GNWT RESPONSE TO THE STANDING COMMITTEE ON ACCOUNTABILITY AND OVERSIGHT REPORT 1-15(5) ON THE REVIEW OF THE 2004-2005 ANNUAL REPORT OF THE HUMAN RIGHTS COMMISSION

GNWT Response to 2004-2005 Recommendations

The NWT *Human Rights Act*[1] ("the Act") came into force in 2004. It provides authority to the Director of Human Rights to investigate complaints and refer them on to an Adjudication Panel for determination. The Adjudication Panel may issue orders to address discrimination in a particular complaint. The Human Rights Commission and the Director and Deputy Director of Human Rights, all appointed under the Act, report to the Speaker of the Legislative Assembly. There is no reporting relationship with any member of the Executive Council.

The Standing Committee on Accountability and Oversight (AOC) conducted a review of the *Northwest Territories Human Rights Commission Annual Report 2004-2005*, which covered the first nine months of work for the Commission. Among other things, the Annual Report recommended that the *Human Rights Act* be amended to allow the Adjudication Panel to order broad remedies, such as the implementation of policies or practices, to address systemic discrimination. It also recommended that the Act be amended to extend protection to individuals with "unrelated" criminal convictions, rather than limiting the protection to those who have pardoned criminal convictions.

The AOC recommended the GNWT review the implications and advisability of the two amendments suggested by the Human Rights Commission. The AOC also suggested the GNWT consider an amendment to change the word "sex" to "gender" in the Act.

The following is the GNWT's response to the recommendations contained in *Committee Report 1-15(5): Standing Committee on Accountability and Oversight Report on the Review of the 2004-2005 Annual Report of the Human Rights Commission.* For a number of reasons, set out more specifically below, the GNWT considers it inadvisable, at this point, to proceed with the amendments suggested by the Human Rights Commission.

Recommendations

1. **The Standing Committee on Accountability and Oversight recommends the GNWT review the implications and advisability of including systemic remedies in the *Human Rights Act* and report back on its findings in its response to this report.**

Response

At page 13 of its report, the Human Rights Commission recommended that the remedies under the Act be expanded "to allow an Adjudication Panel to order changes

[1] S.N.W.T. 2002, c. 18

in policies or practices, or to implement special programs to address systemic discrimination." Systemic discrimination is usually unintentional. It results from the application of practices, policies and procedures, none of which are intended to promote discrimination but which, through their operation, create barriers for certain groups. Although it can occur in any facet of society, it is most likely to arise in the employment context.

Systemic remedies are broad and extend beyond the context of a particular complaint. They may take the form of an order requiring an employer to ensure that all personnel receive training in disability and anti-racism awareness,[2] or the imposition of an employment equity program requiring, among other things, preferential hiring of women until a certain percentage of blue-collar positions are filled by females.[3] It could also take the form of an order requiring the GNWT to amend its own Affirmative Action policy.

The GNWT considers it inadvisable to amend the *Human Rights Act* to include the power to impose broad, systemic remedies. Although the Commission's report recommends that the power to grant systemic relief be provided to the Adjudication Panel, there is nothing in the report to indicate that there is a need to include this power. Systemic discrimination is currently prohibited by the Act,[4] and a complainant who proves systemic discrimination will be entitled to an appropriate remedy.[5] Further, the Adjudication Panel may currently make orders against the party or business complained of requiring it to cease activities that contravene the Act and to refrain in the future from committing the same or any similar contravention.[6]

Individuals, businesses and other organizations must comply with the *Human Rights Act.* If they breach the Act, systemically or otherwise, they are subject to a remedial order, which could, as noted above, require them to refrain from committing the same or similar contravention in future. In our view, the individual, business or other organization that is the subject of the order, is in the best position to determine how to change its policies and procedures to avoid future breaches of the *Human Rights Act.*

Finally, the imposition of systemic remedies will have significant cost implications, something that is, perhaps, less of a consideration in southern jurisdictions. A business that is ordered to provide specialized training to its employees, for example, may have to expend funds to bring in experts to provide it, if the service is not available here.

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[2] *Radek v. Henderson Development (Canada) Ltd.*[2005] BCHRT 302
[3] *Action Travail des Femmes v. Canadian National Railway Co. et. al.* [1987], 40 D.L.R. (4th) 193 (SCC)
[4] *supra,* note 1, section 6
[5] *supra,* note 1, subsection 62(3)
[6] *supra,* note 1, subsections 62(3)(a)(i) and (ii)

2. **The Standing Committee on Accountability and Oversight recommends the GNWT review the implications and advisability of amending the Human Rights Act to prohibit discrimination on the basis of unrelated criminal convictions and report back on its findings in its response to this report.**

Response

The Human Rights Commission also recommended that the Legislative Assembly amend the Act to expand the prohibition against discrimination on the basis of a pardoned criminal conviction to protection from discrimination on the basis of an "unrelated" criminal conviction. British Columbia, the Yukon and Québec all have provisions that prohibit discrimination on the basis of unrelated criminal convictions. In British Columbia and Québec, the protection is limited to employment or potential employment. In the Yukon, an exception to discrimination based on a criminal record is created where it is relevant to the person's employment. All other jurisdictions, and Canada, offer protection from discrimination only where the person has received a pardon.[7]

The GNWT has assessed the legal and practical implications of this change and considers it highly inadvisable for a number of reasons.

A pardon may be granted by the National Parole Board to individuals who have served their sentence and who have demonstrated that they are law-abiding citizens. An individual with a criminal record may apply for a pardon after a certain period of time has passed following the conclusion of their sentence.[8] The National Parole Board conducts its own investigation to determine whether the pardon should be granted. It can deny a pardon in the event it determines that the applicant has not displayed good or responsible conduct.

Currently, the *Human Rights Act* permits an employer to determine whether or not it will hire or continue to employ an individual who has a criminal conviction for which a pardon has not been granted. Many employers, including the GNWT, have a practice of requiring disclosure of an applicant's criminal record for certain positions. If the applicant has a record, then the employer will assess it and determine whether or not the criminal record should disqualify the applicant from further consideration, or continued employment, as the case may be. In doing so, the employer, presumably, takes into account their intimate and extensive knowledge of the particular business or industry. Arguably, for the reasons just noted, the employer is in the best position to do this.

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[7] Ontario prohibits discrimination based on convictions under provincial statutes and criminal convictions for which a pardon has been granted.

[8] The waiting period for *Criminal Code* and other Federal offences is 3 years for summary offences and 5 years for indictable offences.

The proposed amendment would remove the decision of what is "unrelated" from the employer, and put it into the hands of a third party, namely, the Human Rights Adjudication Panel. This would have significant legal, practical and financial consequences to businesses in the Northwest Territories. These consequences stem not only from the results of any such decision, but also from the process that would be used in getting to that decision.

Under the *Human Rights Act,* complaints are submitted to the Director of Human Rights, who causes them to be investigated. The GNWT's own experience has been that investigations can take up to a year to complete. Thereafter, parties are invited to make submissions to the investigator's findings and ultimately, the Director of Human Rights will determine whether the matter should proceed to a hearing of the Adjudication Panel. There is a very low threshold for determining whether something should proceed to a hearing, and most cases do. If the matter proceeds, then the employer must go through a hearing – these are complex, typically require the submission of documentary and oral evidence, and it is usually necessary to retain a lawyer. It is quite possible that by the end of the process, two years or more will have elapsed. In the meantime, there will have been a profound effect on the employer's ability to staff a position and carry on with its business. The employer will have paid money to lawyers and have taken time away from his or her business to attend to the complaint. While this is something that might be readily absorbed by a larger organization, many small businesses would not be able to do so.[9]

The majority of the case law on what constitutes an "unrelated" criminal conviction comes from British Columbia. Whether something is "unrelated" depends on all of the circumstances of the case, and at least one of the following:[10]

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

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[9] see, for example, *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Maksteel Québec Inc.* [2003] S.C.J. No. 68. The employer dismissed an employee who did not return to work after a period of approved leave because he was incarcerated. Although the employer was ultimately successful in proving the this was not discrimination, the case took over 6 years to resolve, starting at the human rights adjudication panel level, through the court of appeal and, ultimately, to the Supreme Court of Canada.

[10] as cited in *Dunphy v. B.C. (Ministry of Public Safety and Solicitor General),* 2005 BCHRT 3

While an employer may consider all of these factors, it would, potentially, be open to the Adjudication Panel to substitute its own views. These circumstances would lead to uncertainty and, in some cases, undesirable results. For example, in *Laurio v. Okanagan's Finest Foods Inc.*[11] the adjudicator made the following comment:

> "Although I have found that the respondents did not discriminate against Mr. Laurio ... they could have handled the incident differently. Mr. Laurio, even though he has been convicted of a criminal offence, is still entitled to work. ... Mr. Laurio went to a place where he thought he had a job. He was setting up tables and setting them before he was removed from the premises. His criminal convictions were for possession and trafficking of drugs, which had nothing to do with the work he was performing, which can only be described as service-type work ... "

There are many who would consider work within the hospitality industry might provide excellent opportunities to network with criminal elements, and that loyalty of clientele of an establishment could be tested should they become aware that their server has a conviction for trafficking in narcotics.

In summary, whether a criminal conviction is "unrelated" to a particular job or detrimental in a particular business is subjective. It is for the employer, who has all of the facts and knows their business and industry, to determine whether a particular criminal conviction makes an applicant or an employee, as the case may be, unsuitable. The current provision – which prohibits discrimination based on criminal conviction only where the person has been granted a pardon from the National Parole Board – offers certainty and finality that cannot be achieved by substituting the term "unrelated".

Suggestion

The Committee suggests the Government consider bringing forward an amendment to the Act to change the word "sex" to "gender", which is in its opinion a less confusing and more appropriate term.

Response

The wording used in the *Human Rights Act* is intentional and cannot be altered without changing the meaning and intention of the legislation. The words "sex" and "gender" may appear to be interchangeable, but the word "sex" is the recognized legal term: "sex" in this context holds a biological meaning, whereas "gender" carries a societal meaning that may have problematic legal consequences. Therefore, this wording change is considered inadvisable.

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[11] [2006] B.C.H.R.T.D. No. 199 at paragraph 37