appropriate person to advise a claimant about mediation.

Another relevant factor is that the staff of the Human Rights Commission will provide assistance in analyzing a potential claim and in preparing and filing the necessary documents. That is one of the ways in which the process differs from a court proceeding in which the parties usually get no help from the court in starting the process. Of course, some cases will present complex issues of law that require the services of a lawyer early in the process. Yet it is wrong to assume that lawyers provide the best service in every case or that they are always needed at the beginning of the process.

An earlier recommendation in this Report was that the Human Rights Commission work together with organizations in the community to provide advice and assistance to those considering filing a claim and that these community organizations be supplied with the necessary financial support and resources to carry out this function. That recommendation is relevant to decisions about legal services. Claimants need support and advice at all stages of the proceedings. If there are no alternative sources of advice, legal services will have to be expanded more than otherwise would be necessary. It makes more sense, both in terms of effective services and of cost, to develop a mixed system of support that involves both lawyers and non-lawyers.

8. Remedies

The Human Rights Act presently grants a range of remedies that is generally consistent with those provided in other Canadian statutes. If a person is found to

have violated the Act, the order must require the person to cease the contravention and to refrain from similar contraventions. The order can also require a person to take steps to correct the effects of the violation and to adopt an employment equity program or other special program if the violation is part of a pattern or practice.

If the person injured is a party to the claim, the order can require that the person who violated the Act make available what was denied. The violator can also be required to compensate the person for lost wages or other expenses. In addition, the order can require that the person receive damages for injury to dignity, feelings or self respect.

Some of these remedies were added by amendments in 1992. Until that time, there was no provision allowing an order requiring an employment equity or other special program, and the damages for injury to dignity, feelings or self respect were limited to a maximum of $2,000.

These remedies do not need any major modifications. However, it would be useful to put in place a number of refinements that would make the existing remedies more effective and would clarify the scope of the remedies available.

a. **Clarifying Systemic Remedies**

Some of the remedies, such as those for lost wages and expenses, are straightforward and need no elaboration. However, some of the remedies are broader in scope, and there may be some doubt as to exactly what they cover.

In some respects, the wording of the statute could be clearer and more informative. For example, section 17(2)(c)(ii) allows an order to adopt and implement "an employment equity program or other special program". To find out what kinds of special programs are covered, it is necessary to turn to section 19.1(2)(b), which refers "special programs or activities that have as their objective the amelioration of conditions of disadvantaged individuals or groups."

The submission of the B.C. Educational Association of Disabled Students suggested that the Act be clarified by referring specifically to equity programs regarding public services and educational institutions. It would be helpful to redraft the statutory wording to make it more clear that the statute covers all programs designed to ameliorate the conditions of groups or individuals who experience disadvantage, whether the disadvantage relates to public services such as education, to housing, to employment or to any other area of activity covered by the statute.

3-C-61 It is recommended that the provisions of the Human

Rights Code make clear that a remedy to ameliorate conditions of disadvantaged individuals or groups can be granted with regard to all areas of activity covered by the Code.

b. Power to Give Interim Remedies

Another area that deserves attention is the possibility of interim remedies. There are circumstances in which a remedy at the end of a hearing cannot adequately compensate a claimant for discrimination that has occurred, or where discrimination is ongoing and should be stopped immediately. For example, harassment at work may force a claimant to quit a job before the normal human rights process has been completed. In such circumstances, it may be appropriate to grant an interim remedy providing protection to the claimant pending the outcome of the case.

Several Canadian human rights statutes allow interim remedies in certain circumstances. Recent cases have granted such remedies in cases involving the distribution of hate messages in violation of the Canadian Human Rights Act. The Manitoba Human Rights Code allows the Commission to apply to a court for a restraining order until the claim has been disposed of. Quebec authorizes the Human Rights Tribunal to make such an order in certain circumstances, and Saskatchewan allows court proceedings that could include an interim order.

Interim remedies must also take account of principles of fairness and must balance the interests of all parties. By definition, an interim order is issued before a final determination in the case. If the final decision is that no violation has occurred, the order may turn out in hindsight to have been unjustified. Therefore, a power to grant interim orders should be accompanied by appropriate safeguards.

3-C-62 It is recommended that the Human Rights Code specifically authorize regulations permitting the Human Rights Tribunal to grant interim orders in circumstances in which waiting for the final decision would not adequately protect the legitimate interests of the claimant or of the individual or group affected by the discrimination.

3-C-63 It is recommended that these regulations should include safeguards to ensure that the interests of the persons against whom the order is made are properly taken into account.

c. Powers Regarding Consent Orders

Section 43(5) of the Manitoba Human Rights Code specifically allows an

adjudicator to make consent orders. While such orders can be made under the current wording of the B.C. Human Rights Act, it would be useful to include this power explicitly in the statute so that all concerned are aware of this possibility. Consent orders help to ensure that settlements are enforceable, as noted earlier in this Report. Of course, the Tribunal would have the power to refuse to grant a consent order if it was contrary to public policy or was otherwise improper.

3-C-64 It is recommended that the Human Rights Code authorize the Human Rights Tribunal to grant consent orders.

d. Supervision of Remedies

Remedies that can be implemented immediately need no supervision. A cheque is written or an apology given, and that is that. But implementation of some remedies takes time. If a claimant is to be offered the next available job or apartment, the opening may occur long after the order is given. A remedy to deal with systemic discrimination may require that a series of steps be taken over a considerable period. For example, in a case involving sex discrimination by Canadian National, the Supreme Court of Canada ordered that a series of steps be taken to change hiring procedures. In addition, the railroad was required to fill at least one in four future openings by hiring a woman until women held thirteen percent of the blue collar positions in the railroad yards in the Montreal region. The company was ordered to file periodic reports with the Canadian Human Rights Commission and with the organization that had filed the claim until the remedy was fully implemented.

The periodic reports ordered in that case were a key part of the remedy. The claimant may have no way of knowing whether the respondent is or is not complying with the order. For example, it would be difficult for a claimant or for the Commission to know when the next apartment had become available and even harder for someone outside an organization to know whether women were being hired by a company to fill future openings.

Most respondents will comply with an order of a human rights tribunal, but some method should be available to verify that there has been compliance and to take further steps to deal with the few who do not comply. Therefore, the statute should clearly provide the Tribunal the power to order steps to monitor implementation of an order, as it did in the Canadian National case. This power is probably implicit in the current wording of the remedy section, but it would be useful to eliminate doubt that might lead to future litigation.

3-C-65 It is recommended that the Human Rights Code specify

that a remedy can include a requirement that the Commissioner for Human Rights or any other party to a proceeding must be provided with the information needed to determine whether a remedy is being implemented.

3-C-66 It is recommended that the Code should also specify that the Human Rights Tribunal retains jurisdiction over a claim until a remedy is fully implemented.

e. Power to Modify Remedies

When a remedy must be implemented over a period of time, it may become apparent at some point that the remedy does not fulfil the original purposes. For example, jobs may be rearranged so that an order of reinstatement is no longer feasible. Changed conditions may mean that a systemic remedy no longer will effectively correct the inequality caused by the discrimination, or what seemed at the time to be a reasonable remedy may cause undue hardship to a respondent because of changed circumstances.

It is impossible to take account of all possible future circumstances when granting a remedy. Therefore, there should be a power to modify the remedy when it no longer will fulfil the original intention. However, this power should not become an excuse for a reconsideration of remedies simply because one party is dissatisfied with the award.

Under most Canadian human rights statutes, cases are heard by ad hoc tribunals that do not have an ongoing existence. That fact makes it more difficult to modify the original remedy. One of the advantages of the permanent tribunal proposed in this Report is that the application for a modification could be made to the same tribunal that made the original order.

3-C-67 It is recommended that the Human Rights Code authorize any party to apply to the Human Rights Tribunal for a modification of an order on the ground that it is no longer appropriate due to unforeseen circumstances.

3-C-68 It is recommended that the Code should also authorize the enactment of regulations to specify in greater detail the criteria for modifying an order.

f. Costs of the Proceedings

Courts generally have the power to make an award to compensate the winning party for part of the costs of the proceedings. A board of inquiry in

Alberta and the Human Rights Tribunal in Quebec have similar discretion to award costs. In Manitoba, Ontario and the Yukon, costs can be awarded in special circumstances.

The wording of the B.C. Human Rights Act is somewhat misleading concerning costs. Section 17(3) gives a "board of inquiry" the power to award costs. However, in practice, boards of inquiry are never appointed, and cases are heard by a member of the B.C. Council of Human Rights. A member of the Council does not have the power to award costs. The statute should resolve this matter one way or the other.

It would not be appropriate to allow an award of costs against claimants that would result in them being worse off financially than if they had not filed a claim. If potential claimants knew that they might be out-of-pocket several hundred dollars or more, many would feel that they could not take this risk even if the risk were small. If such a provision discouraged only claims that were without merit, it might be useful. But the likely effect would be to discourage meritorious claims by people in precarious financial circumstances. Groups who experience the most severe inequality would be especially likely to be dissuaded from filing because the financial risk would be of greater significance to them.

In most circumstances, it is appropriate to let both sides bear their legal expenses and to make no award as to costs. Human rights claims raise matters of public interest. It is sometimes the obligation of a Human Rights Commission to litigate a matter in the public interest, and it would not be appropriate for the Commission to bear the legal costs of all parties whenever the case did not ultimately succeed. It would not be just to require respondents to pay costs whenever they lost if they could not collect costs when they won. Providing for a routine award of costs to the winning party would be contrary to the normal practice in other jurisdictions.

It may be appropriate, however, to award costs in circumstances in which a party has misused the process in some way. If a competent evaluation of a claim would have shown that it did not justify a hearing, or if one party or the other prolongs the process for improper motives, it would be just to allow an award of costs against the party. The one qualification is that the rules should not risk discouraging legitimate claims because of the fear, however groundless, that the claimant might be out of pocket. Where the claim is completely without merit, costs should be against the Commission rather than the claimant, since the Director of Investigation and Mediation is the person who refers a claim to the Tribunal for hearing.

3-C-69 It is recommended that the Human Rights Tribunal have the power to award costs against the Human Rights

Commission or any party to a claim other than a claimant if the Tribunal concludes that the Commission must have known prior to the hearing that the claim was completely without merit and the litigation did not in any way serve the purposes of the Code, or if the Commission or any party prolongs the process for frivolous, vexatious or other improper motives.

Such a provision would be similar to section 45 of the Manitoba Human Rights Code.

g. **Enforcement of Remedies**

The B.C. Human Rights Act provides that a remedy granted at a human rights hearing can be filed by the Council or the claimant in the Supreme Court of British Columbia. Once it is filed, it can be enforced in the same way as an order of the Court itself. A similar mechanism is used in most Canadian statutes.

One difficulty that has arisen is that, in practice, it is the claimant who must take the necessary steps to enforce the order. The arrangement between the B.C. Council of Human Rights and the Legal Services Society for legal aid does not extend to this stage of the proceedings. Therefore, a claimant may receive no help in enforcing the award unless the claimant is eligible for legal aid apart from this arrangement.

It would be unjust for the claimant to be denied the benefit of a remedy because of lack of resources to enforce the remedy. The inability to enforce a remedy would also frustrate the public interest in eliminating discrimination. Under the present structure, it may be somewhat awkward for the B.C. Council of Human Rights to participate in enforcing its own award. Under the proposed structure, the separation of the Commission from the Tribunal would solve this problem.

3-C-70 It is recommended that the Commissioner for Human Rights take the steps that are necessary to enforce a remedy granted by the Human Rights Tribunal.

h. **Criminal Remedies**

Several submissions to the Review suggested there was a need for penalties for human rights violations, at least in certain circumstances. Some proposed penalties in specific circumstances, while others propose an escalating series of penalties for repeat violators of the statute.

The fact that discrimination is a wrong to the public as well as those directly

affected, and the threat it causes to the social fabric, make the adoption of penalties tempting. The criminal (and quasi-criminal) process is a powerful symbol of society's condemnation of conduct. Certainly, the harm caused by discrimination is of a magnitude that would justify such condemnation.

Nevertheless, it is not recommended that criminal penalties be added to the Human Rights Code for several reasons.

Perhaps the most important reason is that criminal penalties have been tried and have failed. The earliest human rights statutes relied on criminal penalties for enforcement. The safeguards that rightly apply to criminal proceedings, such as proof beyond reasonable doubt and the right to remain silent, proved to be almost insurmountable barriers to proof that conduct had a discriminatory purpose. The Criminal Code prohibits certain conduct that constitutes discrimination in extreme forms. For example, sexual assault is a crime, as is advocacy of genocide and wilful promotion of hatred. But as applied to less blatant forms of discrimination, the criminal approach has not succeeded.

One possibility would be to add penal provisions to the Human Rights Code while retaining civil remedies as well. However, if people who violated the Code were potentially subject to fines or imprisonment as well as to awards of damages, the rules about criminal proceedings might be applied to all stages of the process. For example, investigations might be subject to the same stringent rules as police searches. Therefore, the addition of penal provisions might make enforcement less effective even if the penalties ultimately were not requested at the hearing.

A penal approach also likely would result in a narrower definition of what constitutes discrimination. Crimes usually require proof of intent or recklessness. In contrast, the courts have held that human rights laws prohibit conduct that has an adverse effect on a protected group, whether or not the effect was intended.That broad definition would be put in jeopardy by adoption of a penal approach.

For all of these reasons, the addition of penal provisions would be more likely to weaken protection against discrimination than to strengthen it.

9. Time limits for process

Under the current human rights protection system, a case that goes all the way to a final hearing takes approximately three years. During the last fiscal year, the average time for completion of intake was 38.1 days.Investigations took an average of 283 days. Most of this time is not spent on the actual investigation but is due, in part, to the backlog of cases that Industrial Relations Officers have to investigate.

Once the investigation is completed, the investigator's report is sent to the parties for comment. The disclosure took an average of 156 days and the response of the parties 180 days during the last fiscal year. An average of a further 294 days elapsed between the referral of a case to hearing and the completion of the hearing, and it took an average of 140 days to release the decision.

Every segment of the community that participated in the consultation process expressed concerns about the length of the process. Claimants pointed out that they sometimes have to endure serious discrimination while waiting for their case to be heard. Many of the participants from the business community felt it was unfair for an innocent respondent to have to wait three years for a judgment in his or her favour. We also heard that a pending human rights claim against a business can severely damage a respondent's reputation over a three year period. Participants from labour organizations further reinforced the message that delay hurts everyone.

Some of the changes recommended in earlier parts of this Report will help speed up the process. For example, allowing intake officers to conduct at least a cursory investigation will allow for quick resolutions and dismissals of some cases. Placing the investigative function within the Human Rights Commission will also cut down on administrative delays. Investigators will also be able to conduct their investigations more efficiently once they have the authority to compel production of the required evidence. Pre-hearing procedures such as disclosure of documents and pre-hearing conferences will help the parties to narrow the issues before a hearing.

In addition, the Human Rights Code should provide a guarantee that the process will be shorter. Many groups, including the B.C. Nurse's Union, the B.C. Civil Liberties Association, and the Canadian Anti-Racism and Education Research Society, proposed that there be statutory time limits on each part of the process. Statutory time limits are used in other statutes. For example, the Labour Relations Code place limitations on the time for a certification vote and on the work of a settlement officer in dealing with a dispute. Human rights claims can be large or small, and some leeway must be allowed. But statutory time limits would help to speed up the process.

The following time limits are less strict than some of those proposed in the submissions. Experience in other jurisdictions suggests that people will find ways around a time limit if it is too short to be feasible. The limits proposed are reasonable, taking account of the other reforms that have been proposed. The total of these limits roughly approximates the one year limit on the entire process recommended by the B.C. Human Rights Coalition.

3-C-71 It is recommended that the Human Rights Code should prescribe statutory time limits for each stage of the process of dealing

with a claim. The following limits are suggested:

- **The Director of Investigations and Mediation should assign an investigator to a claim within fifteen working days of the claim being completed and filed and within thirty days of the initial request to file a claim, not counting any delay due to the conduct of the claimant.**
- **The investigation should be completed no later than 100 working days after the filing of the claim.**
- **After the completion of the investigation, the parties should be given a maximum of thirty working days to comment on the report of the investigator unless the Director determines that a longer period is needed in special circumstances in the interests of fairness. The Director of Investigation and Mediation should decide whether to refer the claim to the Human Rights Tribunal for hearing within a further thirty working days after the investigation is complete.**
- **The hearing should take place within sixty working days of the date that the claim was referred to the Human Rights Tribunal, unless all parties consent to a longer period or the Tribunal finds that this limit would cause unfairness to one or more parties despite the fact that they have prepared for the hearing with due diligence.**
- **The decision should be issued within sixty working days of the completion of the hearing.**

There will be circumstances in which it is legitimate to extend these time periods. For example, a claim may concern broad issues of systemic discrimination, or a hearing may be postponed to allow the attendance of key witnesses who, through no fault of the parties or the Commission, are not available earlier. Therefore, the statute should allow extensions of these time limits as long as there are safeguards to prevent extensions from being misused:

3-C-72 It is recommended that the Director of Investigation of Mediation be required to authorize any extension of the time limits described in points one to three of the previous recommendation. The authorization should be in writing and should give the reasons for the extension. The authorization should be sent to all parties to the claim, and the annual report of the Commission should include a report on extensions.

3-C-73 It is recommended that the Chair of the Human Rights Tribunal should be responsible for authorizing any extension to the limits described in points four and five of the previous recommendation. The same conditions should apply to the authorization as apply to

extensions granted by the Director of Investigation and Mediation.

It is not easy to devise a remedy if the time limits in the statute are not met. Since the fault will often be that of the Commission or the Tribunal rather than any of the parties, it is not appropriate to penalize the parties. A court order is a possibility, but the proceedings to obtain the order could be a source of delay instead of a cure. Since the Office of the Ombudsman is more generally responsible for overseeing administrative agencies, it is proposed that authorizations for extensions be sent to this Office. The Ombudsman will then be able to determine if this power is being abused.

3-C-74 It is recommended that unless an extension is made with the consent of all parties to a claim, each authorization for an extension of the statutory time limits should be transmitted to the Office of the Ombudsman.

10. Labour Grievances and Human Rights Claims

By law, all collective agreements must require employers to have just and reasonable cause for dismissal or discipline of an employee and must contain a provision setting up arbitration machinery to resolve disputes about these matters. Of course, dismissal or discipline for discriminatory reasons violating the Human Rights Act would not be just or reasonable. Also, many collective agreements contain clauses specifically prohibiting certain kinds of discrimination.

As a result of these terms of collective agreements, many human rights disputes can result in a labour grievance, a claim under the Human Rights Act, or both. It is worth considering how these different proceedings may interact.

One issue that arose often during the consultation process was that it can be burdensome to litigate both a grievance and a human rights claim about essentially the same matter. Employers cited the expense of the combined proceedings. Trade unions referred to cases in which they had taken forward a grievance on behalf of a member but had been subsequently joined with an employer as a respondent in a human rights claim.

Various proposals were made in the submissions and during consultation meetings to deal with this overlap. The suggestions might be placed in four categories:

- Allow both a grievance and a human rights claim to proceed simultaneously, as at present.
- Require an election of one remedy or the other at the beginning of the process.
- Allow a person to file both a grievance and a human rights claim, but deal with one process before the other, and continue with the second proceeding

only if the first has not properly dealt with the issue

- Combine the two processes into one.

a. **Differences Between Labour Grievances and Human Rights Claims**

In considering these possibilities, it is important to keep in mind the differences between grievances and human rights claims. Among the more important differences are:

- Human rights claims and grievances overlap but do not cover exactly the same matters. Grievances concern violations of the collective agreement. Human rights claims concern discrimination on certain grounds. For example, a wrongful dismissal based on an improper evaluation of a person's work would be a valid grievance, but not a valid human rights claim.
- A labour grievance is brought forward by the union rather than by the employee directly affected. It is the union that decides whether to use the grievance process to deal with an employee's complaint. Since the union has a legal obligation to represent all of its members, it will balance the interests of the individual against those of other members in making this decision. If the union does decide to proceed, it will represent the interests of the grievor.

Human Rights claims are usually filed by the person directly affected. The human rights agency has as its purpose the protection of individuals and groups against discrimination, and it does not have to represent other competing interests. After a claim is filed, the human rights agency has the power to decide whether the claim will go forward to a hearing or be dismissed. At present, the agency has no authority to represent the claimant at a hearing, though legal aid is available. A human rights claim can be filed against both the employer and the union.

- The procedures used in grievances and human rights claims are somewhat different. Procedures used in a grievance are governed by the collective agreement. While the terms of the agreements vary, the grievance may proceed through a number of stages involving discussions between the union and the employer prior to a hearing before an arbitrator. Human Rights claims are governed by the Human Rights Act. One feature is that investigation and mediation are carried out by third parties (the human rights investigators).
- The expertise of arbitrators and of human rights adjudicators is often different. Arbitrators are almost always experts in labour law but are not necessarily knowledgeable about human rights statutes. Human rights adjudicators are experts in laws concerning equality and discrimination but may not be expert in related labour issues.

- The remedies under a collective agreement are not the same as the remedies under human rights legislation. The remedies available in a grievance depend on the terms of the particular collective agreement and may be broader or narrower than those available under human rights legislation. One remedy available under human rights legislation that is generally not available under collective agreements is an award of damages for injury to feelings and self respect. Also, a human rights award can be both against an employer and a fellow employee, while a typical collective agreement would provide remedies only against the employer.

b. **Comparing the Options**

None of the options for dealing with the overlap between grievances and human rights claims is superior in every respect to the others. The status quo, in which the proceedings tend to go forward in parallel with little reference to one another, has the advantage of ensuring that all aspects of the dispute are fully considered. Allowing a hearing before both an arbitrator and a human rights adjudicator provides expertise in all aspects of the dispute. From the claimant's perspective, an advantage is that all the remedies under both the statute and the collective agreement are available.

A serious disadvantage of the status quo is that the combined burden of the two proceedings can be costly and time-consuming. Sometimes, exactly the same matters will be examined twice. This produces the feeling on the part of employers that they have been subjected to "double jeopardy" if an arbitrator has rejected a grievance and a human rights hearing is then held about the same issues. The legal concept of double jeopardy does not apply since the parties and the legal issues are not identical. However, an employer may feel with reason that the claimant has been given a second chance to make essentially the same arguments.

In a sense, the status quo presumes that the other proceeding will not adequately deal with human rights issues. That is sometimes true, but in cannot be presumed. While labour arbitrators are not universally knowledgeable about human rights, many of them have considerable human rights expertise. Also, the remedies may be essentially the same in the two proceedings, though that will depend on the terms of the collective agreement.

The disadvantages of the status quo are sufficiently serious that it is worth seeking ways to develop new rules that avoid them, or at least mitigate their effect.

In its pure form, the second option would require that the claimant elect at the outset to either file a grievance or a human rights claim. Filing one

would preclude access to the other process. The primary advantage of this option is that it avoids any possibility that there will be duplication in considering the dispute. Also, there will be no element of "double jeopardy." The result would be both more expeditious and fairer from the perspective of an employer.

There are several disadvantages to requiring such an election. The claimant often will not have enough information at the beginning of the process to make an informed choice. Often the person will have no access to an advisor who is an expert in both grievances and human rights claims. Before any investigation or discussions with the employer, the employee would often have to guess as to the motives for the conduct. For example, an employee might suspect that a dismissal was motivated by race discrimination and file a human rights claim, only to learn in the end that the conduct was motivated by the personal animosity of a supervisor unrelated to race. If the employee were forced to give up the opportunity to file a grievance in order to file a human rights claim, he or she would be denied a remedy for wrongful dismissal.

An election also would sometimes require a person to forego remedies that would be available under the other process. In addition, the claimant does not have full control over either a grievance or a human rights claim, and the process that was selected might go in directions that the employee neither desired nor anticipated.

While the disadvantages of parallel proceedings are substantial, requiring an election at the beginning of the process does not seem to be a just solution. The legitimate interests of employers would be protected by means that would cause undue harm to both the interests of employees and the purposes of the Human Rights Code.

The third option – deferring one process until the other has been completed – has greater potential to provide an acceptable solution. In general terms, a claimant would be allowed to file both a grievance and a human rights claim. However, one process would be suspended until the other had been completed. If the first process resulted in a solution satisfactory to the claimant, the second process would be terminated. If the claimant wished to proceed with the second process, it would be re-opened, but it would be limited to matters not adequately dealt with in the first proceeding.

One aspect of this proposal was discussed earlier in this Report. If a human rights claim were filed while a labour grievance was pending, the Director of Investigation and Mediation would have the obligation to consider whether the grievance appeared capable of fully and adequately dealing with the substance of the human rights claim. If it did, the Director would

suspend the human rights claim pending the outcome of the grievance process. At the conclusion of the grievance process, the Director would consider whether the grievance had fully and adequately dealt with the human rights claim. If it had, the claim would be dismissed or would be restricted to those aspects not fully and adequately considered during the grievance process.

This proposal should solve much of the problem of parallel proceedings. However, sometimes the issue will arise later in the process. This can happen either because the Director of Investigation and Mediation was not made aware of the grievance or because the Director had concluded, perhaps in error, that the grievance process was not capable of dealing with the human rights issues.

In those circumstances, the Human Rights Tribunal should have the power to dismiss a claim, to defer a hearing or to limit the scope of a claim to matters not fully and expertly dealt with in the grievance. The Tribunal should use the same criteria that applied to the decision of the Director. It would assess whether the process used to deal with the grievance was suitable for dealing with the human rights issues. If it was, the Tribunal would not reassess the ultimate result.

Normally, this decision would be made at the pre-hearing conference. The Tribunal would only dismiss a claim if the grievance process had been completed. As a result, the Tribunal could examine the entire grievance process in determining whether it had dealt with all matters raised in the human rights claim in a manner reflecting expertise about human rights. If the process were still continuing, the Tribunal would defer the human rights hearing rather than dismissing the claim. After the grievance had been completed, the Tribunal would determine whether to proceed with the full claim, to dismiss it or to limit its scope.

If a claim is deferred by either the Director of Investigation or the Tribunal, there should be a time limit on the deferral. It is proposed that the time limit be similar to that which would apply to the Director and somewhat shorter than would apply to the Tribunal, since a grievance should be well under way before the claim reaches the Tribunal. Regulations could change these time limits if experience demonstrated that they were not achieving their objective.

Instead of deferring a human rights claim, it would, of course, be possible to solve the duplication by deferring the grievance. If the union and the employer decide to defer the grievance, the human rights claim would proceed, since it would be obvious that the grievance would not adequately deal with the human rights aspects of the dispute within the specified time

limits.

This result is not entirely satisfactory, since an employee who files both a grievance and a human rights claim does not have a right to participate in the decision, though in practice the employee would usually be consulted. The ideal solution would be to enact complementary amendments to the Labour Relations Code and the Human Rights Code to provide the employee with the right to participate. That is a matter partially outside the mandate of this Review. In the meantime, the Director of Investigation and Mediation should make it a practice to consult with the claimant, the union and the employer before making any decision to defer a claim. Similarly, the Tribunal should invite the claimant, union and employer to make submissions regarding a proposed deferral of the hearing.

3-C-75 It is recommended that the Director of Investigation and Mediation take account of the fact that a grievance under a collective agreement has been initiated or will be initiated. The Director should consider the matter according to the process set out in recommendations 3-C-12, 3-C-18 in this Report.

3-C-76 It is recommended that the Human Rights Code require the Human Rights Tribunal to consider whether the substance of a human rights claim has been fully and adequately dealt with in another proceeding, if any party to the proceedings requests such a determination.

3-C-77 It is recommended that in making this determination, the member of the Tribunal assigned to the claim at the time of the application should take account of all relevant factors, including:

- **the subject matter of the other proceedings, and whether those proceedings had fully and adequately considered the human rights aspects of the dispute;**
- **the expertise of the tribunal or decision-maker in human rights;**
- **the fairness and effectiveness of the other process and whether or not the parties had been adequately represented in the process; and**
- **whether the other proceeding offered a range of remedies comparable to those available under the Human Rights Code in the circumstances**

3-C-78 It is recommended that the statute authorize the Tribunal to dismiss a human rights claim that has been fully and

adequately considered in another proceeding or to limit the claim to matters not fully and adequately dealt with. The Tribunal would not reassess the ultimate result in the other proceeding if the proceeding had met the criteria just outlined.

3-C-79 It is recommended that if the Tribunal decides that a portion of the claim has been fully and adequately dealt with in the other proceeding, it should limit the hearing under the Human Rights Code to those matters not fully and adequately dealt with.

3-C-80 It is recommended that the Human Rights Code permit any party to a claim to apply to the Tribunal to defer the hearing pending the outcome of another proceeding concerning the same, or essentially the same, matter.

3-C-81 It is recommended that the Tribunal should be authorized to defer the hearing if the other proceeding appears capable of fully and adequately dealing with the substance of the claim, taking account of the same criteria specified in Recommendation 3-C-77.

3-C-82 It is recommended that the Tribunal may defer the hearing for no more than ninety working days, unless a different limit is specified in regulations enacted under the Human Rights Code.

3-C-83 It is recommended that the Commissioner for Human Rights and the parties to a claim should have the opportunity to make representations before a final decision is made to dismiss a claim and that the claimant be consulted before a decision to defer a hearing.

These recommendations are broad enough to cover any other proceedings. It seems likely that their primary use would be in relation to grievances under collective agreements. However, they could be used in connection with other similar proceedings.

During the consultation meetings, some participants recommended that the human rights process be deferred if an internal process existed. An example of such a process is an internal complaints process dealing with sexual harassment. The difficulty with this proposal is that, unlike grievances under a collective agreement, there are no legal requirements concerning the nature or effectiveness of such an internal process. The remedies under internal processes are usually much narrower than those available under the

Human Rights Code, for example. For these reasons, it would not be appropriate to defer human rights proceedings merely because such a process existed.

The recommendations would allow the Director of Investigation or the Tribunal to take account of the actual results of such a process, however. If the process was comparable to a human rights claim, provided a range of remedies comparable to the Code and was carried out by people with the required expertise and independence, there would be a power to dismiss the claim. There would also be a power to defer investigation of the claim or to defer the hearing. However, the criteria contained in the recommendations are stringent and would only allow a dismissal or deferral if, in all respects, the process was comparable to a claim under the Human Rights Code.

A fourth and more radical option for avoiding overlap between labour grievances and human rights claims is to combine the two proceedings in some manner. For example, the statute might authorize the Chair of the Human Rights Tribunal to appoint a person who was arbitrating a related grievance to hear a human rights claim arising out of the same facts. The Chair would make this appointment only if satisfied that the arbitrator had the expertise necessary to adjudicate the human rights claim. The arbitrator would hold a single hearing but would rule on both the grievance and the claim. If both were successful, the adjudicator would have the power to award any remedy available either under the collective agreement or the Human Rights Code.

A variation on this option would be to allow grievances related to a human rights claim to be adjudicated by the Human Rights Tribunal. In effect, the Tribunal would serve as an arbitrator as well as a human rights adjudicator.

These possibilities require consideration not only of the implications regarding human rights protection but of the consequences for the labour grievance machinery. Amendments would be needed to the Labour Relations Code as well as new provisions in a Human Rights Code. Therefore, these options are partially outside the mandate of this Review. In addition, it would be necessary to resolve a number of questions before taking such a step. For example, would the employee be entitled to be a party to the grievance as well as the human rights claim? What rules of procedure would apply? Who would bear the cost of the hearing?

All of these questions require further research. However, the potential advantages of combined proceedings justify further study of this option.

One further point deserves consideration. Earlier, it was suggested that the Human Rights Code should not require an employee to choose between a

grievance and a human rights claim at the outset. The courts have held that it is not possible to try to exempt activity from human rights legislation by private agreement; the legislation supersedes all private agreements. However, some terms of collective agreements provide that a member is deemed to have waived a right to make a grievance by taking other steps to deal with a dispute. The result is that the member elects to forego a grievance by filing a human rights claim.

Such an election should not be forced on an employee for the reasons discussed earlier. It is contrary to the purposes of both the Human Rights Code and the Labour Relations Code to force a person to choose between their statutory rights under the two statutes.

3-C-84 It is recommended that there be a statutory prohibition on including in a collective agreement a term denying access to normal grievance procedures because a member of a union has proceeded with a human rights claim.

This provision could be included in either the Human Rights Code or the Labour Relations Code. It should be worded so that it does not prevent arrangements to coordinate grievance and human rights machinery by measures that do not require the employee to make an election at the beginning of the process.

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D. scope of coverage

The previous sections of this Report have covered the structure of the Commission and of the Human Rights Tribunal and the procedures for dealing with a human rights claim. This part of the Report discusses the areas of activity and grounds of discrimination covered by the statute, as well as the scope of exemptions in the statute.

1. Where the Human Rights Code Fits in the Legal System

The courts have recognized that human rights legislation has a special place in the legal system. They have given it a status that is next to the Constitution itself and have recognized that it is more fundamental than almost all other statutes. One consequence of this status is that if some other statute contains a provision that violates the human rights statute, it is the human rights statute that prevails and the other statute must give way. As the Supreme Court of Canada has said:

Human rights legislation is of a special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such a nature that it may not be altered, amended, or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement.

This principle is presently incorporated into the Human Rights Act in section 22(2). While this section is legally sound, its placement in the Act is rather obscure. Because of the importance of the section, it should be given a prominent place in the Human Rights Code rather than in a section with the heading "technical and other matters," as proposed earlier in this Report.

The principle that the Code has primacy over other legislation should be subject to one exception. This Report recommends that the definition of age be expanded so that it covers people of all ages. If this recommendation is adopted, protection will be extended to children and youth. However, there are a number of laws that treat children or youth differently from others for legitimate reasons. It is likely that the great majority of these laws would be found not to violate the Human Rights Code, but it is appropriate to remove any doubt about the matter. Other statutes should be exempted from challenge under the Code to the extent that they may apply differently to persons under the age of majority. It would then be appropriate to review all statutes and regulations to ensure that any age limitations are consistent with the purposes of the Human Rights Code. The review should also determine whether they are constitutional under the Canadian Charter of Rights and Freedoms, which also prohibits laws that discriminate on the basis of age.

3-D-1 It is recommended that the Human Rights Code prevail over other legislation with one exception. The exception would apply to other statutes and regulations that impose limitations or requirements based on the fact that a person is under a specified age if the age specified in the statute is less than the age of majority.

3-D-2 It is further recommended that there be a review of such statutes and regulations, and they should be modified unless they are consistent with the purposes of the Human Rights Code and with the Canadian Charter of Rights and Freedoms.

Another option would be to conduct such a statutory review before the Human Rights Code is enacted and to make the necessary changes, eliminating any need for an exception. That task would consume some time, however, and it could delay enactment of the Code.

2. Specifying What is Included in the Term "Discrimination"

The definition of discrimination in Canadian law has changed dramatically over the last two decades. It was once assumed that discrimination involved intentional bias and that the solution was identical treatment. More recently, the courts have rejected both notions. They have held that discrimination can be unintentional or intentional. They have also held that identical treatment may itself be discriminatory if the treatment has a more onerous effect on one person than another. The test of equality is in terms of the effect of the conduct, not the motives for it. In addition, the courts have said that the effect should be measured in the context of the place of the affected group in society. If the effect of conduct is to reduce the gap between a disadvantaged group and others who are more advantaged, the result is to promote equality, not to discriminate, even if a remedy treats the two groups differently.

One consequence of the changes in the definitions of equality and discrimination is that many people may understand the term in a sense that is no longer part of Canadian law. For example, if a person is required to work on a day that is a religious holiday for that person, the result is discriminatory in the current sense of the term because the effect is unintentionally to deny that person religious equality. However, neither the employer nor the employee may realize that discrimination has occurred. As a result, the employee may never obtain the remedy that the law affords. If the person does file a claim, the employer may assume that the allegation is of discrimination in the old sense of intentional bias and may feel unjustly accused. Either way, the human rights statute fails to achieve its purposes.

Old concepts of equality and discrimination have caused particular confusion concerning the accommodation of differences. Such accommodation is of particular significance to people with disabilities, though it also is relevant to a wide variety of other groups.

Even before the recent developments in equality law, there was a growing realization that something should be done to provide people with disabilities with access to services and facilities. Therefore, the duty of "reasonable accommodation" was incorporated into the law. This duty required that some steps be taken to overcome barriers causing exclusion to groups, including people with disabilities and religious minorities. However, there was a tendency to think of this duty as separate from the concept of discrimination or even as an exception to the principle of equality. The result was often to interpret the duty to accommodate in a narrow way that provided only weak assistance to those excluded. Some cases said that only minimal efforts were required.

Applying contemporary meanings to the words "equality" and "discrimination", the duty to accommodate becomes an integral part of equality and of the duty not to discriminate. Accommodation is just another aspect of the principle that equality is measured in terms of results and sometimes requires that different people in different circumstances be treated differently. Those who claim a right to accommodation should receive protection as strong as that afforded to others who also make claims based on the right to equality. Yet older notions sometimes cause doubt and hesitation. Of course, there are limits on the duty to accommodate just as there are limits on any claim to equality. But those limits should be measured by the same standards, whether correcting inequality requires accommodation or some other measure.

Changing concepts of equality have also affected other issues. Courts once held that discrimination based on pregnancy was not sex discrimination and that sexual harassment was not discrimination against women. More recent decisions have decisively rejected these conclusions. In addition, it is now accepted by the courts that equity programs to correct systemic discrimination are consistent with the principle of equality rather than "reverse discrimination."

Earlier in this Report, it was recommended that the Human Rights Code be drafted so that it is itself an educational document. That recommendation is especially relevant to the need to use the statute to help change concepts of equality and discrimination based on ideas that are no longer part of the Canadian legal system. Therefore, it would be useful to state explicitly the key elements of the meaning of equality, and its obverse, discrimination. A number of submissions made this point. For example, the B.C. Education Association of Disabled Students recommended that the statute specifically state that the duty to accommodate should be included in the statutory definition of discrimination. The B.C. Division of the Canadian Union of Public Employees made a similar point regarding harassment.

This Report does not attempt to state a comprehensive definition of "equality" or "discrimination." It is not recommended that the Human Rights Code include a comprehensive definition. However, it would be useful to include in the Code a reference to some of the essential characteristics included in the definitions of these words. In a roundabout way, section 13(2) of the existing Human Rights Act illustrates this approach in stating that the Council shall not dismiss a claim by reason only that there was no intent to violate the Act. It is proposed that this kind of provision be used more broadly and stated in more direct language.

3-D-3 It is recommended that the Human Rights Code include a statement of central features of the meaning of discrimination.

In particular, reference to the following features should be included:

- **Discrimination can be intentional or unintentional.**
- **Discrimination includes the failure to fulfil the duty to accommodate.**
- **Discrimination includes harassment.**
- **Sex discrimination includes discrimination related to pregnancy.**

3. **What Areas of Activity Should Be Covered?**

The B.C. Human Rights Act presently covers four general areas of activity:

- Discriminatory publications
- Accommodations, services and facilities customarily available to the public
- Purchase or rental of housing and certain other property
- Employment

Some of these areas are divided further. For example, the protection against discrimination in employment is divided into several sections. These sections define the scope of activity covered by the Act and must be read together with exemptions and defences set out in the Act.

Both the areas covered and the exemptions and defences in the Act are, with certain exceptions, much like those in other Canadian jurisdictions. For the most part, the reforms needed are not major. Many of them are intended to clarify the law rather than to change it. However, there are a few areas that deserve more significant reform.

Reforms should be consistent with the larger purposes of human rights legislation. The purpose is not to cure all unfairness in society – that is far too large a task for one statute. Instead, the primary objectives are to correct persistent patterns of equality affecting certain groups and to provide a remedy to individuals for conduct that has a substantial effect on their lives.

a. **Clubs and Social Institutions**

One issue that arose frequently at consultation meetings was the issue of discrimination by clubs and social institutions. Some participants expressed the view that such institutions should not be immune from the Human Rights Act. Some members of such organizations spoke with considerable anguish about the need for reform within their organizations and the damage that was being

caused by attempts to maintain discriminatory policies. Other participants felt that the Act should not extend to these organizations.

The current law on this issue is moving in the direction of expanding the definition of the definition of the words "services" and "facilities" and of the phrase "customarily available to the public." The Supreme Court of Canada recently held that a liberal and purposive interpretation ought to be applied to these words in the B.C. Human Rights Act. The Court rejected earlier narrow formulations of these words. For example, it said that each service has its own public and that a service is public even though a person must meet eligibility requirements to use the service. The Court approved of an Alberta decision holding that the Canadian Legion was covered by the Alberta Individual Rights Protection Act when it rented out its facilities to the public. The internal rules of the organization did not automatically give it immunity.

While a number of Canadian statutes have language similar to that of the B.C. Act, some statutes contain broader language. For example, the Manitoba Human Rights Code uses the phrase "available or accessible to the public or to a section of the public", and the Newfoundland Human Rights Code refers to "a certain segment of the public." These formulations are consistent with the interpretation adopted by the Supreme Court of Canada.

The application of human rights laws to clubs and social institutions is contentious. Some argue that the government should not regulate such organizations on the ground that it is undue intrusion on "private" facilities. However, the Supreme Court of Canada has noted that "the words ‘public’ and ‘private’ have no self evident meaning, and serve as the starting point, rather than the conclusion, of the analysis...."

The line between what is covered and what is not should be drawn in a way that is consistent with the purposes of the Human Rights Code. The purpose is to promote equal access to accommodation, services and facilities that affect the ability of people to take part in normal social activities and to be an equal member of the community in which they live. It is not to tell people who their friends should be nor to regulate organizations that have no significant effect on the community or on the lives of those who may be excluded.

The difficulty is in translating these principles into workable rules. Some organizations are important parts of the social life of an entire community even though they require that people become members to

have access to the services and facilities offered. For example, an organization may be an important place to do business, and exclusion may affect a person’s employment or business opportunities. In some communities, such organizations are the most important social gathering place in town. Those who are denied access cannot take full part in the social activities of the community.

Even in the 1940s, some judges recognized that the government may have special obligations to protect against exclusion if the government supports the activities of an organization by giving it privileges not available to others. In particular, they found that a facility that chooses to apply for a liquor licence may legitimately be required to extend its services on a non-discriminatory basis in exchange for the privilege of selling liquor. It is "affected with a public interest." While these judges were often in the minority at the time, their views were eventually accepted and translated into statutes. More recently, it has become more generally accepted that the government cannot regulate or facilitate activity and then wash its hands of responsibility for the consequences of that activity.

It would be appropriate to modify the language of the Human Rights Code to reflect more accurately the current approach of the courts to the definition of what is a public service or facility. It is also proposed that the government take account of its obligations when it grants a licence to carry out activity. This obligation is especially significant when the licence is not of a type that is automatically given to all applicants and is subject to some form of competition.

3-D-4 It is recommended that the Human Rights Code prohibit discrimination without bona fide and reasonable justification with respect to any accommodation, service or facility available or accessible to the public or to a section of the public.

3-D-5 It is recommended that the Human Rights Code authorize all agencies of government with authority for granting licenses or permits to impose an obligation not to discriminate on grounds prohibited by the Human Rights Code. Such a condition should be included if discrimination by the person receiving the licence or permit would directly or indirectly affect equality in areas of activity covered by the Code, such as employment opportunities. It should also be included if discrimination by the recipient would exclude people from the common social activities in their community.

b. Pre-Employment Requests for Information

Section 8 of the Human Rights Act prohibits discrimination in hiring (as well as other employment discrimination). Section 6 prohibits employment advertisements that express a limitation, specification or preference on a prohibited ground of discrimination unless based on a bona fide occupational qualification. However, nothing in the Act regulates what information can be requested or gathered before making a hiring decision.

As a result, there is no prohibition on requesting information about a person's race or religion, for example, even though such information could not be used for any legal purpose. If a person were asked for such information and later turned down for a job, the request could be used as evidence of discrimination. However, it seems to be necessary to wait for such a denial. For example, a claim could not be based on the wording of an application form itself.

Every other Canadian statute has a section that explicitly or implicitly prohibits pre-employment inquiries about characteristics related to a prohibited ground of discrimination, unless the information relates to a defence or exemption under the statute such as a bona fide occupational requirement. Seven jurisdictions explicitly prohibit a request for information. Four additional jurisdictions prohibit inquiries expressing or implying a limitation or discriminatory condition. The Yukon legislation simply contains a general prohibition of discrimination in connection with any aspect of an application for employment.

This loophole in the B.C. Act needs correcting, as noted in submissions of the B.C. Human Rights Coalition, the B.C. Federation of Labour and the B.C. Division of the Canadian Union of Public Employees. There is no justification for requiring an applicant to supply information if it cannot be used for any legitimate purpose. Sometimes, the information may be legitimately used to determine job qualifications, and requests for such information should be allowed. Other information may be needed for purposes such as calculating tax deductions, but there is no reason why it cannot be supplied after the hiring decision has been made.

The prohibition should apply to any written or oral request for information and to any test or examination that would reveal this information. For example, an employer should not be allowed to require that employees have a general medical examination before they are offered a position, though it would be legitimate to obtain

information about medical conditions that constitute a bona fide occupational requirement. Again, it would be legitimate to request a test or examination after a decision to hire a person if the test or examination served a legitimate purpose.

3-D-6 It is recommended that the Human Rights Code prohibit any request for information from an applicant for employment about a prohibited ground of discrimination unless the information is needed for a purpose permitted by the Code. The prohibition would apply to any written or oral request for information from any person and to any test or examination that would supply such information. This prohibition would not prohibit a request for information needed for legitimate purposes after a decision has been made to hire a person.

c. Equal Pay for Work of Equal Value

Section 7 of the B.C. Human Rights Act prohibits an employer from paying employees of one sex less than employees of the other sex for "similar or substantially similar work." This section is similar to that in certain other provinces.

This section is designed to deal with systemic differences in the pay of men and women. In the past, it was not uncommon for collective agreements to provide explicitly that women should be paid less than men for the same work. Such provisions have largely, if not entirely, disappeared. But unfortunately, patterns of unequal pay for women have lived on. While the inequality may no longer be explicit, it continues to exist. No matter how the measurements are made, there is a gap between the wages of men and women that cannot be explained by any legitimate factor.

Today, this inequality is more likely to be related to the fact that women are concentrated in certain jobs that receive lower pay than to a lower rate of pay than men for the same job. As a result, the language of the B.C. Human Rights Act often does not cover the situation.

If the work of women is not substantially similar to that of the men with whom they are being compared, there is no violation of section 7. Ironically, a claim under section 7 would lose if there were evidence that the work performed by the women claimants was different from that performed by men because it involved more onerous duties with greater responsibility. For example, a woman

with complex administrative responsibilities would lose if her claim were based on the fact that she was paid less than a man performing less onerous custodial duties with less responsibility.

Some jurisdictions have modified their laws to correct this anomaly. The reforms fall into two categories. The first is to amend human rights statutes to include claims based on the principle of equal pay for work of equal value. The protection remains in the human rights statute and is dealt with in the same manner as claims of discrimination on other grounds. However, the change in language allows comparisons based on whether the work of the claimant is of equal value to the work of members of the other sex, rather than on an assessment of whether the jobs are "similar or substantially similar." This formula is used in the Canadian Human Rights Act and in the statutes of the Yukon and Quebec.

The second category consists of separate pay equity statutes. These statutes contain the principle of equal pay for work of equal value, but the process for achieving this goal is different. Instead of relying on complaints, these statutes place positive obligations on employers over a certain size to assess jobs within the organization, using recognized assessment systems. Employers must then adjust the wages of the positions to correct the imbalances. The statutes sometimes allow employers to accomplish this over a period of time. For example, the statutes may gradually expand the job categories to be compared or may place a ceiling on the monetary adjustments required in any single year.

Ontario and Manitoba have both enacted pay equity legislation. The Manitoba legislation applies only to the public sector, while the Ontario legislation applies to employers over a certain size in the private sector as well as in the public sector.

Pay equity laws have the advantage that they do not involve a complaint of past discrimination. The focus is on identifying areas in need of change and correcting the situation rather than on past fault. Critics of the laws have argued that they involve an overly complex administrative process and that imbalances can be corrected by other means.

The enactment of pay equity legislation is beyond the scope of this Review. Part I of this Report concluded that claims-based human rights statutes such as the existing Human Rights Act or the proposed Human Rights Code cannot effectively deal with some forms of inequality. It is recommended that the government actively study

additional measures to correct persistent patterns of inequality, including pay equity. The question to be considered here is whether other changes are needed in the meantime.

It is proposed that the Human Rights Code should adopt wording similar to that of the Canadian Human Rights Act and incorporate the principle of equal pay for work of equal value. The result would be to adjust the Code so that it deals with the problems of the 1990s rather than the forms of unequal pay that were prevalent a generation ago. There is some judicial authority that the right to equal pay for equal value already exists, because it is implicit in the prohibition of sex discrimination in employment already covered by the Code.However, it would be a useful evolutionary step to extend the equal pay provision itself. That step would also avoid litigation about the matter.

To minimize the chance of litigation about details and to provide guidance to employers and trade unions as to how to measure equal value, it would be useful if this provision were accompanied by regulations setting out the process for making this determination. Such regulations would help avoid uncertainty about the new provisions.

3-D-7 It is recommended that the Human Rights Code include provisions similar to those of the Canadian Human Rights Act incorporating the principle of equal pay for work of equal value for female and male employees. Regulations should provide guidance as to the application of this provision.

4. **What Grounds of Discrimination Should Be Included**

The grounds of discrimination covered by the Human Rights Act are generally similar to those in other Canadian statutes. They also seem to cover all the grounds specifically set out in the equality provisions of the Canadian Charter of Rights and Freedoms, except for the limits on age discrimination discussed below.

The Charter of Rights and Freedoms also covers grounds that are not explicitly set out but that are analogous to the grounds listed. For example, courts have held that citizenship and sexual orientation are within the equality protections of the Charter even though neither ground is explicitly named.Courts have also held that human rights legislation may itself violate the right to equal protection and benefit of the law under the Charter if it does not cover a ground that is included within the listed or analogous

grounds. For example, a court held that the Canadian Human Rights Act must be extended to cover sexual orientation to conform to the Charter.

The B.C. Human Rights Act would seem generally to conform to the Charter, with a few possible exceptions. In 1992, sexual orientation was added as a protected ground, filling one gap. However, there are a few grounds of discrimination that are included in the equality provisions of the Charter explicitly or by analogy that are not fully protected under the Act. Therefore, some amendments may be required to make the Act constitutional.

Aside from the requirements of the Charter, it would be consistent with the purposes of human rights legislation to modify somewhat the grounds of discrimination covered by the Human Rights Code. One purpose of the Code is to correct persistent patterns of inequality, as discussed in Part I of this Report. It is relevant to consider whether persistent patterns of inequality affect any groups not protected by the Human Rights Act and whether these groups should be included within human rights protection.

During the consultation meetings, a participant suggested that it was appropriate to examine whether any grounds of discrimination should be *deleted* from the Act, as well as whether any grounds should be added. That point is legitimate, but there is little leeway since the Code must include all grounds of discrimination that are covered by the Charter. No participant in the consultation process proposed the repeal of any of the few grounds that may not be covered by the Charter, and none of these grounds seem inconsistent with the purposes of the legislation.Also, most of these grounds have not yet been considered by the courts and may be found to be analogous in future cases.

The section of the Report which follows discusses a global approach to ensuring that the Human Rights Code meets the requirements of the Charter of Rights and Freedoms. Later sections discuss specific grounds of discrimination that might be modified, and exemptions and defences.

a. Including Analogous Grounds

The section of the Charter of Rights and Freedoms dealing with equality includes analogous grounds that are not explicitly set out. Therefore, it is not possible to identify with certainty all the grounds that will be found in the future to be protected by the Charter. It is very likely that the courts will identify new analogous grounds as time goes on, since the equality provisions of the Charter only came into effect in 1985 and we are still at an early stage of interpreting these provisions.

The surest way to avoid an unconstitutional gap in the Human Rights Code would be for the Code to be worded in a way that recognized analogous grounds. The Human Rights Tribunal, taking guidance from the courts, could then interpret the Code in a manner consistent with the equality guarantees in the Charter. The way to achieve this result would be to include in each section a right to equality "without discrimination, and in particular, without discrimination based on" specified grounds. This formula would signal to the courts an intent to adopt the approach taken in the Charter. That would provide guidance in interpreting the section. The list of explicitly prohibited grounds would inform those reading the statute of what was clearly covered by the Code. It is very likely that the vast majority of claims would relate to those grounds. A similar approach has been used in the Manitoba Human Rights Code and under the B.C. Human Rights Code that preceded the present Human Rights Act.

3-D-8 It is recommended that the Human Rights Code incorporate grounds analogous to those set out in the Code in order to ensure conformity with the equality provisions of the Canadian Charter of Rights and Freedoms.

Whether or not this recommendation is adopted, certain other modifications to the current list of grounds deserve consideration. That is particularly true of grounds included in some sections of the Human Rights Act, but not others, and grounds such as age that have special statutory limits placed upon them.

b. Age Discrimination

Age is one of the grounds explicitly listed in the Canadian Charter of Rights and Freedoms. The B.C. Human Rights Act also includes protection against age discrimination in the sections concerning discriminatory publications, rental of property and employment. There is no protection against age discrimination in the sections covering public accommodation services and facilities or the sale of property. Moreover, age is defined as "an age of 19 years or more and less than 65 years," excluding protection for youth and seniors even in the sections that cover age discrimination.

There are legitimate reasons to place some limitations on the protection against age discrimination. However, the blanket limitations in the existing Act are hard to justify.

Only in B.C., Alberta and Newfoundland is age excluded entirely from protection in some sections; the remaining jurisdictions prohibit age discrimination in all the areas of activity covered by the legislation. However, those jurisdictions place various other limitations on the protection.

Six jurisdictions place some limits on the ages covered. B.C. and Newfoundland are the most restrictive, covering the ages of nineteen to sixty-five. Saskatchewan and Ontario cover the ages of eighteen to sixty-five, and Alberta covers all ages over eighteen. Several human rights statutes provide that age restrictions in other statutes prevail over the human rights statute, contrary to the normal rule that the human rights statute is paramount. Also, of the statutes covering age discrimination over the age of sixty-five, two specifically allow mandatory retirement policies.

During the consultation process and in the submissions to the Review, there was a clear consensus that age discrimination should be extended to cover people of all ages, though some participants would place specific limits on this protection. For example, the submission of End Legislated Poverty called attention to the existence of discrimination against persons under nineteen. Participants at consultation meetings told of people under nineteen being denied housing simply because of their age. Other participants noted that a person over the age of sixty-five could be denied services or housing because of age. They also could be denied employment benefits. The B.C. Human Rights Coalition said that the present statutory limitation is itself discriminatory.

It seems most consistent with the purposes of human rights legislation and with the Charter of Rights and Freedoms to expand the protection of age discrimination to cover all ages, but to add specific exemptions to cover situations in which age distinctions seem legitimate. These exemptions would be in addition to exemptions or defences that exist more generally, such as the bona fide and reasonable justification and bona fide occupational requirement defences.

One exemption should be a provision deferring to other statutes with age limitations applying to minors, such as statutes about liquor and drivers' licences. This would be an exception to the normal rule that the Human Rights Code has primacy over other statutes, as noted earlier. The other statutes could themselves be challenged under the Canadian Charter of Rights and Freedoms if they discriminated unreasonably on the basis of age.

Mandatory retirement is a far more contentious issue. Some participants in the consultation process argued eloquently that forcing a person to terminate employment solely because of their age is contrary to the principle that a person should be judged on the basis of merit rather than a characteristic over which the person has no control such as age. They also noted the hardship that mandatory retirement can cause to people who have not had the opportunity to build up savings to provide support after retirement.

On the other hand, other participants said that mandatory retirement is an integral part of a larger social and economic structure. They argued that ending mandatory retirement would have far-reaching consequences on this structure. For example, it might jeopardize benefit programs that come into effect at age sixty-five. These participants also noted the problem of high youth unemployment and suggested that ending mandatory retirement might magnify this problem by creating fewer openings for new workers.

The Supreme Court of Canada has held that statutes allowing mandatory retirement do not violate the prohibition of age discrimination in the Charter of Rights and Freedoms because they are a reasonable limit that can be demonstrably justified in a free and democratic society. The Court cited many of the social factors raised during the consultations by those defending mandatory retirement. This does not mean, however, that statute must allow mandatory retirement. It means only that legislatures have a choice about the matter.

It has not been possible to deal with all the complex issues surrounding mandatory retirement within the time limits for carrying out this Review. A full study of the issue might conclude that mandatory retirement should be retained, that it should be abolished or that some intermediary position should be adopted such as allowing mandatory retirement only if certain conditions are met. Therefore, it is proposed that the extension of protection against age discrimination to people over the age of sixty-five should be accompanied by an exemption allowing mandatory retirement. This exemption would apply until this issue can be studied with the thoroughness that is required.

Another question is whether the protection against age discrimination should be extended to the sections that do not have this protection, notably the sections regarding public accommodation, services and facilities and the sale of property. The extension to the sale of property is intimately related to the scope of protection on the basis

of family status. It is discussed in the section that follows.

There does not seem to be any convincing justification for failing to extend protection against age discrimination to the section dealing with public accommodation, services and facilities. This step was recommended in the submission of the Ombudsman for B.C.

One possible reason for the omission of age from this section is the fear that it would make it impossible to place legitimate limitations on children regarding matters such as liquor and driving a car. As has been discussed, a more specific exemption can deal with that issue.

A second possibility is that the omission was designed to allow for preferences that have been traditionally afforded seniors, such as lower fares on public transportation. Insofar as such a preference has as its object the amelioration of conditions of disadvantaged individuals or groups, it would be protected by the replacement for the existing section 19(2) of the Human Rights Act. If further protection of such policies was thought to be appropriate, an exception could be added similar to section 15 of the Ontario Human Rights Code. That section provides that the prohibition against age discrimination is not infringed if an age of sixty-five or over is a qualification or consideration for preferential treatment.

Section 3 presently contains an exemption regarding sex and disability as applied to life and health insurance. If age was added to section 3, it would be necessary to consider whether this ground should be subject to this kind of exception. This issue is discussed later in this Report.

3-D-9 It is recommended that the prohibition of age discrimination extend to all ages and to accommodations, services and facilities customarily available to the public. This prohibition should be subject to provisions in other statutes and regulations that impose limitations or requirements based on the fact that a person is under a certain age if the age specified is less than the age of majority. It should also be subject to an exemption allowing a bona fide mandatory retirement policy, pending further review of the issue of mandatory retirement.

c. Children, Family Status, and Age

Family status was added as a prohibited ground of discrimination in 1992. It is included in the statutes of eight other Canadian

jurisdictions. It is included in all sections of the B.C. Act except the section regarding the purchase of property. As a result, the Act prohibits discrimination in the rental of property on the basis of family status, but not the sale of the same property. The question is whether the sections covering the sale of property and the rental of property should be reconciled, and if so, how.

This question is related to the question whether a prohibition against age discrimination should be added to the section concerning the sale of property. Again, there is some inconsistency since age discrimination is prohibited when property is rented, but not when it is sold. The discrepancy would grow if, as proposed in this Report, the protection against age discrimination is expanded to cover persons of all ages rather than persons between the ages of nineteen and sixty-five.

One further exception in the existing Human Rights Act is relevant to these issues. If the space being rented is in premises where every unit is reserved for persons fifty-five years of age or older, the prohibition against discrimination on the grounds of age and family status does not apply.

Family status can cover a range of familial relationships. However, the contentious area concerning property focuses around the parent-child relationship. At present, it is legal to restrict the sale of property to persons without children, but it is not legal to impose this restriction if the property is being rented (unless the units are reserved for persons fifty-five or over). For example, a condominium can impose rules that no owner will occupy the premises if they have children, but anyone renting out their unit would be required by the statute to rent to an applicant with children.

This produces rather bizarre consequences. For example, one person who contacted the Review explained that he and his spouse somewhat unexpectedly had a child after they had purchased a condominium unit. They were told that they could not live in the unit with their child because of a rule of the condominium organization prohibiting children. Yet if they moved and tried to rent the unit, the Act would prohibit them from refusing to rent to anyone else because they had children. To circumvent this legal obligation, some condominium organizations have enacted rules prohibiting owners from renting their suites in order to preserve the exclusion of children.

The inconsistency between the rules regarding the sale and rental of

property also has a significant effect on manufactured home owners. These people generally own their home but rent the pad on which it sits. Therefore, the prohibition of discrimination based on family status and age does not apply to the sale of the home, but that is of little significance since it does apply to the occupancy of the pad. Many, if not most, units cannot be easily moved to other premises.

There are additional consequences arising from the exemption allowing discrimination based on age or family status if all units are reserved for people fifty-five years of age or over. While some occupants favour using this limitation to exclude persons under fifty-five, others wishing to sell their home may find that the owner of the park in which it is located has unilaterally limited the park to persons over fifty-five. The effect is to restrict the market, making it harder to sell the home. Some participants at consultation meetings argued that residents ought to have a say in such changes.

It is hard to justify the differences in the way the Act applies to the sale and rental of property. The arguments for and against restricting buildings to adults are no different for premises that are rented than for those that are owned. The discrepancy should be resolved one way or the other.

The Review received strong submissions on both sides of this issue. Some correspondents felt strongly that they should have the right to live in buildings or communities restricted to adults. Others felt equally strongly that this kind of exclusion was unconscionable segregation.

It seems most consistent with the principles underlying the Human Rights Code to extend the protection against discrimination based on age and family status to the sale of property. In a number of regions of the Province, the price of single family homes has reached levels far beyond the reach of young families. People living on limited incomes, such as many single parents, have very few housing options. Communities such as manufactured home parks may provide the only housing that is affordable for many families. Their interests should prevail over the understandable desire of others to live in quiet premises.

One suspects that part of the heat surrounding this issue arises from the fact that many new communities and buildings are not planned with children in mind. The lack of adequate sound-proofing or areas suitable for play then creates tensions and becomes an argument for excluding children. While beyond the scope of this Review, reform

of building codes and zoning standards may deserve study as a way of reducing this tension.

There was also some discussion during consultation meetings of the merits of the exemption for units reserved for people aged fifty-five and over. This provision is obviously a compromise, but it seems to be an acceptable compromise. If, however, it proved over time to significantly affect the housing available to people with children, the matter should be reconsidered.

In the meantime, there should be additional safeguards to make sure that this exception is not subject to abuse. At present, there are no rules as to the procedure for reserving premises to people fifty-five years or over. For example, there is no indication whether notice must be given of this change or whether there are any conditions on rescinding the rule reserving the premises. Therefore, it is possible that the policy could be put in place when convenient and rescinded whenever a person renting premises wanted to make an exception for any reason.

3-D-10 It is recommended that the section of the Human Rights Code concerning the sale of property prohibit discrimination on the basis of age and family status, subject to an exception similar to that contained in section 5(2)(b) of the existing Human Rights Act.

3-D-11 It is further recommended that the statute authorize regulations to define how the exception is to be monitored and to ensure that it is not used for improper purposes.

Regulations under the Human Rights Code may not be broad enough to deal with all the concerns expressed by the United Manufactured Home Owners Association in their submission to the Review. While beyond the scope of the Review, concerns about unilateral changes in the rules deserve further consideration. In most communities, residents participate in fundamental decisions about their communities through the political process, and the argument is attractive that owners of manufactured homes should also have a right of participation.

d. Source of Income and Poverty

A law enacted in 1994 effectively adds protection against discrimination based on source of income in the rental or property to the Human Rights Act. The amendment is part of the Residential

Tenancy Act, but enforcement is carried out under the Human Rights Act. This means, for example that an apartment manager cannot refuse to rent to a person because their income comes from social assistance. Protection against discrimination based on source of income is included in four Canadian human rights statutes in addition to the B.C. Human Rights Act.

During the consultation meetings, a number of participants suggested that discrimination based on source of income arises not only in the rental of housing, but also in public services and employment. For example, a person may be denied credit when buying merchandise even though someone with the same financial resources from another source would be given the credit. Other participants told of people who were denied a job simply because they were on social assistance at the time, obviously prolonging the time a person receives social assistance.

There would seem to be no reason why discrimination on this ground should be limited to the rental of housing. The reason for this limitation seems to be that source of income was added through an amendment to the Residential Tenancy Act rather than an amendment to the Human Rights Act. A new Human Rights Code should extend this protection to other areas of activity.

It is fair for business people to take reasonable steps to determine whether someone can fulfil their financial obligations, but it is not fair to treat people receiving income from social assistance differently from those with comparable income from a different source. A participant at a consultation meeting spoke eloquently about the pain that stereotypes about people on social assistance can cause. It is in the interests of everyone that business decisions be based on objective assessments of the individual rather than stereotypes about the group.

3-D-12 It is recommended that protection against discrimination based on "lawful source of income" be extended beyond the rental of property and included in the sections of the Human Rights Code regulating all areas of activity.

A number of submissions, including those of the B.C. Human Rights Coalition, End Legislated Poverty, The federated anti-poverty groups of B.C., the Downtown Eastside Women’s Centre and the Smithers Human Rights Society, proposed that "social condition" be added as a ground of discrimination. This ground is included in the protection

granted by the Quebec Charter of Rights and Freedoms. A somewhat similar but narrower ground, "social origin", is included in the Newfoundland Human Rights Code.

The groups proposing this addition said that without this ground, some people who experience persistent and severe inequality will "fall between the cracks" in the protection scheme. For example, people living in poverty, people with certain occupations such as domestic workers, people branded as inferior because they have difficulty reading and writing, and people whose dress or patterns of speech identify them as coming "from the wrong side of the tracks" may all experience discrimination.

This discrimination often is an ongoing result of the interaction of many factors. For example, stereotypes may cause teachers to expect less of certain students. These students may then drop out of school. As a result, they may not be able to find jobs that allow them to live above the poverty line. Poverty will then reinforce the cycle for both them and their children.

These points are hard to deny. If a central purpose of human rights legislation is to correct persistent patterns of inequality, we should strive to protect all those who experience such inequality. Like other grounds of discrimination, poverty is a systemic problem. While individuals can escape from poverty or fall into poverty, the economic status of an individual is often tied to that of the parents of the individual.

Often, the inequality described in the examples just outlined will be associated with a ground that is included in Human Rights Act. For example, patterns of speech may be related to a group’s ancestry or place or origin, and the low social status of an occupation often is due to biases about the race or gender of those engaged in the occupation. However, it is not always possible to show a neat correlation between such inequality and a protected ground. The term "social condition" seems capable of covering some forms of inequality that otherwise would fall outside the statute.

The more difficult issue is whether we overburden the Human Rights Code by assigning it this task. As discussed in Part I, the Code must be seen as one part of a broader strategy to provide equality and protect against discrimination. If it is expected by itself to correct all inequality, not only will it fail in this larger objective, but in trying to succeed, it likely will become less effective in dealing with those areas for which it is better suited.

The Quebec cases have emphasized that the term "social condition" must be interpreted in a broad, liberal and flexible manner and must take account of a variety of factors, including social origins, level of education, occupation and income. The Quebec Human Rights Tribunal has also said that these factors are not exhaustive and must be adjusted to meet the circumstances of the particular case.

There is a risk that this ground of discrimination may not provide adequate guidance as to what is covered and what is not. Its flexibility is both a strength and a weakness. The term is not used in other areas of law, and the phrase "social condition" does not have a well-accepted meaning outside the law. It is possible that this ground would require so much attention that other grounds of discrimination would not receive their fair share of attention. The lack of an accepted meaning of the phrase "social condition" also would likely result in lengthy litigation.

Earlier in this Report, it was recommended that the Human Rights Code adopt the model used in the Canadian Charter of Rights and Freedoms and protect against discrimination analogous to those set out explicitly in the Code. That recommendation provides another avenue to cover some of the situations that might come within the term "social condition." That approach provides a degree of flexibility, but the characteristics of the other grounds of discrimination, together with court decisions under the Charter of Rights and Freedoms, do provide guidance as to what is covered and what is not. This approach also allows the Human Rights Tribunal and the courts to define analogous grounds in ways that are more specific than the somewhat indeterminate phrase "social condition."

For these reasons, the model of the Charter of Rights and Freedoms provides a way to achieve at least some of the objectives of including "social condition" with less uncertainty and less risk of overburdening the Code in a way that ultimately would make it less effective, rather than more.

e. Discrimination Based on Relationships

The Human Rights Act contains two grounds of discrimination that are explicitly based on a relationship with another person or group of persons. They are marital status and family status. Other grounds of discrimination also take account of relationships with others, though not as explicitly. Two examples are religion and political belief.

An issue that arose frequently during consultation meetings was the recognition of relationships between members of the same sex. Some participants proposed that Human rights legislation should specifically recognize gay and lesbian relationships. Other participants opposed this proposal.

The Human Rights Act prohibits discrimination based on sexual orientation, as do the statutes of seven other Canadian jurisdictions. It contains no language referring to same sex relationships, either to include or exclude them from protection.

A significant number of the presentations arguing against recognizing same sex relationships were based on the belief that sexual orientation itself should not be recognized as a protected ground of discrimination. It was said that recognizing these relationships would also recognize the legitimacy of homosexuality. Therefore, the focus of attention was on sexual orientation rather than on issues concerning recognition of the relationships apart from their tie with sexual orientation. Indeed, business people almost uniformly stated that there would be little or no effect on their businesses if same sex relationships were taken into account.

Some participants felt deeply, however, that homosexuality is immoral and contrary to religious beliefs that they hold to be fundamental. The Canadian Constitution gives all people have the fundamental right to hold and profess their moral and religious beliefs. That right must be upheld. It is also a fundamental principle, however, that this right must be exercised in a way that takes account of the fact that others have the same right. The Human Rights Act reflects the view that the moral and religious views different from one’s own must also be recognized and respected. More specifically, it is based on the idea that economic relationships such as those between business and customer or employer and employee should not be used to cause disadvantage to those with different moral or religious views. Adherence to one’s own moral and religious tenets should not serve as a justification for discrimination against others.

Much has been said on both sides about how to apply these principles to the ground of sexual orientation. However, it would serve no purpose to review this debate in detail in considering the Human Rights Code. The reason is that the Constitution specifies that sexual orientation must receive protection comparable to other grounds of discrimination in human rights legislation. For example, it was held that the Charter required that sexual orientation should be read into the Canadian Human Rights Act, which does not refer to

this ground explicitly, in order to conform to the right to equal protection and benefit of the law. To the extent that arguments against recognizing same sex relationships are tied to the views that sexual orientation should not be a protected ground, those arguments are inconsistent with these authorities.

That does not fully answer the question whether same sex relationships should be specifically added to the Human Rights Code. There are various arguments from different quarters as to whether to take this step and, if so, where to add this protection.

It is likely that these relationships are already protected because they come within existing grounds of discrimination. For example, a B.C. case held that the denial of medical benefits to the partner of a gay man constituted discrimination based on sexual orientation. Therefore, it is possible to argue that the present wording achieves the result proposed by those proposing the coverage of same sex relationships.

That interpretation is consistent with the evolution of the interpretation of other grounds of discrimination. Earlier interpretations of the ground of religion held that the term covered only the holding of a religious belief or membership in a religious group. It did not cover activity associated with a religion, no matter how closely the activity was tied to the religious beliefs of the group. For example, in 1969 the Supreme Court of Canada held that a law prohibiting members of the Hutterite faith from owning land communally did not infringe on religious freedom. Members of the group had the right to believe in a particular religion but not to work together communally, as their religion specified, in order to put their beliefs into practice.

That narrow approach to the meaning of religion was overturned by the Supreme Court of Canada in interpreting the Charter. The Court recognized that this definition would provide a right that is hollow. It said that religion includes conduct tied to religion as well as matters such as membership and belief. Freedom of religion would mean little if it did not include the right to join with others in religious activities such as worship. In a similar fashion, it can be argued that the ground of sexual orientation should include the formation of relationships arising from one’s sexual orientation.

A similar progression in thought has applied to sex discrimination. The courts once held that sex discrimination meant the fact of being male or female. Therefore, it was not discrimination based on sex to

discriminate on the basis of pregnancy. That approach to the definition of sex discrimination was emphatically overruled by the Supreme Court of Canada in 1989. The court held that discrimination based on pregnancy is also discrimination based on sex.

Of course, these cases do not provide an exact analogy to the issue of same sex relationships. But they do warn us against narrow definitions that give the form of protection but not the substance or that protect one against discrimination on a particular ground only as long as people refrain from conduct associated with the ground.

As applied to the question at hand, this progression in thought suggests that same sex relationships are included within the protection against discrimination based on sexual orientation. Sexual orientation refers to the potential for a relationship with another person. To protect against discrimination based on the orientation but not the relationships that arise from it is less than full protection of sexual orientation itself.

While some court cases have applied similar reasoning in interpreting the meaning of "sexual orientation," others have not fully adopted this approach. One such case is pending before the Supreme Court of Canada, and others can be explained on various grounds. But there is some divergence in the cases as to whether the ground of sexual orientation includes recognition of relationships. Therefore, it is appropriate to clarify the matter in the statute rather than to wait for the results of what may be a lengthy series of cases. In preparing its submission for this Review, the Vancouver Lesbian Connection conducted a survey that revealed the confusion that is caused by recognizing same sex relationships in some contexts and not others. The submission of the December 9 Coalition also recommended that the statute specifically cover these relationships, as did the B.C. Human Rights Coalition.

The next question is what is the most appropriate statutory language. The submission of the Lesbian and Gay Rights Section of the B.C. Branch of the Canadian Bar Association usefully reviewed the advantages and disadvantages of different statutory wording. One possibility is to add a definition of marital status or of family status that includes same sex relationships. Another is to make clear that the ground of sexual orientation encompasses these relationships.

The last option is the one that seems most appropriate. It reflects the evolution in thinking that has been described about how to define grounds of discrimination. It also is based on recognition of these

relationships rather than on the argument that they are identical with other kinds of relationship, an argument that is contested both by those opposed to recognition of these relationships and by members of the gay and lesbian communities themselves.

One alternative that was considered was to include in the statute a more general provision stating that all grounds of discrimination include the right to engage in lawful activity and in relationships with others that are integral to the ground itself. This option has the advantage of emphasizing that recognition of same sex relationships arises from a more general principle and of making sure that other grounds receive similar broad interpretation. However, this approach may not be sufficiently clear to avoid future litigation.

3-D-13 It is recommended that the Human Rights Code contain a provision defining the term "sexual orientation" as including a relationship with another person of either sex that is of primary importance in the lives of the two persons.

This recommendation would not spell out the exact consequences of this recognition, and it may be useful to include more specific criteria in regulations. The proposed wording would, however, provide an essential starting point in the analysis.

f. Multiple Grounds of Discrimination

A number of submissions expressed concern that human rights cases frequently fail to recognize the ways in which different grounds of discrimination interact to cause inequality that is distinct from any single ground. This concern applies to human rights protection across the country and is not caused by any particular wording in the B.C. Human Rights Act. It is the policy of the B.C. Council of Human Rights to accept claims based on more than one ground of discrimination. However, the submissions suggested that the consideration of claims does not always take account of the ways in which grounds interact. As in other jurisdictions, there is some tendency, particularly during the investigation phase, to assess each ground in isolation from the others.

There has been a growing recognition of the ways in which different forms of inequality interact in unique ways. The inequality experienced by a woman of colour cannot be understood by looking first at sex discrimination and then at race discrimination. Her situation is different from men of colour and from white women, and

the solutions needed may be different for her than for others sharing one of the characteristics. The situation of a woman of colour with a disability is differentiated even more.

This insight is important in evaluating equality claims. It helps to avoid pigeon holes that have little to do with people's lives. A number of groups, including the B.C. Human Rights Coalition, recommended that this principle be explicitly set out in the legislation. Statutory language may not be capable, however, of expressing this principle clearly enough to inform those who do not already understand it. Therefore, the best way to put this insight into practice is to educate human rights officers and adjudicators about how to examine a claim from this perspective.

The statute could assist, however, in making clear that the grounds of discrimination should be interpreted in relation to one another. For example, discrimination based on sex should also take account of family responsibilities that overlap with the ground of family status. The earlier recommendation that the Code include recognition of analogous grounds is a step in this direction, for it is based on the proposition that there are common threads linking the different grounds of discrimination. However, more explicit recognition may be useful.

3-D-14 It is recommended that the Human Rights Code make clear that each ground of discrimination should be interpreted in a manner consistent with the purposes of the Code and consistent with a broad and liberal interpretation of the other rights enumerated in the Code.

5. Exemptions and Defences

The Human Rights Act has a number of exemptions and defences. For example, section 3 of the Act allows the denial of an accommodation, service or facility if a bona fide and reasonable justification exists, and section 8 allows employers to apply a bona fide occupational qualification. Defences such as these have been interpreted extensively by the courts and do not need modification at this time. However, there are some more specific exemptions and defences that do deserve consideration.

a. Exemptions Regarding Insurance, Retirement and Pension Plans

Section 3 of the Human Rights Act allows discrimination on the basis of sex or physical or mental disability in determining premiums

or benefits under contracts of life or health insurance. Section 8, concerning employment, provides a similar exemption based on marital status, physical or mental disability, sex or age, regarding the operation of any bona fide retirement, superannuation or pension plan or bona fide group or employee insurance plan.

The justification for a complete exclusion from the legislation in section 3 is not obvious. It can be argued that actuarial considerations can legitimately apply to these matters in some circumstances. For example, it is legitimate to adjust premiums of life insurance to take account of age. The effect of the exclusions is to allow even irrational refusals and distinctions, however, and it is hard to justify that result.

Part of the reason for the exclusion in section 3 may be that until 1992, this section flatly seemed to prohibit any denial, no matter how justified. The 1992 amendments added the words "without bona fide and reasonable justification" to section 3. Arguably, this provision makes it unnecessary to have any special exemption regarding life or health insurance.

The provisions in section 8 concerning employment plans require that these plans be "bona fide." This requirement may incorporate standards of reasonableness, but it is not clear that it provides protection comparable to that provided in section 3.

Other jurisdictions deal with this situation in two ways. The federal Act itself contains no blanket exemption, but it authorizes regulations stating that certain provisions do not violate the Act. Other jurisdictions such as Ontario, Manitoba and Quebec, state that any discrimination must meet a standard of reasonableness. Manitoba and Quebec use both approaches, setting out a standard of reasonableness but also authorizing regulations.

3-D-15 It is recommended that the Human Rights Code require that contracts of life and health insurance meet a standard of bona fide and reasonable justification with regard to discrimination based on sex or disability (or other grounds such as age, if they are added to the section governing such contracts).

3-D-16 It is further recommended that the standard of bona fide and reasonable justification apply to any retirement, superannuation or pension plans or group or employee insurance plans that discriminate on the basis

of marital status, disability, sex or age.

3-D-17 It is recommended that the Code authorize the enactment of regulations specifying what may be deemed reasonable and bona fide for the purposes of such contracts and plans.

The submission of the West Coast Leaf Association points out another problem. It notes that the exemptions authorizing discrimination based on sex could be interpreted as allowing health or group insurance plans to discriminate on the basis of pregnancy. Such discrimination was held to be sex discrimination by the Supreme Court of Canada. Indeed, the Court stressed the importance to women of protection against discrimination tied to pregnancy.

Earlier in this Report, it was recommended that the Code specify that sex discrimination includes discrimination based on pregnancy. However, that statement alone may not make it sufficiently clear that insurance policies and plans cannot discriminate on this basis.

3-D-18 It is recommended that the sections of the Human Rights Code dealing with insurance plans specifically prohibit the denial of benefits or a reduced level of benefits because of pregnancy.

b. **Discriminatory Publications**

Like the great majority of Canadian jurisdictions, the B.C. Human Rights Act has a section dealing with discriminatory publications. This section (section 2) prohibits publications that indicate discrimination or an intention to discriminate on a prohibited ground. It also prohibits publications likely to expose a person or a group or class of persons to hatred or contempt because of a ground of discrimination in the Act. This last prohibition was added by amendment in 1993. It was subject to vigorous debate.

A significant amount of the controversy was based on the fact that the section does not include a guarantee of freedom of expression, as do many of the other statutes. This point was made by the Confederation of University Faculty Associations of B.C. and the B.C. Press Council. The B.C. Library Association also called for clarification of the section. In addition, fears were expressed by some participants in the consultations that the B.C. Council of Human Rights will interpret this section broadly as covering any strong criticism of a group protected by human rights legislation. Because

there has been no published decision since the 1993 amendment, those fears have persisted.

The response from others was that such a guarantee is unnecessary, because the section is automatically subject to the right to freedom of expression in the Charter of Rights and Freedoms. The Supreme Court of Canada has interpreted a similar provision in the Canadian Human Rights Act in a manner consistent with the right to freedom of expression, though that Act also contains no specific reference to that freedom. Those who oppose a statutory guarantee of freedom of expression argue that an additional statutory guarantee might be interpreted by the courts as a signal that the Legislature wanted to go further than the Charter in protecting freedom of expression, even if the result were to deny equality rights to others. It is also noteworthy that unpublished pre-hearing rulings by the B.C. Council of Human Rights have been careful to apply the right to freedom of expression to the interpretation of section 2 of the Human Rights Act.

There is another option that would recognize the right to freedom of expression without implying that it takes precedence over the equality rights that are also guaranteed by the Charter. Earlier in this report, it was recommended that the Code should have provisions setting out its purposes. One purpose was to interpret the Code in a manner that is consistent with all of the rights set out in the Canadian Charter of Rights and Freedoms. An important consequence of such a provision would be to protect freedom of expression, as well as the other rights in the Charter. Moreover, the protection would apply to the entire Human Rights Code, not just to the section covering discriminatory publications.

The Supreme court of Canada has held that the Charter must be applied in a way that gives full recognition to all of the rights that are relevant to a particular case. The recommendation made earlier in this Report is designed to apply the same approach to the Human Rights Code. Rights such as freedom of expression would be considered along with other rights such as the right to the equal protection and benefit of the law. The result would be to require consideration of the rights of all those affected by a human rights claim and to strike an appropriate balance between the rights claimed by different parties, as required by the Supreme Court of Canada.

c. Special Programs and Employment Equity

Two sections of the Human Rights Act deal with employment equity programs and other special programs. Section 19(2) allows the B.C.

Council of Human Rights to approve a program or activity that has the object of ameliorating conditions of disadvantaged individuals or groups. An approved program cannot be challenged under the Act. This provision is in a section with the heading "exemptions." The following section, section 19.1, provides that it is not discrimination or a contravention of the Act to plan and implement an employment equity program that has the objective of ameliorating conditions of disadvantaged groups covered by the statute. This section allows the Council to make general recommendations concerning the objectives of such programs and, on application, to provide advice and assistance. The heading for this section is "special programs."

These sections are an important part of the statute. They incorporate the principle that equality is to be measured in terms of results rather than identical treatment, as the Supreme Court of Canada has explained. If equal results constitute the standard of measurement, sometimes special measures will be needed to achieve equality.

These sections of the statute are a key part of the strategy for correcting persistent patterns of inequality. They also help to achieve the goal of preventing discrimination before it occurs. They do so by setting up systems to identify barriers to equality and to put in place plans that incorporate steps to eliminate these barriers. Preventive measures require positive steps, and these sections provide a vehicle for taking the necessary positive steps.

While the intent of these sections is laudable, the present wording does not entirely achieve these objectives. Most fundamentally, these provisions are not "exemptions" from the duty not to discriminate, as the heading for section 19 implies. Instead, they set out a mechanism for achieving the central goals of the entire statute. The wording should reflect that fact.

A second difficulty is that the two sections are somewhat inconsistent with one another. Section 19(2) is broader in the sense that it refers to any program or activity with the object of correcting disadvantage, while section 19.1 refers only to *employment* equity programs. As the submission of the B.C. Educational Association of Disabled Students noted, positive measures are needed just as much in areas such as the educational system as they are in the field of employment. The sections should be worded to make clear that employment equity is merely one example of the kind of program needed to correct patterns of inequality and to prevent discrimination.

In another sense, section 19(2) is narrower than section 19.1. It allows the Council to approve programs, and that may carry the implication that programs which have not been approved violate the Act. However, the courts have adopted a definition of equality that not only allows special measures but sometimes requires them, and many special measures may be completely consistent with the rest of the statute. The wording of section 19(2) is at best confusing in this regard. In contrast to the wording of section 19(2), section 19.1 authorizes employment equity programs without approval, though it authorizes the Council to make recommendations and to give advice and assistance.

The probable reason for these discrepancies is the two sections were enacted at different times. Section 19(2) was enacted in 1984, before court cases interpreting the equality rights in the Charter of Rights and Freedoms had occurred. That may explain why it is deemed to be an "exemption." Section 19.1 was enacted in 1992 after these cases had been decided. Since the differences seem to be more accidental than intentional, they should be corrected.

In amalgamating the sections, one issue is whether such programs should require approval. As has been noted, a requirement that they be approved seems to be based on the proposition that the programs are exceptions to the principle of equality and would violate other sections without such approval. If one starts instead from the idea that they are a strategy for achieving equality, there is less reason to require approval. An approval process does help to ensure that programs achieve their purposes, and mandatory approval might be included in an employment equity statute. In the context of the Human Rights Code, however, its disadvantages outweigh its advantages.

While approval should not be required, the statute should authorize the Human Rights Commission to approve programs that are submitted to it. In short, approval would be available but not mandatory. If a program were approved, it would not be subject to challenge on the ground that the measures to ameliorate conditions of disadvantaged individuals and groups may affect other advantaged individuals or groups. The benefit of seeking approval would be a measure of immunity from challenge.

3-D-19 It is recommended that the provisions concerning employment equity and other equity programs be worded to make clear that these programs are a mechanism for achieving equality rather than an exemption from the duty

not to discriminate.

3-D-20 It is recommended that the Human Rights Code be worded so as to make clear that equity programs regarding accommodation, services, facilities and housing have equal status with employment equity programs.

3-D-21 It is recommended that the Human Rights Code provide a mechanism for approval that would immunize an approved program from challenge on the ground that it discriminates against groups that are not disadvantaged. However, the Code should not require that all programs be approved in advance.

Another limitation is that section 19.1 does not cover all the groups that are included in other parts of the Act. It allows employment equity programs only on the basis of race, colour, ancestry, place of origin, physical or mental disability or sex. This contrasts with section 19(2) that allows programs to ameliorate conditions of any disadvantaged individual or group without any limit on the groups covered.

It is true that employment equity programs most commonly designate women, First Nations People, members of visible minorities and people with disabilities as the groups covered. It is also true that not all aspects of employment equity programs may be equally suitable to all grounds of discrimination. However, other aspects of an employment equity program may be useful and should not be excluded. For example, it might not be feasible to establish specific goals and timetables for the employment of single parents, but a program might contain special measures to help attract and integrate single parents into the workforce of an organization. Similarly, it might include measures to prevent harassment against lesbians and gay men.

3-D-22 It is recommended that sections dealing with equity programs include programs to ameliorate the condition of any disadvantaged individual or group characterized by any ground of discrimination protected by the Code.

The same issue arises in considering section 19(1). That section allows non-profit groups that are formed to promote the interests and welfare of a particular group to give preference to that group. For

example, a religious group can give preference to members of that religion. Because this section is not limited to disadvantaged individuals and groups and is not designed to achieve equality of results, it can be considered a true exemption from the statute. However, the legislative purpose is to recognize the value of permitting groups to organize together to achieve mutual goals and preserve the identity of the group. For example, the section allows ethnic and cultural groups to give preference to their members, helping to preserve and enhance our multicultural heritage.

While this section can serve a useful purpose, it does not cover all groups covered by other sections of the Code. For example, if a group formed to represent the interests of single parents gave preference to single parents in hiring staff, it might violate the Human Rights Act. The same would be true of a gay or lesbian organization.

3-D-23 It is recommended that the provision of the Human Rights Code equivalent to section 19(1) of the existing Act apply to groups having the purpose of promoting the interests and welfare of any group or class of persons protected by the Code.

6. **Retaliation**

Section 20 of the Human Rights Act protects against retaliation for filing or participating in a human rights claim. It protects a person who files or is named in a claim, a person who gives evidence or otherwise takes part in a claim. This section is consistent with that of most other jurisdictions. However, there is a gap in the protection. It does not cover retaliation against a person who refuses instructions to violate the Code. For example, it does not cover an apartment manager who is dismissed for refusing instructions of the owner to turn down people with children who want to rent a unit. This gap should be closed and the section brought into line with that contained in the statutes of Manitoba, Ontario and the Yukon.

There is also a smaller procedural issue regarding section 20. Enforcement is by means of filing a claim under the statute. It would be simpler if the statute specifically allowed a claim of retaliation to be added to an existing claim if the same parties are involved. This change could be considered a clarification of, or minor addition to, section 11(3), which allows two claims to be joined.

3-D-24 It is recommended that the protection against retaliation be extended to cover retaliation based on the fact that a person

has refused, or will refuse, to contravene the Human Rights Code.

3-D-25 It is recommended that, in addition to the general provision concerning the joinder of claims, the Human Rights Code specifically authorize the joinder of a claim of retaliation with another claim between the same parties.

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1. setting standards and providing guidance

Previous sections of the Report have described the procedures for administering the Code and the matters covered by the Code. Because a statute must be written in general language to cover all circumstances, it does not always provide specific guidance as to what is required or how to proceed. This section of the Report discusses ways in which regulations under the statute might help meet this need.

1. Regulations to set standards regarding recurring matters

As discussed in Part I of this Report, the Human Rights Act establishes a process based on the filing of complaints. The process is designed to provide a remedy for past instances of discrimination. It is not well suited to preventing discrimination. In addition, litigation focuses on what an organization should have done to avoid past discrimination and is not particularly well suited to telling an organization in advance how to comply with the Act. Over time, litigation will provide guidance, but not always as effectively as needed.

It would be often be useful to have specific standards set in advance. Such standards assist persons who experience inequality by establishing a floor of protection. They also assist those responsible for compliance with human rights legislation by stating what is required to comply with the Act.

Often, it would be most useful to incorporate these standards into other laws dealing with a specific activity. For example, building codes should specify in detail what is required to provide access to persons with disabilities, just as they specify other requirements to make the structure comfortable and safe for occupants. In a similar way, laws or directives governing educational institutions should specify the measures required to accommodate disabilities.

Sometimes, however, it would be useful if there were regulations under the Human Rights Code itself dealing with issues that recur frequently. Sometimes these regulations could be quite specific. For example, they might specify religious

holidays that must be taken into account in considering the duty to accommodate religious beliefs. Other regulations might be more general and set out an approach to an issue rather than a specific rule. For example, they might specify the factors to be taken into account in considering the need for accommodation. Both representatives of the B.C. Federation of Labour and participants from the business community suggested that uncertainty about the extent of the duty to accommodate can cause tension.

Such regulations would avoid the need for litigation in some circumstances. If the exact facts of a potential claim were covered by a regulation, either the matter would be settled between the parties without a claim or the claim would likely be settled one way or another early in the enforcement process. Even when the regulation did not provide a specific answer to all the issues raised, it would sometimes narrow the area of dispute by eliminating certain issues from consideration or by establishing a framework for the analysis of an issue.

In summary, regulations setting standards for compliance with the Act would provide better protection to those affected by discrimination. They would also provide greater guidance to those responsible for compliance and would help avoid or minimize the costs of litigation. Sometimes their effect would be to show a clear violation and sometimes to show that there had been full compliance. In either event, they would resolve the matter more quickly and inexpensively than a protracted hearing.

Part I of this Report recommended that the government study measures in addition to the Human Rights Act, including employment equity and pay equity. The proposal here stops well short of those measures and should not be considered a replacement for such measures. The regulations could set out standards to be used in determining compliance with the Human Rights Code, but they could not impose additional obligations not based on a section of the Code. Also, enforcement would continue to be through a complaints-based process. However, such standards would be a step in the direction of a preventive approach and a further step away from an accusatory approach.

There is a similar power in the Canadian Human Rights Act. That Act authorizes the Cabinet to enact regulations prescribing standards of accessibility to services, facilities or premises. In addition, the Canadian Human Rights Commission can issue guidelines concerning the application of the Act, and these guidelines are binding on a Human Rights Tribunal. The Nova Scotia and Saskatchewan statutes permit Cabinet to enact regulations defining any term that is not defined in the statute, a power that could be used to establish standards. A number of other statutes, including the B.C. Human Rights Act, provide a general power to make regulations.

One further question is who should enact such regulations. As noted, the Canadian

Human Rights Act allows the Commission itself to issue binding guidelines. Most other statutes require that Cabinet enact regulations. The Saskatchewan Code authorizes the Commission to make regulations, subject to the approval of Cabinet.

If this power were given to the Commissioner for Human Rights, there would be the assurance that the necessary expertise would be applied in making the regulations. The independence of the Commissioner would also help ensure that the process was not influenced by improper political considerations. However, the Commissioner also has the power to file complaints and to intervene in cases. Giving the Commissioner this power might create some risk that the power could be used to unfair advantage in litigation. On the other hand, if the power were given to Cabinet alone, there would be the danger that the necessary expertise would not be available.

The best solution would be to give the power to Cabinet based on the recommendation of the Commissioner. This solution would assure expertise while providing a check against misuse of the power by the Commissioner.

3-D-26 It is recommended that the statute empower the Lieutenant Governor in Council (Cabinet), on recommendation of the Commissioner for Human Rights, to enact regulations prescribing standards for determining compliance with the Human Rights Code.

3-D-27 It is recommended that the Commissioner for Human Rights engage in an ongoing program of consultation with other agencies and ministries of government to encourage them to enact standards within their mandate to carry out the purposes of the Human Rights Code.

2. **Regulations regarding procedures**

At present, there are no regulations specifying the details of the procedures to be used to consider a human rights claim. The Human Rights Act allows regulations to be enacted, and this power could be used to develop regulations about procedures. Therefore, no recommendation for a statutory amendment is needed, except to note that this power should be carried over into a new Human Rights Code.

Regulations would help to inform the parties of what to expect and of how to prepare their case. They could shorten litigation by avoiding unnecessary disputes about the correct procedure to use. The enactment of procedural regulations would serve both to make the process more expedient and fairer.

Earlier in this Report, it was recommended that the Human Rights Tribunal have the power to adopt rules of procedure for human rights hearings. Since the Tribunal is itself impartial, it seems an appropriate body to exercise this power. There might

be more concern, however, if a similar power were given to the Human Rights Commission to issue regulations concerning earlier parts of the process, since the Commission collectively performs a mixture of functions.

3-D-28 It is recommended that the Lieutenant Governor in Council (Cabinet) be authorized by statute to enact procedural regulations regarding matters not covered by rules of procedure issued by the Human Rights Tribunal.

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2. budgets

This Report has recommended significant changes to the process for protecting human rights. It is legitimate to ask about the cost implications of the recommendations.

The short answer is that implementing the recommendations would require some increase in the budget of the B.C. Council of Human Rights. For example, the Council presently has no budget for education. Therefore, even a modest educational program would require some increase in the budget of the Council. However, many of the structural changes would represent a shift in budgets rather than additional allocations.

Some increase in the budget seems essential, if the goals of human rights protection are to have any chance of being attained. When the Human Rights Act was first enacted in 1983, the government of the day said that the new statute was designed to reduce the budget devoted to human rights enforcement. At the time, the B.C. Council of Human Rights was given a very small staff and a minimum of resources. While the budget of the Council was increased in subsequent years, it has never caught up to what is needed.

An increase also seems to be warranted when B.C. is compared with other Canadian jurisdictions. Professor Brian Howe has conducted a study comparing the budgets of human rights agencies across the country. The figures used here are derived from his report, with certain adjustments. They are based on the 1992-1993 fiscal year, which is the latest year in which data is available from all jurisdictions.

Based on this data, it appears that B.C. is markedly below the national average in the amount of money it expends on human rights. Obviously, the size of the jurisdiction and the workload of the agency are relevant in assessing the data. B.C. comes out below average in terms of both criteria.

On average, each Canadian jurisdiction spends $1.75 per resident per year for enforcing human rights legislation. The figure in B.C. is $1.09. Obviously, this is not a major item in the budgets of any jurisdiction. It is an even less significant part of the budget in this

province. Indeed, B.C. spends only about sixty-two percent of the Canadian average per resident.

The figures are even more dramatic if once calculates the budget in relation to the number of claims handled by the agency. Measured this way, B.C. spends only about half the average in other jurisdictions.

Significant recommendations in this Report do not represent an overall increase in the cost of enforcement but rather a shift in budgets from one agency to another. In particular, the recommendation that the Human Rights Commission have its own investigators would mean that the costs of investigations would be paid by the Commission rather than the Employment Standards Branch, but there is no reason to think investigations would be more expensive. Indeed, the opposite is true, since the greater flexibility in planning investigations and efficiencies arising from coordinating intake and investigations should save money.

Clearly, some of the recommendations have a price-tag. Education, research and legal clinics are not free. That cost must be measured against the costs of discrimination, both direct and hidden. Often those costs are monetary, including the costs of lost productivity. There are also costs in terms of dignity and self-esteem. Social stability has a positive value that should be included in the equation.

Measured in this way, it is hard to avoid the conclusion that the relatively modest cost of additional human rights protection would be a bargain. Even in times of budgetary restraint, this would be money well spent.

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APPENDIX A

summary of recommendations

Part I: The Goals of Human Rights Protection

1-1

It is recommended that the Government of British Columbia actively study measures in addition to the Human Rights Act to correct persistent patterns of inequality. The study should include an examination of employment equity and pay equity legislation and of contract compliance programs. It should also examine laws and programs outside North America that may provide innovative solutions.

Part III: Proposals for Change

A. HOW TO ORGANIZE THE WORK: A NEW STRUCTURE

3-1

It is recommended that a new statute be enacted to replace the B.C. Human Rights Act and that the statute be entitled the B.C. Human Rights Code.

3. Human Rights Commission

a) Options for Organizing the Commission

3-A-1

It is recommended that there be established a Human Rights Commission consisting of three elements: a Commissioner for Human Rights, a Director of Investigation and Mediation and a Human Rights Council of Advisors. The Commissioner for Human Rights should have overall responsibility for administration, but the Commissioner should not have the power to overrule decisions of the Director of Investigation and Mediation about claims that are filed. The Human Rights Council of Advisors should have the power to give advice and to make that advice public without being subject to the direction of the Commissioner for Human Rights.

b) The Commissioner for Human Rights

3-A-2

It is recommended that the Commissioner for Human Rights be appointed by the Lieutenant Governor in Council from a short list of candidates submitted by a selection committee appointed for the purpose.

3-A-3

It is further recommended that regulations under the Human Rights Code specify the procedures to be used in the selection process and the method of choosing the selection committee. The procedures should include public invitations for applications and a process that ensures the appointment will be based on relevant criteria.

3-A-4

It is recommended that the Human Rights Code specify a term of appointment of five years and that a Commissioner for Human Rights be eligible to serve no more than two terms.

3-A-5

It is recommended that the Human Rights Code require the Commissioner for Human Rights, in consultation with the Human Rights Council of Advisors, to file annually a report on the activities of the Commission and on such other matters as warrant public consideration. This report should be filed with the responsible Minister, who should be required to table it in the Legislative Assembly within a specified period.

3-A-6

It is recommended that the Human Rights Code empower the Commissioner for Human Rights, in consultation with the Human Rights Council of Advisors, to transmit to the Minister a special report regarding any matter that warrants an immediate response because of its urgency or importance. The report would be tabled in the Legislative Assembly in the same manner as the annual report.

3-A-7

It is recommended that the Human Rights Code specify that one of the duties of the Commissioner for Human Rights is to conduct research programs into matters relevant to the purposes of the Code and to encourage similar research by others.

3-A-8

It is recommended that the Commissioner for Human Rights have the power to conduct inquiries into matters relevant to achieving equality that go beyond those matters that would be the subject of a human rights claim. There would be no legal obligation on any person to participate in such an inquiry.

3-A-9

It is recommended that the Commissioner for Human Rights be allocated staff sufficient to carry out the duties assigned to the Commissioner.

3-A-10

It is further recommended that the staff of the Commission include legal counsel.

c) Director of Investigation and Mediation

3-A-11

It is recommended that a Director of Investigation and Mediation be appointed specially to the position rather than being selected from the public service.

3-A-12

It is recommended that the Director of Investigation and Mediation be appointed by the Lieutenant Governor in Council from a short list of candidates submitted by a selection committee appointed for the purpose. The appointment should be for a term of five years, and the Director should be eligible for reappointment.

3-A-13

It is recommended that the Director of Investigation and Mediation be responsible to the Commissioner for Human Rights for purposes of administration, but that the Commissioner should have no power to intervene in the exercise by the Director of the powers granted by the Act.

3-A-14

It is recommended that the Director of Investigation and Mediation be assigned staff sufficient to carry out the functions assigned to the Director.

3-A-15

It is recommended that investigation and mediation should not be assigned to another agency or ministry of government unless the Director of Investigation and Mediation has determined that special circumstances justify a departure from the normal process.

d) Human Rights Council of Advisors

3-A-16

It is recommended that there be a Human Rights Council of Advisors composed of not less than seven nor more than eleven members broadly representative of the community. In particular, the Council

should be representative of groups who have been historically excluded from the government process. It should also include representatives of labour and business.

3-A-17

It is recommended that the members of the Human Rights Council of Advisors should be appointed by the Lieutenant Governor in Council for such period as that body determines but should be removable only for cause during the term of their appointment.

3-A-18

It is recommended that the Human Rights Council of Advisors should have the following powers and responsibilities:

- to serve as a link between those responsible for administering the Human Rights Code and the community;
- to advise the Commissioner for Human Rights and the Director of Investigation and Mediation on the administration of the Code;
- in conjunction with the Commissioner for Human Rights, to participate in preparation of any special reports that are transmitted through the Minister to the Legislature;
- to make such statement as it deems appropriate in the annual report that the Commissioner for Human Rights transmits through the Minister to the Legislature.

e) Sharing Administrative Staff

3-A-19

It is recommended that the statutory officers within the Commission have a common pool of administrators to perform functions such as accounting and bookkeeping, information services, human resources, and other services that can be shared without undermining the functional division between the statutory officers.

3-A-20

It is recommended that, on a more limited basis, the Human Rights Tribunal share technical resources such as accounting and bookkeeping with the Commission.

3-A-21

It is recommended that staff be assigned to regional offices if the volume of complaints and the other duties of the officers are sufficient to justify a full-time position in a region.

3-A-22

It is recommended that these officers work out of the Access Centre in the community in order to make the office accessible and to keep costs to a minimum.

3-A-23

It is recommended that to the extent possible, the regional officers provide the full range of services offered by the Commission and that the Commissioner for Human Rights and Director of Investigation and Mediation work together to coordinate these services.

4. Human Rights Tribunal

3-A-24

It is recommended that a tribunal to be named the B.C. Human Rights Tribunal be established to perform the adjudicative functions required by the statute.

a) Composition of the Tribunal

3-A-25

It is recommended that the B.C. Human Rights Tribunal be composed three or more full-time members, one of whom would be designated Chair of the Tribunal. In addition to the full-time members, the statute should authorize the appointment of not more than six additional members to serve part-time.

b) Selection and Appointment Process

3-A-26

It is recommended that the members of the B.C. Human Rights Tribunal be appointed for a fixed term of five years, renewable once.

3-A-27

It is recommended that the members of the Tribunal should be removable before their term expires only for serious misconduct or incapacity and only by the Lieutenant Governor in Council on address to the Legislative Assembly.

3-A-28

It is recommended that the terms of office of the members of the Tribunal be staggered in order to provide continuity.

3-A-29

It is recommended that the selection process be designed to attract the most capable candidates and to ensure that the persons nominated have the necessary qualifications. The following features would be a part of the selection process:

- There should be public advertisements about the opening.
- Representatives from outside government should participate in the selection.
- The appointment should be made by the Lieutenant Governor in Council from a list of candidates recommended by a selection committee appointed for the purpose.

c) Reporting Structure Within Government

3-A-30

It is recommended that the reporting relationship with government be the same as the relationship of the government with other independent tribunals such as the Labour Relations Board. While the responsible Minister would have administrative responsibilities, the Minister would have no power to direct the Human Rights Tribunal in the exercise of its adjudicative functions.

5. What Ministry Should be Responsible for Human Rights

3-A-31

It is recommended that the agencies designated to administer and enforce the Human Rights Code report on ongoing basis to a ministry with experience in administering the affairs of independent offices, agencies and tribunals.

B. PUBLIC INFORMATION AND EDUCATION

1. Programs To Provide Information and Education

3-B-1

It is recommended that the Human Rights Code explicitly mandate the Commissioner for Human Rights to provide information and education about human rights. The Commissioner should be provided with adequate resources to carry out that mandate.

3-B-2

It is recommended that the Commission appoint staff to work full time on programs and initiatives to develop educational and informational materials on human rights. The staff should be expert in techniques of education and information, as well as knowledgeable about human rights issues.

3-B-3

It is recommended that the Commission work together with other ministries and agencies of government and with organizations outside government to develop a coordinated strategy in areas of mutual interest, to provide information, training and education about human rights.

3-B-4

It is recommended that the educational budget provide funds to assist organizations to work with the Commission on projects of mutual interest and to develop and deliver their own material on human rights.

3-B-5

It is recommended that information about the rights and responsibilities under Human Rights Code, and about the enforcement machinery, be prepared by the Human Rights Commission.

3-B-6

It is recommended that basic information about the Human Rights Act and its enforcement be prepared and distributed as soon as possible. This step should not await the broader structural change recommended in this Report.

3-B-7

It is recommended that informational material be prepared in different formats that are accessible to all users.

3-B-8

It is recommended that, in particular:

- Material should be available in plain language format.
- Material should be available in all the languages spoken by substantial numbers of British Columbians.
- Material should be available in a variety of formats used by people who do not have access to the usual print formats. Plans for such formats should be formulated in consultation with users of this information and organizations with specialized knowledge of such formats.

3-B-9

It is recommended that material be readily available in all communities and all regions of the Province. It should be available in government offices of other ministries and agencies. Community groups, unions and business organizations can also play a valuable role in distributing the material.

3-B-10

It is recommended that in addition to basic informational material, more detailed material be prepared and distributed to assist those who are involved in human rights cases or who are responsible for human rights issues within their organizations.

3-B-11

It is recommended that the Office of the Commissioner for Human Rights provide advice to individuals and organizations about their obligations under the Act. Such advice should be available about specific policies or practices, as well as about more general strategies for complying with the legislation. The person giving the advice should make clear that the advice does not bind the Director of Investigation and Mediation or the Human Rights Tribunal.

2. The Code As An Educational Document

3-B-12

It is recommended that provisions be added to the legislation setting out its purposes and the assumptions on which it is based.

3-B-13

It is recommended that the section should set out the following purposes:

- to foster the creation of a society in British Columbia in which there are no impediments to the full and free participation of all British Columbians in the economic, social, cultural and political life of British Columbia;
- to promote a society in which there is at the community level a climate of understanding and mutual respect in which all people will be made to feel that all are equal in dignity and rights, that each is a part of the whole community, and that each has a rich contribution to make to the development and well-being of the Province and the Nation;
- to encourage measures to prevent discrimination by identifying and eliminating the causes of inequality before they result in discrimination;
- to monitor progress in achieving equality in the Province and to initiate and encourage positive measures to eliminate persistent patterns of inequality associated with grounds of discrimination set out in Code;
- to implement rights set out in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic Social and Cultural Rights, and other solemn undertakings that British Columbia has committed itself to honour; and
- to provide the information, education and advice necessary to achieve these goals.

3-B-14

It is also recommended that the section acknowledge and adopt the following principles:

- that equality is measured in terms of the effect on the individual or group concerned rather than the intent of those responsible for the conduct;
- that equality must be assessed not only in relation to the alleged discriminatory conduct, but in the larger social, political and legal context;
- that identical treatment may produce serious inequality and that achieving equality often requires the accommodation of differences and positive measures to ameliorate conditions of disadvantaged individuals and groups;
- that multiculturalism is a fundamental characteristic of the society of British Columbia that enriches the lives of all British Columbians;
- that the Human Rights Code sets out matters of fundamental public policy, and where there is conflict between a provision of the Code and a provision of another enactment, the Code prevails.

3-B-15

It is recommended that the Code state that it shall be interpreted in a manner that is consistent with all the rights set out in the Canadian Charter of Rights and Freedoms.

3-B-16

It is further recommended that the Code provide that it shall be interpreted in a manner that recognizes and enhances the aboriginal and treaty rights of the aboriginal peoples of Canada.

3-B-17

It is recommended that every effort be made to draft the statute in plain language accessible to all.

3-B-18

It is recommended that the statute be written in gender neutral language throughout.

C.. THE PROCESS FOR PROTECTING HUMAN RIGHTS

2. Access to the Claims Process

a) Starting the Process – Making a Claim

3-C-1

It is recommended that the Director of Investigation and Mediation should be responsible for receiving claims and should have sufficient staff to carry out this function.

3-C-2

It is recommended that a mechanism be put in place to ensure that the Commissioner for Human Rights is informed of all claims and has the opportunity to intervene in appropriate cases.

3-C-3

It is recommended that the services of the Commission, particularly at intake, be available in all of the languages spoken by substantial numbers of British Columbians.

3-C-4

It is recommended that efforts be made to ensure that the staff of the Commission is representative of the larger community.

3-C-5

It is recommended that the Director of Investigation and Mediation continue the practice of assisting claimants to prepare the documents necessary to file a claim.

3-C-6

It is recommended that the Commission work with organizations in the community to provide advice and assistance to those considering filing a claim.

3-C-7

It is further recommended that financial assistance, materials and training be provided to these organizations to allow them to carry out this role.

b) Who Cam Make a Claim

3-C-8

It is recommended that the Human Rights Code empower the Commissioner for Human Rights to file a claim if the Commissioner has reasonable grounds to suspect that a violation has occurred.

3-C-9

It is recommended that the statute permit individuals or groups to intervene in a claim with leave of the Human Rights Tribunal if the Tribunal determines that the intervention would facilitate the representation of all points of view and is fair to all parties.

3-C-10

It is recommended that the Commissioner for Human Rights provide an individual or group with funding for research or for the costs of participating in a claim if the Commissioner determines that such funding would further the purposes of the Human Rights Code and that it is consistent with fairness to all parties.

Assigning Priorities to Cases

3-C-11

It is recommended that the Commission (and the existing Council) develop guidelines for setting priorities for dealing with cases. These guidelines should take account both of special circumstances of individuals and of the goal of correcting persistent patterns of equality affecting groups.

3. Whether To Proceed With A Claim

a) Overlap with Other Proceedings

3-C-12

It is recommended that the Human Rights Code require the Director of Investigation and Mediation to consider whether the substance of the human rights claim has been fully and adequately considered in another proceeding.

3-C-13

It is recommended that in making this determination, the Director should take account of all relevant factors, including:

- the subject matter of the other proceedings, and whether those proceedings had fully and adequately considered the human rights aspects of the dispute;
- the expertise of the tribunal or decision-maker in human rights;
- the fairness and effectiveness of the other process and whether or not the parties had been adequately represented in the process; and
- whether the other proceeding offered a range of remedies comparable to those available under the Human Rights Code in the circumstances.

3-C-14

It is recommended that the statute authorize the Director to dismiss a human rights claim that has been fully and adequately considered in another proceeding or to limit the claim to matters not fully and adequately dealt with. The Director would not reassess the ultimate result in the other proceeding if it had met the criteria just outlined.

3-C-15

It is further recommended that the Director of Investigation and Mediation be authorized to defer further consideration of a human rights claim, pending the outcome of another proceeding that appeared to the director capable of fully and adequately dealing with the substance of the claim. After that proceeding finished, the director would determine whether, in light of the other proceeding, the human rights claim should be dismissed or should continue, applying the same standards as set out in the preceding recommendations.

3-C-16

It is recommended in no event, should the claim be deferred for more than 100 working days or such other time as is specified in regulations under the Code

3-C-17

It is recommended that the Director of Investigation and Mediation have the power to dismiss or defer a human rights claim as described in the previous recommendations at any time between the filing of the claim and the decision whether the claim should be referred to the Human Rights Tribunal for hearing.

3-C-18

It is recommended that the Commissioner for Human Rights and the parties to a claim have the opportunity to submit comments before a final decision is made to dismiss a claim.

b) Cases Unlikely to Succeed

3-C-19

It is recommended that the Director of Investigation and Mediation have the statutory power to dismiss a claim at any time prior to a reference to the Human Rights Tribunal if the Director concludes that the claim is without merit and there is no reasonable likelihood that the results of further proceedings would affect the validity of this conclusion.

3-C-20

It is further recommended that the Director of Investigation and Mediation have the power to dismiss a claim at any time prior to a reference to the Human Rights Tribunal if the director concludes that proceeding with the claim would not further the purposes of the Act because it raises no significant issue of discrimination or because it was filed for improper motives.

3-C-21

It is recommended that the Commissioner for Human Rights and the parties to a claim have the opportunity to submit comments before a final decision is made not to proceed.

3-C-22

It is recommended that if the Director of Investigation and Mediation decides to dismiss a claim, the Director shall inform the claimant (and the respondent, if the respondent has been notified of the claim) in writing, giving reasons for this decision.

c) Time Limit for Filing a Claim

3-C-23

It is recommended that the statute provide that claims must be filed within one year of the alleged contravention. Where a continuing contravention is alleged, the period would be within one year of the last alleged instance of the contravention.

3-C-24

It is recommended that the Director of Investigation and Mediation be authorized to extend this period if the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay.

3-C-25

It is recommended that regulations under the statute set out a procedure for notifying the parties that an extension is being considered and allowing them to make submissions on this matter.

4. The Investigation

c) When Should There Be an Investigation

3-C-26

It is recommended that the statute give the Director of Investigation and Mediation the discretion to decide whether an investigation will assist with the resolution of a claim or whether the claim can proceed in a fair and effective manner without an investigation.

d) Powers of Investigation

3-C-27

It is recommended that the Director of Investigation and Mediation and any other officer investigating a case be empowered, for purposes relevant to any investigation under the Act:

- to demand the production of documents and things;
- to examine a party to the claim or any other person with knowledge relevant to the claim,

including an examination on oath or affirmation;
- with the authorization of the Director of Investigation and Mediation, to enter and inspect any business premises at any reasonable time.

3-C-28

It is recommended that if any person refuses to produce what was demanded, to take part in an investigation or to provide entry into premises, the Director of Investigation should be authorized to apply to a judge of the Supreme Court of B.C. for an order enforcing these provisions.

3-C-29

It is further recommended that if a party to a claim improperly withholds access to a document or other evidence, or improperly refuses to respond to a request for information, the Director of Investigation and Mediation and the Tribunal shall be entitled to assume that the document or information withheld would be adverse to the party withholding it.

3-C-30

It is recommended that the Code authorize regulations governing investigations.

f) Process At The End of an Investigation

3-C-31

It is recommended that regulations establish time limits for the parties to respond to an investigation report, The Director of Investigation and Mediation should have the discretion to extend the period if there is a legitimate reason why more time is needed.

3-C-32

It is recommended that the Director of Investigation and Mediation be authorized to refer a case to the Human Rights Tribunal for hearing if, in the opinion of the Director, a hearing would further the objectives of the Code or assist the Commission in discharging its responsibilities under the Code.

3-C-33

It is recommended that the Human Rights Code authorize the Director of Investigation and Mediation to delegate the power to decide to proceed with a claim or to refer a claim to the Tribunal to an appropriate member of staff. The Code should require the Director or another person authorized by regulation to personally make the decision not to proceed with a claim or not to refer a claim to the Tribunal. Not more than two additional persons should be permitted to carry out this function.

3-C-34

It is recommended that the Commissioner for Human Rights, as well as the parties to a claim, should have the power to make representations regarding the decision whether to dismiss a case prior to full investigation and whether refer a case for hearing. Those representations should be made on the record and should be communicated to all the parties.

3-C-35

It is recommended that the Director of Investigation and Mediation be required to notify the parties in writing of a decision not to refer a claim to the Human Rights Tribunal for hearing and to set out the reasons for that decision.

g) Review of the Director's Decision and other Safeguards

3-C-36

It is recommended that if the Director of Investigation and Mediation decides to dismiss a case prior to a full investigation or decides not to refer a claim to the Human Rights Tribunal for hearing, any party adversely affected by this decision should have the right to seek review of the decision by a member of the Tribunal designated by the Chair. The review would be based on the written record and would be a quick process similar to the process for seeking leave to appeal before the courts.

3-C-37

It is recommended that the procedure for reconsideration and the criteria for the decision be set out in regulations.

3-C-38

It is further recommended that the Commissioner for Human Rights should have the power to make a submission regarding the review of the decision, whether or not the Commissioner is a party to the claim.

5. Mediation and Settlement

b) Who Should Carry Out Mediation and Settlement

3-C-39

It is recommended that responsibility for mediation be assigned to the Director of Investigation and Mediation. The Director should be provided with adequate staff and resources to carry out this function.

3-C-40

It is recommended that the Director of Investigation and Mediation take steps to ensure that the parties at all times know the nature and purpose of each stage of the proceedings and that they have the information needed to make informed decisions about mediation. Internal procedures should make it possible to assign a person other than the investigator to mediate if the investigator cannot act effectively as a mediator in that case. However, it is not recommended that the statute require that mediation be strictly separated from investigation or that separate personnel carry out these two roles.

3-C-41

It is recommended that the Director of Investigation and Mediation be granted a statutory power of delegation broad enough to allow the appointment of special outside mediators in appropriate circumstances.

c) Should Mediation be Mandatory?

3-C-42

It is recommended that the Director of Investigation and Mediation have the statutory power to engage in mediation efforts but that there be no obligation to attempt mediation.

d) Reporting of Settlements

3-C-43

It is recommended that the terms of all settlements be reported to the Director of Investigation and Mediation and be available to the Commissioner for Human Rights.

3-C-44

It is recommended that where there is a demand for confidentiality, the Director and Commissioner would not release information that would identify the parties. However, they would be permitted and encouraged to publicize settlements in a way that does not identify the parties, in order to assist other settlement negotiations and to educate the public.

e) Enforcement of Settlements

3-C-45

It is recommended that the Human Rights Code permit a settlement to be filed with the Human Rights Tribunal and to be enforced as an order of the Tribunal, unless the Tribunal concludes that the terms of settlement are contrary to the purposes of the Code.

3-C-46

It is recommended that the Human Rights Code permit any party to apply to the Human Rights Tribunal for a determination that there has been a breach of the terms of a settlement agreement that has been filed with the Director of Investigation and Mediation.

3-C-47

It is recommended that the Tribunal should be empowered to make the settlement agreement an order of the Tribunal if it finds that there has been a breach. Until such a finding, any terms of the agreement regarding confidentiality should be respected.

3-C-48

The Director of Investigation and Mediation should have the power to reopen any claim that has been settled if the Director concludes that there has been a breach of the settlement agreement. The claim would then proceed in the same manner as if there had been no settlement. The Director's determination should be subject to review by the Tribunal.

3-C-49

It is recommended that regulations under the Human Rights Code provide a mechanism for both parties to make formal offers of settlement and a formula for a monetary adjustment if a party refuses a reasonable offer of settlement. Any adjustment affecting a claimant should be limited to a reduction of the amount awarded the claimant and should never result in a net loss to the claimant.

6. Hearings

3-C-50

It is recommended that the Chair of the Human Rights Tribunal designate a member of the Tribunal to hear a claim that is referred to the Tribunal.

3-C-51

It is further recommended that the Chair of the Tribunal have the discretion to designate a panel of three persons to hear claims of particular importance.

3-C-52

It is recommended that the Human Rights Code empower the Human Rights Tribunal to issue binding rules of procedure.

3-C-53

It is recommended that the Human Rights Code provide for a process for the disclosure of documents

prior to the hearing.

3-C-54

It is further recommended that the Human Rights Tribunal formulate binding rules to regulate this process.

3-C-55

It is recommended that the Human Rights Code permit one party to orally examine other parties to the proceedings. However, such an examination should be permitted only upon application to the Human Rights Tribunal. The Tribunal should authorize such an examination only if special circumstances make other means of gathering information inadequate and only if the examination can be carried out without undue emotional or financial cost to the party being examined. The Tribunal should be authorized to place any restrictions on the examination that it thinks are appropriate.

3-C-56

It is recommended that the Human Rights Code specifically authorize the Human Rights Tribunal to include in its Rules of Procedure a provision for a pre-hearing conference. The Code should authorize the Tribunal to make rulings at the conference about both the substance of the claim and about procedural issues. The details concerning the exercise of these powers would be specified in the rules of procedure.

7. Legal Representation and Other Assistance

3-C-57

It is recommended that legal representation of claimants be provided through the Legal Services Society. An essential component of these services is the establishment of a Human Rights Law Clinic, either by establishing a new facility or by providing an existing organization delivering similar services with the resources necessary to undertake this role. Claimants would be represented by staff of the clinic, by staff lawyers of the Legal Services Society Community Law Offices, by Native Community Law Offices and by private counsel, as appropriate. The Human Rights Law Clinic would serve as a resource and research facility for all lawyers representing claimants.

3-C-58

It is recommended that if it is not possible to establish a Human Rights Law Clinic and to give it the resources necessary to provide adequate support to all lawyers representing claimants, the Commissioner for Human Rights should be assigned the responsibility of representing claimants at hearing.

3-C-59

It is recommended that the terms of the legal aid tariff for human rights be reviewed and modified as appropriate.

3-C-60

It is recommended that clear guidelines be established making respondents eligible for legal aid if they meet the financial criteria used in other similar cases. It is further recommended that all respondents be informed of the availability of legal aid and of how to apply for it.

8. Remedies

3-C-61

It is recommended that the provisions of the Human Rights Code make clear that a remedy to ameliorate conditions of disadvantaged individuals or groups can be granted with regard to all areas of activity covered by the Code.

3-C-62

It is recommended that the Human Rights Code specifically authorize regulations permitting the Human Rights Tribunal to grant interim orders in circumstances in which waiting for the final decision would not adequately protect the legitimate interests of the claimant or of the individual or group affected by the discrimination.

3-C-63

It is recommended that these regulations should include safeguards to ensure that the interests of the persons against whom the order is made are properly taken into account.

3-C-64

It is recommended that the Human Rights Code authorize the Human Rights Tribunal to grant consent orders.

3-C-65

It is recommended that the Human Rights Code specify that a remedy can include a requirement that the Commissioner for Human Rights or any other party to a proceeding must be provided with the information needed to determine whether a remedy is being implemented.

3-C-66

It is recommended that the Code should also specify that the Human Rights Tribunal retains jurisdiction over a claim until a remedy is fully implemented.

3-C-67

It is recommended that the Human Rights Code authorize any party to apply to the Human Rights Tribunal for a modification of an order on the ground that it is no longer appropriate due to unforeseen circumstances.

3-C-68

It is recommended that the Code should also authorize the enactment of regulations to specify in greater detail the criteria for modifying an order.

3-C-69

It is recommended that the Human Rights Tribunal have the power to award costs against the Human Rights Commission or any party to a claim other than a claimant if the Tribunal concludes that the Commission must have known prior to the hearing that the claim was completely without merit and the litigation did not in any way serve the purposes of the Code, or if the Commission or any party prolongs the process for frivolous, vexatious or other improper motives.

3-C-70

It is recommended that the Commissioner for Human Rights take the steps that are necessary to enforce a remedy granted by the Human Rights Tribunal.

9. Time Limits for Process

3-C-71

It is recommended that the Human Rights Code should prescribe statutory time limits for each stage of the process of dealing with a claim. The following limits are suggested:

- 1) The Director of Investigations and Mediation should assign an investigator to a claim within fifteen working days of the claim being completed and filed and within thirty days of the initial request to file a claim, not counting any delay due to the conduct of the claimant.

  2) The investigation should be completed no later than 100 working days after the filing of the claim.

  3) After the completion of the investigation, the parties should be given a maximum of thirty working days to comment on the report of the investigator unless the Director determines that a longer period is needed in special circumstances in the interests of fairness. The Director of Investigation and Mediation should decide whether to refer the claim to the Human Rights Tribunal for hearing within a further thirty working days after the investigation is complete.

4) The hearing should take place within sixty working days of the date that the claim was referred to the Human Rights Tribunal, unless all parties consent to a longer period or the Tribunal finds that this limit would cause unfairness to one or more parties despite the fact that they have prepared for the hearing with due diligence.

5) The decision should be issued within sixty working days of the completion of the hearing.

3-C-72

It is recommended that the Director of Investigation of Mediation be required to authorize any extension of the time limits described in points one to three of the previous recommendation. The authorization should be in writing and should give the reasons for the extension. The authorization should be sent to all parties to the claim, and the annual report of the Commission should include a report on extensions.

3-C-73

It is recommended that the Chair of the Human Rights Tribunal should be responsible for authorizing any extension to the limits described in points four and five of the previous recommendation. The same conditions should apply to the authorization as apply to extensions granted by the Director of Investigation and Mediation.

3-C-74

It is recommended that unless an extension is made with the consent of all parties to a claim, each authorization for an extension of the statutory time limits should be transmitted to the Office of the Ombudsman.

10. Labour Grievances and Human Rights Claims

3-C-75

It is recommended that the Director of Investigation and Mediation take account of the fact that a grievance under a collective agreement has been initiated or will be initiated. The Director should consider the matter according to the process set out in recommendations 3-C-12, 3-C-18 in this Report.

3-C-76

It is recommended that the Human Rights Code require the Human Rights Tribunal to consider whether the substance of a human rights claim has been fully and adequately dealt with in another proceeding, if any party to the proceedings requests such a determination.

3-C-77

It is recommended that in making this determination, the member of the Tribunal assigned to the claim at the time of the application should take account of all relevant factors, including:

- the subject matter of the other proceedings, and whether those proceedings had fully and adequately considered the human rights aspects of the dispute;
- the expertise of the tribunal or decision-maker in human rights;
- the fairness and effectiveness of the other process and whether or not the parties had been adequately represented in the process; and
- whether the other proceeding offered a range of remedies comparable to those available under the Human Rights Code in the circumstances.

3-C-78

It is recommended that the statute authorize the Tribunal to dismiss a human rights claim that has been fully and adequately considered in another proceeding or to limit the claim to matters not fully and adequately dealt with. The Tribunal would not reassess the ultimate result in the other proceeding if the proceeding had met the criteria just outlined.

3-C-79

It is recommended that if the Tribunal decides that a portion of the claim has been fully and adequately dealt with in the other proceeding, it should limit the hearing under the Human Rights Code to those matters not fully and adequately dealt with.

3-C-80

It is recommended that the Human Rights Code permit any party to a claim to apply to the Tribunal to defer the hearing pending the outcome of another proceeding concerning the same, or essentially the same, matter.

3-C-81

It is recommended that the Tribunal should be authorized to defer the hearing if the other proceeding appears capable of fully and adequately dealing with the substance of the claim, taking account of the same criteria specified in Recommendation 3-C-77.

3-C-82

It is recommended that the Tribunal may defer the hearing for no more than ninety working days, unless a different limit is specified in regulations enacted under the Human Rights Code.

3-C-83

It is recommended that the Commissioner for Human Rights and the parties to a claim should have the

opportunity to make representations before a final decision is made to dismiss a claim and that the claimant be consulted before a decision to defer a hearing.

3-C-84

It is recommended that there be a statutory prohibition on including in a collective agreement a term denying access to normal grievance procedures because a member of a union has proceeded with a human rights claim.

D. SCOPE OF COVERAGE

1. Where the Human Rights Code Fits in the Legal System

3-D-1

It is recommended that the Human Rights Code prevail over other legislation with one exception. The exception would apply to other statutes and regulations that impose limitations or requirements based on the fact that a person is under a specified age if the age specified in the statute is less than the age of majority.

3-D-2

It is further recommended that there be a review of such statutes and regulations, and they should be modified unless they are consistent with the purposes of the Human Rights Code and with the Canadian Charter of Rights and Freedoms.

2. Specifying What is Included in the Term "Discrimination"

3-D-3

It is recommended that the Human Rights Code include a statement of central features of the meaning of discrimination. In particular, reference to the following features should be included:

- Discrimination can be intentional or unintentional.
- Discrimination includes the failure to fulfil the duty to accommodate.
- Discrimination includes harassment.
- Sex discrimination includes discrimination related to pregnancy.

3. What Areas of Activity Should be Covered?

a) Clubs and Social Institutions

3-D-4

It is recommended that the Human Rights Code prohibit discrimination without bona fide and reasonable justification with respect to any accommodation, service or facility available or accessible to the public or to a section of the public.

3-D-5

It is recommended that the Human Rights Code authorize all agencies of government with authority for granting licenses or permits to impose an obligation not to discriminate on grounds prohibited by the Human Rights Code. Such a condition should be included if discrimination by the person receiving the licence or permit would directly or indirectly affect equality in areas of activity covered by the Code, such as employment opportunities. It should also be included if discrimination by the recipient would exclude people from the common social activities in their community.

b) Pre-Employment Requests for Information

3-D-6

It is recommended that the Human Rights Code prohibit any request for information from an applicant for employment about a prohibited ground of discrimination unless the information is needed for a purpose permitted by the Code. The prohibition would apply to any written or oral request for information from any person and to any test or examination that would supply such information. This prohibition would not prohibit a request for information needed for legitimate purposes after a decision has been made to hire a person.

c) Equal Pay for Work of Equal Value

3-D-7

It is recommended that the Human Rights Code include provisions similar to those of the Canadian Human Rights Act incorporating the principle of equal pay for work of equal value for female and male employees. Regulations should provide guidance as to the application of this provision.

4. Grounds of Discrimination

3-D-8

It is recommended that the Human Rights Code incorporate grounds analogous to those set out in the Code in order to ensure conformity with the equality provisions of the Canadian Charter of Rights and Freedoms.

3-D-9

It is recommended that the prohibition of age discrimination extend to all ages and to accommodations, services and facilities customarily available to the public. This prohibition should be subject to

provisions in other statutes and regulations that impose limitations or requirements based on the fact that a person is under a certain age if the age specified is less than the age of majority. It should also be subject to an exemption allowing a bona fide mandatory retirement policy, pending further review of the issue of mandatory retirement.

3-D-10

It is recommended that the section of the Human Rights Code concerning the sale of property prohibit discrimination on the basis of age and family status, subject to an exception similar to that contained in section 5(2)(b) of the existing Human Rights Act.

3-D-11

It is further recommended that the statute authorize regulations to define how the exception is to be monitored and to ensure that it is not used for improper purposes.

3-D-12

It is recommended that protection against discrimination based on "lawful source of income" be extended beyond the rental of property and included in the sections of the Human Rights Code regulating all areas of activity.

3-D-13

It is recommended that the Human Rights Code contain a provision defining the term "sexual orientation" as including a relationship with another person of either sex that is of primary importance in the lives of the two persons.

3-D-14

It is recommended that the Human Rights Code make clear that each ground of discrimination should be interpreted in a manner consistent with the purposes of the Code and consistent with a broad and liberal interpretation of the other rights enumerated in the Code.

5. Exemptions and Defences

3-D-15

It is recommended that the Human Rights Code require that contracts of life and health insurance meet a standard of bona fide and reasonable justification with regard to discrimination based on sex or disability (or other grounds such as age, if they are added to the section governing such contracts).

3-D-16

It is further recommended that the standard of bona fide and reasonable justification apply to any retirement, superannuation or pension plans or group or employee insurance plans that discriminate on the basis of marital status, disability, sex or age.

3-D-17

It is recommended that the Code authorize the enactment of regulations specifying what may be deemed reasonable and bona fide for the purposes of such contracts and plans.

3-D-18

It is recommended that the sections of the Human Rights Code dealing with insurance plans specifically prohibit the denial of benefits or a reduced level of benefits because of pregnancy.

3-D-19

It is recommended that the provisions concerning employment equity and other equity programs be worded to make clear that these programs are a mechanism for achieving equality rather than an exemption from the duty not to discriminate.

3-D-20

It is recommended that the Human Rights Code be worded so as to make clear that equity programs regarding accommodation, services, facilities and housing have equal status with employment equity programs.

3-D-21

It is recommended that the Human Rights Code provide a mechanism for approval that would immunize an approved program from challenge on the ground that it discriminates against groups that are not disadvantaged. However, the Code should not require that all programs be approved in advance.

3-D-22

It is recommended that sections dealing with equity programs include programs to ameliorate the condition of any disadvantaged individual or group characterized by any ground of discrimination protected by the Code.

3-D-23

It is recommended that the provision of the Human Rights Code equivalent to section 19(1) of the existing Act apply to groups having the purpose of promoting the interests and welfare of any group or class of persons protected by the Code.

6. Retaliation

3-D-24

It is recommended that the protection against retaliation be extended to cover retaliation based on the fact that a person has refused, or will refuse, to contravene the Human Rights Code.

3-D-25

It is recommended that in addition to the general provision concerning the joinder of claims, the Human Rights Code specifically authorize the joinder of a claim of retaliation with another claim between the same parties.

E. SETTING STANDARDS AND PROVIDING GUIDANCE

3-D-26

It is recommended that the statute empower the Lieutenant Governor in Council (Cabinet), on recommendation of the Commissioner for Human Rights, to enact regulations prescribing standards for determining compliance with the Human Rights Code.

3-D-27

It is recommended that the Commissioner for Human Rights engage in an ongoing program of consultation with other agencies and ministries of government to encourage them to enact standards within their mandate to carry out the purposes of the Human Rights Code.

3-D-28

It is recommended that the Lieutenant Governor in Council (Cabinet) be authorized by statute to enact procedural regulations regarding matters not covered by rules of procedure issued by the Human Rights Tribunal.

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APPENDIX B

List of consultation meetings

The following is the schedule of consultation meetings held in different parts of the Province. More than

one meeting was held in most communities on the same day. As a result, the total number of meetings is sixty-four. This list does not include numerous other meetings with particular human rights, labour and business groups and organizations that were of great help in carrying out the Review.

The locations and dates are as follows:

May 11 Surrey

May 17 Victoria

May 18 Nanaimo

May 19 Campbell River

May 25 Cranbrook

May 26 Castlegar

June 2 Abbotsford

June 7 Kamloops

June 8 Vernon

June 9 Kelowna

June 14 Dawson Creek

June 15 Fort St. John

June 16 Prince George

June 21 Prince Rupert

June 22 Terrace

June 23 Smithers

June 27 Abbotsfortd

June 28 Burnaby

June 29 Vancouver

July 7 Port Alberni

July 16 Vancouver

July 19 Vancouver

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APPENDIX C

participating groups

The following is a list of businesses, groups and organizations that made submissions and that participated in the roundtable discussions held during the Human Rights Review. It does not include participants at the public meetings that were held, because participants were not asked to identify themselves at those meetings. Also, the list has been prepared on the basis of sheets that were distributed during the meetings, and we apologize for any errors that may have occurred in transcribing those sheets and for any omissions.

In addition to the groups listed here, a large number of individuals made submissions or took part in the roundtable discussions and public meetings. We have not listed individual participants because some of these participants may have assumed that their participation was off the record and would not become part of a public report. It is important to respect the privacy of these individuals. However, they made a very important contribution to the process, and some of them took the time to prepare extensive submissions that have been very useful in preparting this report. All of us who worked on the Report are very grateful for this assistance.

The participating groups are as follows:

- Abbotsford Legal Services

  Abbotsford Right to Life

  Abbotsford Right to Life Society

  Action Committee of People With Disabilities

  Active Manufactured Home Owners Association

  Adult Learning Disabilities Association

Adventure Paving

Affiliation of Multicultural Societies and Service Agencies of B.C. (AMSSA)

AIDS Society of Kamloops

AIDS Vancouver Island

Aim High Prince George Association

Alcan Smelters & Chemicals Ltd.

Alcan Smelters & Chemicals Ltd. (Kitimat Works)

Armstrong Community Service

Armstrong Teachers' Association

B.C. Aboriginal Network on Disability

B.C. Association of Indian Friendship Centres

B.C. Educational Association of Disabled Students

B.C. Federation of Labour

B.C. Human Rights Coalition

B.C. Native Courtworkers

B.C. Packers Ltd.

B.C. Persons with AIDS Coalition

B.C. Schizophrenic Society

B.C.Teachers Federation Committee Against Racism

BC Association of Social Workers

BC Civil Liberties Association

BC Government and Service Employees’ Union

BC Library Association

BC Nurses' Union

BC Organization to Fight Racism (BCOFR)

BC Press Council

BC Public Interest Advocacy Centre

Better Business Bureau of Vancouver Island

Building Trades Council

Bulkley Valley District Hospital

Bulkley Valley Maintenance

Burnaby Multicultural Society

Business Council of British Columbia

Camosun College

Campbell River & District Teachers Association

Campbell River - Legal Service Society

Campbell River Business Women's Network

Campbell River Family Service

Campbell River, Municipality of

Canadian Anti-Racism Education & Research Society

Canadian Bar Association, Civil Liberties Subsection

Canadian Bar Association, Lesbian and Gay Rights Subsection

Canadian Federation of Business & Professional Women

Canadian Fishing Co.

Canadian Jewish Congress (Pacific Region)

Canadian Mental Health Association

Canadian Union of Public Employees

Capital Families Association

Carpenter's Union Local 1346

Catholic Charities of the Archdiocese of Vancouver

Central Vancouver Island Multicultural Society

Chiilliwack Career Centre

Children’s Services Employees Union

Chilliwack Community Services Centre

Chilliwack Multicultural Services Centre

Christian Outreach of Canada

City of Castlegar

City of Kamloops

City of Nanaimo

City of Vernon

City of Victoria - Human Resources Department

Coalition of BC Businesses

Coast Inn of the West

College Institute Educators' Association of BC

Committee for Racial Justice

Community Legal Assistance Society

Concerned Citizens

Confederation of University Faculty Associations of B.C.

Congress of Black Woman of Canada

Consumers Glass

Cranbrook Chamber of Commerce

Cranbrook Regional Hospital

Cranbrook Society for Community Living

Crest Motor Hotel

Creston Valley Civil Liberties Association

CUPE, B.C. Division

CUPE Local 389

CUPE Local 523 (Vernon)

CUPE Local 900 (Kamloops)

DAWN B.C.

DAWN Vancouver

December 9 Coalition

Downtown Eastside Women's Centre

Downtown Granville Tenants' Association

Dze l̲ k'ant Friendship Centre Society

East Kootenay Labour Council

East Kootenay Women's Council

EMCON Services

Employment Equity Update

End Legislated Poverty

Equinet Broadcasting Network

Federated Anti-Poverty Groups of BC

First Nations Women's Group

Friendship House Association

Frontline Advocacy Workers

Gay and Lesbian Society West Kootenay

Gaynor Smith & Scott

Greater Victoria Hospital Society

Harmac Pacific Inc.

HEABC

Health Sciences Association

Hire a Logger Agency

Hospital Employees' Union

Hudson Bay Lodge

Independent Living Resource Centre

Indo-Canadian Women's Organization

Interior Forest Labour Relations Association

Interior Indian Friendship Society

IWA (Kamloops)

IWA Canada Local 1-423 (Kelowna)

IWA (Port Alberni)

James Bay Community Project

Japanese Canadian Citizens Association of Greater Vancouver - Human Right Committee

Kelowna Aids Research and Education Society

Kamloops Active Support Against Poverty

Kamloops District Labour Council.

Kamloops Immigrant Services

Kamloops Legal Services

Kamloops Street Clinic

KEDCO

Kelowna General Hospital (Department of Human Resources)

Kelowna School District

Kelowna Women's Centre

Kitsilano Christian Community

Ktunaxa Kinbasket Tribal Council

Kwakiutl Women’s Council

L'ax ghels Community Law Centre

Labourers' Union Local 602

Langara College Library

Langley Anti-Poverty Group

Langley Legal Assistance

Law Society Library

Learning Disabilities Association of B.C.

Legal Services Society (Kelowna)

Legal Services Society (Nanaimo)

Legal Services Society (Nelson)

Legal Services Society (Prince Rupert)

Legal Services Society (Vancouver)

Literacy B.C.

Louis Riel Metis Council

Lumby Community Services

Macadams Law Firm

Mahila Association

Malaspina College

Malcolm Hilcove Corporation (Macdonald's)

Matsqui-Abbotsford Community Services

Mayo Forest Products

Monte Carlo Motor Inn

MOSAIC

Multicultural Advisory Council

Nanaimo Hospital

Nanaimo Independent Living Resource Centre

Nanaimo Women's Centre

Native Courtworker and Counselling Association of BC

Nelson Chamber of Commerce

Nelson Municipal Library

Nelson Women's Centre

New Brunswick Human Rights Commission

North Coast Professional Services

North Coast Tribal Council

Northern Native Broadcasting

Northwest Community College

Northwest Drug Co. Ltd.

O.R.C. Canada

Occupational Health & Safety

Office of the Ombudsman

OK Valley Strata Owners Association

Okanagan Gay & Lesbian Organization

Okanagan University College Faculty Association

Overseas Chinese Association

P.P.W.C. Local 10

Penticton & District Community Resources

Penticton Legal Services

People in Motion

Place Inn

Port Alberni Women's Centre

Progressive Indo-Canadian Community Society

Pulp Paper & Woodworkers of Canada

R.E.A.L. Women of B.C.

R.E.A.L. Women of Smithers

Regional District of Central Okanagan

Repap Smithers Inc.

Restaurant & Food Services Association of B.C.

Royal Inland Hospital

School District #61 (Victoria)

School District #72 (Campbell River)

Selkirk College

Seniors Resource Bureau

Shuswap Nation Tribal Council

Skeena Cellulose Inc.

Skeena Sawmills

Smith & Hughes

Smithers Chamber of Commerce

Smithers Christian Reformed Church

Smithers Human Rights Society

Smithers Pro Life Society

Social Planning Council for the North Okanagan

Somali-Canadian Community Development Association

South Asian Women's Centre

South Island Women in Trades & Technology

South Okanagan Civil Liberties Association

Staff Systems

Sto:lo Nation Canada

Sto:lo Tribal Council

Storefront Orientation Service

Tamitik Status of Women

Terrace and District Multicultural Association

Terrace Women's Centre

The Advocacy Centre (Nelson)

Thompson Valley Family Service

Tillicum Housing Society

Together Against Poverty Society

Tolko Industries Ltd.

U.S.W.A.

UBC-Sexual Harassment Policy Office

Union of Spiritual Communities of Christ

United Brotherhood of Carpenters and Joiners of America, Local 1237

United Food & Commercial Workers

United Manufactured Home Owners Association of BC

United Nations Association, Kootenay Region

United Native Nations

United Steelworkers of America

University College of the Cariboo

Upper Fraser Valley Society for Mentally Handicapped People

Vancouver General Hospital

Vancouver Island Human Rights Coalition

Vancouver Lesbian Connection

Vancouver Multicultural Society of BC

Vancouver Public Library

Vancouver Society of Immigrant and Visible Minority Women

Vancouver-Richmond Mental Health Network

Vernon Immigrant Services

Vernon Immigrant Society

Vernon Jubilee Hospital

Vernon Multicultural Association

Victims Assistance Program

Victoria and District Labour Council Workers' with Disabilities Project

Victoria Status of Women Action Group

Welfare Rights & Handicapped Persons

West Coast Domestic Workers Association

West Coast LEAF Association

West Kootenay Gay & Lesbian Society

West Kootenay Women's Association

West Personnel

West Vancouver Memorial Library

Weyerhouser Canada

Willowhaven Private Hospital

Zenith Foundation

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