NATIONAL ACTION COMMITTEE ON THE STATUS OF WOMEN

presentation to the

STANDING COMMITTEE ON JUSTICE AND LEGAL AFFAIRS

and

CABINET OF THE GOVERNMENT OF CANADA

April 26 , 1977

OTTAWA

SUMMARY OF POINTS IN BRIEF

We are pleased to have the opportunity to present our views to you today. Thank you for your interest. To summarize the points we will be dealing with I would like to draw your attention to the index.

In the section on jurisdiction, we comment on the transfer of jurisdiction of employment complaints from the Department of Labour to the Human Rights Commission and the relationship between the Commission and other investigatory agencies of the federal government.

In the section on Discriminatory Practices, we comment primarily on the sections relating to equal opportunity and equal remuneration. We are very pleased that Bill C-72 was amended to include equal pay for work of equal value in Bill C-25. However, this formulation was first suggested in 1951 by the International Labour Organization and was ratified by Canada in 1972. We are deeply concerned that,now that the ratification is being acted upon, it be enacted in a form that lends to strong enforcement rather than a costly stream of civil litigation to clarify interpretation.

We are also disturbed by the use of the broad term "bona fide occupational requirement".

The next section on Grounds of Discrimination includes our recommendation that two new grounds be added, that of sexual orientation and that of political affiliation as well as our recommendation that two classes of people be covered by the Bill - Indian women who have lost their status and illegal immigrants.

In the Enforcement section, we comment on the need to make complaints in employment cases more accessible and efficient by streamlining the procedure to avoid the formal conciliation stage, shifting the onus to the employer, and including the creation of affirmative action programs as part of the award where employers are found guilty of discrimination.

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Complaint procedures should provide mandatory directions to the Commission rather than discretionary. Availability of another remedy should not preclude a remedy under the Canadian Human Rights Act and third party complaints should truly protect the anonymity of complainants in employment situations. Class actions should be introduced for employment complaints, to avoid multiplicity of actions.

Generally, as well as the establishment of affirmative action programs, we would like to see the Commission have the power to levy exemplary fines. We would also like to see funds channelled at the beginning to special projects relating to the status of women, including inquiries into the status of immigrant and visible minority women.

In our section on Privacy, we have limited our remarks to a brief comment as to how the section could or should relate to the status of women and the enforcement of women's right to privacy. We have not studied this section in great depth and leave it to other associations to present their more thorough investigations. We have included in Appendix I a summary of a brief on section 52 of the Bill, which has been submitted to this Committee. It demonstrates the narrow entitlement created in Section 52.

Appendix II includes our worry that in the interim period some of our rights will in effect be taken away. There is a gap in the legislation. It does not provide for continued coverage in discrimination in employment cases.

Finally, at the back of our brief, you will find a Summary of our Recommendations. Those relating to employment are distinguished from other recommendations by the italic script they are typed in.

With this brief introduction, I would like to clarify and expand on the points we wish to raise with you today.

NAC Spokespersons

April, 1977

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	Ruth Bell
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Introduction

The National Action Committee on the Status of Women grew from the Committee for the Equality of Women in Canada (1966) which mounted a national lobby leading to the establishment of the Royal Commission on the Status of Women.

We are an umbrella organization composed of 110 separate organizations across Canada which support our purposes. The combined membership of these organizations is approximately five million.

Our purposes are:

> to press for the implementation of the recommendations of the Royal Commission on the Status of Women and for additional reforms supported by the participating organizations
>
> and
>
> to encourage communication between organizations, local groups and individuals working to improve the Status of Women in Canada.

We held our Annual Conference in Ottawa on March 18-21, 1977. We updated our position on the *Canadian Human Rights Act* and asked for an oral hearing before this Standing

Bill C-72 (1975)

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Committee on Justice and Legal Affairs because we represent the largest number of voluntary women's groups in Canada. We represent women of all races, political beliefs and ages.

We believe that a constitutionally entrenched Bill of Rights would be the best protection against discrimination, in combination with the amended Canadian Human Rights Act.

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Jurisdiction

The National Action Committee has followed the federal Human Rights legislation since it was first proposed in the form of Bill C-72. At present, employment legislation falls under the Canada Labour Code, the Public Service Staff Relations Act and the Public Service Superannuation Act. Section 66, 67 and 68 of Bill C-25 transfer the jurisdiction over discrimination in employment to the Canadian Human Rights Commission. The Minister of Justice in his statement of March 10, 1977 indicated that the government is endeavouring to bring all federal anti-discrimination laws together in one statute with the stated goal of making this law as comprehensive and effective as possible. It should cover all federal government employees.

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S. 67
S. 68

When the National Action Committee took the stand, following Bill C-72, that employment legislation more properly belonged under the umbrella of the Canada Labour Code, we were expressing two concerns: first, that a comprehensive labour code is more readily available to and more easily understood by the layperson and second, that strong enforcement pro-

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cedures are required for complaints relating to discrimination in the work place.

The National Action Committee on the Status of Women is willing to test this new legislation, but remains concerned that a clear distinction be made between discrimination in employment practices on the one hand and discrimination in the areas of federally regulated services, facilities and accomodations, on the other. The first requires a deterrent approach while conciliation is more appropriate for
S. 37 the latter. The procedures for conciliation in sections 37 should not be applicable for employment cases and the information obtained in the investigation under
S. 35 section 35 should be present as evidence directly to
S. 40 the Tribunal as described in section 40. Another
S. 38 investigation should not be necessary. Section 38 provides a route should a settlement be reached, in the interim. Such a settlement should be enforceable. The transfer of jurisdiction from labour legislation to human rights legislation should not obscure the difference between employment cases and those involving services, facilities and accommodations, as in the one case, the discriminating party benefits economically

from the discriminatory practice and in the other case, the discriminating party loses economically from the discriminatory practice.

The consequence of our concern to preserve this distinction has ramifications for more than the procedure of enforcement. For example, section

S.66(2) 66(2) of the Act provides that an inspector under the Canada Labour Code "may" notify the Commission of a possible discriminatory practice. This should read "shall". Where the inspector has made a

S. 11 report demonstrating a breach of section 11 of the Human Rights Act, such report should have status

S. 35 equivalent to an investigation under sections 35

S. 36 and 36. This would avoid duplication of investigations where practical.

Other laws Another example of a body which receives financial information in the course of an investigation is the Anti-Inflation Board. The Board should be compelled to refer by way of report to the Human Rights Commission any information on discriminatory practices received from their investigations. We learned from Vice Chairperson June Menzies of the Anti-Inflation Board that the Board does not presently require a breakdown of male/female earnings. The lack of such information

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prevents the Board from monitoring the employment situations for breaches of the current prohibition found in the Canada Labour Code. We have recommended to Cabinet that the forms and computer studies being used by the AIB include this crucial information. Their report could then have the status of an investigation under

s.11 section 11. (See Appendix II)

Where present legislation is not brought into line or is in conflict with the Human Rights Act, Bill C-25 should be paramount. For example, the Anti-Inflation Act permits an exemption from the guidelines where payments are made to remedy sex discrimination. There are two problems which could be remedied by the paramountcy of Bill C-25. First, the Anti-Inflation Board restricts this exemption to permit payments where discrimination is shown on the basis of the outdated concept of equal pay for equal work. The AIB should be directed by Parliament to change regulations and practice to harmonize with the concept in Bill C-25, that is, equal pay for work of equal value.

Second, the exemption is a voluntary one on the part of the employer. This is inconsistent with the prohibition against unequal wages for equal work now in the Canada

Labour Code, as well as with the discriminatory practice defined in section 11 of Bill C-25. Where such a practice is found by a body other than the Human Rights Commission, the case must be referred to the Commission and the remedy compulsory, not voluntary.

Discriminatory Practices

The discriminatory practices in employment are defined
s. 7-11 in sections 7, 8, 9, 10 and 11. Only section 11 limits the prohibited ground of discrimination to that of sex.
s. 3 The grounds should be extended to all grounds in section 3.

In the decade from 1965 to 1975 the gap between women's income and men's income has been increasing and on the average women earn 55% of wages men earn. It is clearly profitable to pay women cheaper remuneration than men either for the same work or for work of equal value. Women suffer unjust hardship from this discrimination, inherent in the market force. Many excuses are put forward to justify this economic discrimination.

The National Action Committee commends the Government for amending Bill C-72 to include in Bill C-25 the

equal pay for work of equal value formulation. However, Parliament should not take away with one hand what it gives with the other.

WE RECOMMEND THAT THE EQUAL PAY FOR WORK OF EQUAL VALUE PROVISION BE STRENGTHENED AND THAT THERE BE LIMITED EXCEPTIONS.

The Minister of Justice has suggested that we place "faith" in the Commission to define exemptions by way of regulations. He has further stated that it is impossible to devise an
s. 11(3) exhaustive list within section 11(3) foreseeing all underlying possible reasonable factors which may justify a difference in pay. We cannot stress enough how firmly opposed we are to this position. We do not accept the "flexibility" argument. The strongest legislation would provide for no exceptions. If exceptions are to be allowed they must be specified. Only seniority and incentive work are acceptable exclusions. Any reasonable factors that justify the difference in wages can be quantified under the four recognized factors of skill, effort, responsibility and working conditions. Other factors would be an open invitation to employers to evade the law.

Since Bill C-206 (1973), NAC has argued that equal remuneration must include pension benefits. It is meaningless to enforce equal wages if the inequality can

be preserved through unequal fringe benefits, such as pension plan benefits, medical insurance benefits, insurance benefits, sickness/accident benefits,

S. 17 long-term disability benefits.* Section 17 and

S. 18 especially section 18, provide a loophole for such continued discrimination, for example, by allowing actuarial costs as an excuse for discrimination in

S. 17 pension plans. Section 17 is open to the interpretation that secretaries (mostly women) could get different and less pension benefits than truckers (mostly men).

Secondly, equal remuneration must be enforceable. If,

S.11(3) as in subsection 11(3), a broad exception is specifically stated, it renders the prohibition meaningless. The exception is, in fact, so broad that the drafters

S.11(4) felt it was necessary to point out in subsection 11(4), that the factor of sex itself was not a reasonable factor.

Economic discrimination has many faces but the two areas covered in Bill C-25 are equal remuneration and equal opportunity. Legislation must enforce the requirement of equal remuneration regardless of sex but equal

*Note that the Anti-Inflation Guidelines accept this principle by including all compensation in the definition of "wage".

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opportunity must also be available so that women have access to the same jobs as men or jobs of equal value to the employer.

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S. 68

Section 14 provides for equal opportunity but a problem arises in the working of the exception in section 14. For example, is the preference of co-workers a "bona fide" requirement?

The United Kingdom legislation provides a model for such exceptions, for example:

> ... where the nature of the job requires a man or woman for reasons of physiology or authenticity (modelling or acting) or privacy (lavatory attendant)...

A minimum requirement is a direction to the Commission that the exceptions are to receive a narrow interpretation, because a bona fide occupational requirement could otherwise be interpreted as:

(i) the refusal to hire an individual based on stereotyped characterizations of a certain class of individuals.

(ii) the refusal to hire an individual based on assumptions about the comparative employment characteristics of a certain class of individuals in general.

(iii) the refusal to hire an individual because of the preference of co-workers, employer, clients or customers.

(iv) the refusal to hire an individual because of

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the exposure to physical danger or adverse working conditions.

(v) the refusal to hire a member of one class of individuals because it would be more costly than to hire the members of another class of individuals.

ANTI-DISCRIMINATION LEGISLATION MUST CLEARLY PROHIBIT DISCRIMINATION AND NONE OF THE TEXT SHOULD CONTRADICT THIS BASIC PRINCIPLE.

Equal opportunity and equal remuneration are principles that should apply when the employer is the Government. The Government should be subject to its own legislation. There is no valid reason for exempting Parliament as

S. 48 an employer as provided in section 48. If there were an entrenched Bill of Rights, such an exception would not be permitted. It should also apply when the same employer has more than one establishment (e.g. two branches of a Bank).

S.11(1) WE RECOMMEND THAT SECTION 11(1) OF BILL C-25 BE REVISED TO READ "EMPLOYED BY THE SAME EMPLOYER" RATHER THAN "EMPLOYED IN THE SAME ESTABLISHMENT", TO ENSURE THAT THE INTENT OF THE LAW CAN TRULY BE APPLIED AND THAT THE HUMAN RIGHTS COMMISSION BE EMPOWERED TO DETERMINE THAT MORE THAN ONE ESTABLISHMENT IS CONTROLLED BY THE SAME EMPLOYER WHERE DEVICES SUCH AS THE CORPORATE VEIL, DIFFERING BUSINESS NAMES AND OTHER MECHANISMS, ARE USED FOR THE PURPOSE OF AVOIDING COMPLIANCE WITH THE SPIRIT AND INTENTION OF THE ACT.

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Grounds of Discrimination

"Sexual preference" or "sexual orientation" should be a prohibited ground of discrimination. If consenting adults are not prohibited from exercising their freedom of choice with regard to sexual preference, then such freedom to be meaningful, must extend to prohibition of economic discrimination especially, but also of curtailling access to services, facilities and accommodation.

S. 3

WE RECOMMEND THE INCLUSION OF "SEXUAL ORIENTATION" IN SECTION 3.

WE RECOMMEND THAT POLITICAL AFFILIATION BE INCLUDED AS A PROHIBITED GROUND IN SECTION 3.

These prohibitions should apply to protect Indian women, especially in employment situations.

S.63(2)

WE RECOMMEND THE DELETION OF SECTION 63(2) WHICH EXCLUDES THE OPERATION OF THE ACT WITH RESPECT TO INDIAN WOMEN.

These prohibitions should apply to protect illegal immigrants, especially in employment situations. Illegal immigrants will be deported or penalized under the Immigration Act. Like Indian women,

they should not be open to special exploitation at the workplace because of their status under a different statute. (amend section 32(5))

S.32(5)

WE RECOMMEND THAT THE BILL NOT EXCLUDE ILLEGAL IMMIGRANTS FROM ITS AUTHORITY.

Enforcement

A) In Employment Complaints:

(i) WE RECOMMEND THAT THE FORMAL CONCILIATION STAGE BE DELETED, AND THAT WHERE THE ORIGINAL INVESTIGATOR IS UNABLE TO EFFECT A SETTLEMENT, THE COMPLAINT GO DIRECTLY TO THE TRIBUNAL.

S.41(2)

(ii) WE RECOMMEND THAT SECTION 41(2) (a) OF BILL C-25 BE STRENGTHENED TO EMPOWER THE TRIBUNAL TO REQUIRE AN AFFIRMATIVE ACTION PROGRAM BY AN EMPLOYER, WHERE THE EMPLOYER HAS BEEN FOUND TO BE GUILTY OF DISCRIMINATION.

(iii) The Minister has agreed to the concept of onus on the employer but this is not expressly stated in the Bill C-25. Such a change from normal practice should be clearly stated.

WE RECOMMEND THAT THE ONUS BE SPECIFICALLY EXPRESSED TO BE ON THE EMPLOYER TO PROVE NON-DISCRIMINATION.

(see Section 4a of the Ontario Labour Relations Act, where it provides that:

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"the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or the employers' organization")

B) Complaint Procedures:

Rights under Bill C-25 should be independent of other rights, and should provide the complainant with a hearing.

(i) WE RECOMMEND THAT THE REMEDY UNDER BILL C-25 BE AVAILABLE WHETHER OR NOT ANOTHER REMEDY EXISTS AND THEREFORE THE DELETION OF SECTION 33(a) AND 33(b)(i) AND 33 (b) (iii) AND THAT IN SECTION 35(1) "MAY" BE CHANGED TO "SHALL".

S.33(a)
S.33(b)(i)
S.33(b)(iii)
S.35(1)

(ii) In employment cases, the problem of intimidation is a serious one. A general principle of minimum standards legislation is that, once an employer is found in breach of a standard, the minimum standard must be met. Employees who wish to exercise their right to a minimum standard should not be subject to the harrassments and intimidation which may well result from a complaint, especially in a non-unionized workplace. Third party complaints by an organization or by legal counsel, for example, could afford the protection of anonymity.

WE RECOMMEND THAT THERE BE PROVISION FOR THIRD PARTY COMPLAINTS AND THE PROTECTION OF ANONYMITY IN EMPLOYMENT CASES (amend section 32(2)).

S.32(2)

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(iii) Multiplicity of proceedings with one employer should be avoided.

WE RECOMMEND THAT THERE BE PROVISION FOR CLASS ACTIONS, ESPECIALLY IN EMPLOYMENT CASES.

C) General:

The National Action Committee envisages a more active role for the Commission than Bill C-25 provides.

The Royal Commission on the Status of Women recommended that:

> We recommend that (a) federal...Human Rights Commission be set up that would a) be directly responsible to Parliament.... b) have power to investigate the administration of human rights legislation as well as the power to enforce the law by laying charges and prosecuting offenders, c) include within the organization for a period of seven to ten years a division dealing specifically with the protection of women's rights, and d) suggest changes in Human Rights Legislation and promote widespread respect for human rights.

WE RECOMMEND

S.41(2)(a) (i) THAT SECTION 41(2)(a) BE STRENGTHENED TO EMPOWER THE TRIBUNAL TO REQUIRE AN AFFIRMATIVE ACTION PROGRAM WHERE AN EMPLOYER HAS BEEN FOUND GUILTY OF DISCRIMINATION.

(ii) THAT EXEMPLARY FINES BE LEVIED WHERE AN EMPLOYER HAS BEEN FOUND GUILTY OF DISCRIMINATION.

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(iii) THAT THE HUMAN RIGHTS ACT PROVIDE FOR A DIRECTION TO ALL FIRMS, AGENCIES, COMPANIES AND MINES IN FEDERAL JURISDICTION, OR WHO RECEIVE FEDERAL SUBSIDIES AND CONTRACTS TO EMPLOY WOMEN AND MINORITY GROUP PERSONS IN PROPORTION TO THEIR AVAILABILITY.

We disagree with three separate levels of discretionary investigation especially when officers at one level may not be able to testify or make their information

S. 27 available to another level. (section 27)

Finally, WE RECOMMEND THAT

(iv) THE FEDERAL HUMAN RIGHTS COMMISSION, ONCE IT IS ESTABLISHED,CONDUCT AN INQUIRY TO EXAMINE IN DEPTH THE SOCIO-ECONOMIC PROBLEMS AND PROBLEMS OF DISCRIMINATION FACED BY VISIBLE MINORITY WOMEN AND BY IMMIGRANT WOMEN, ESPECIALLY FIRST GENERATION IMMIGRANT WOMEN.

S. 69 We would also urge that the Act will take effect as soon as it is passed and that time limits will be set for the appointment of Commissioners. We have waited many years for this legislation and would like to see it in effect as soon as possible. (See Appendix II)

We urge that the male-female ratio of Commissioners will reflect the ratio in the general population.

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Privacy

A final comment on the privacy section of Bill C-25. Although we have not studied that part in detail, we wish to comment that the definition of privacy is a very narrow one indeed. By narrowly defining the right of privacy, other rights are excluded. (see Appendix I, for comments on section 52(2), (3))

S.52(2)
S.52(3)

The National Action Committee on the Status of Women feels that there should be more than personal information protected.

Article 12 of the Universal Declaration of Human Rights (passed in 1948) provides a model clause:

> "No one shall be subjected to arbitrary interference with his (or her) privacy, family, home or correspondance, nor attacks upon his (or her) honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

The Federal Government could enact this general principle, for application in the federal jurisdiction. The National Action Committee supports the principle of freedom to choose with respect to family planning, including abortion. Any legislation protecting privacy should encompass such a right to choose.

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This is in keeping with our position that section 251 of the Criminal Code should be repealed, and all reference to abortion be removed from the Criminal Code. We would like to see the Badgley Report referred to this committee for review leading to debate.

Conclusion

We believe, in the long run, that a constitutionally entrenched Bill of Rights would be the best protection against discrimination. We urge the Government to continue its efforts in that direction.

In the meantine, the National Action Committee is pleased to see federal legislation on human rights and hopes that Bill C-25 will be passed in a strengthened form, hopefully incorporating the Amendments we have suggested.

APPENDIX I

A SUMMARY OF THE SUBMISSION TO THE STANDING COMMITTEE ON JUSTICE AND LEGAL AFFAIRS

by Philip Gibson, student at the University of Ottawa, Common Law Section, member of the Ottawa Women and Law Association

Re: Section 52 (2) and (3)

1. Meaning of s. 52(2).

Generally, this section provides a restricted right to consent to the use of personal information provided to a government institution for a reason other than that for which it was authorized. Translation:
" I have the right to consent to the use of personal information I gave to certain listed government organizations if:
i) it is to be used to make a decision directly affecting another individual, and
ii) the Minister thinks it is otherwise illegal for the information to be used that way.
By implication, I have no other right to control the use of any other information the government may have about me."

2. Enforcement, and s. 52(3).

There is no method of enforcement. The Privacy Commissioner makes recommendations only. No body is competent to decide if there has been a breach. The government institution alone decides if notice must be sent to the individual, and provides merely for notice in writing. If a written notice is not received from the individual within a time limit, that person is deemed to consent to the use of the information.

(Appendix I)

Conclusion

Part IV does not deliver the protection of privacy promised in the preamble of Bill C-25. It creates an illusion of protection.

Only a strong and enforceable enactment of both a right to privacy and freedom of information will suffice.

Recommendations *

1. THAT PART IV OF BILL C-25 BE DELETED;
2. THAT THIS STANDING COMMITTEE PREPARE A "RIGHT TO PRIVACY AND FREEDOM OF INFORMATION BILL" CONTAINING AT LEAST THE FOLLOWING PROVISIONS:
   i) A STATEMENT OF A RIGHT TO PRIVACY
   ii) A STATEMENT THAT ALL INFORMATION IS PUBLIC, UNLESS EXCEPTED
   iii) NARROWLY DRAFTED EXCEPTIONS
   iv) AN INDEPENDENT TRIBUNAL TO DETERMINE DISPUTES ON ALL MATTERS RELATING TO PRIVACY AND FREEDOM OF INFORMATION INCLUDING HAVING THE RIGHT TO EXAMINE ALL INFORMATION
   v) THE REPEAL OF s.41(2) OF THE FEDERAL COURT ACT.

* These are the recommendations of P. Gibson and have not been endorsed by a NAC Committee or Annual Meeting.

SUMMARY OF RECOMMENDATIONS

(over)

Appendix II

Re: Section 69

The whole of the Bill should be brought into effect immediately upon Royal Assent, otherwise there will be a gap in the protection against discrimination in wages or salaries. The Canada Labour Code will no longer contain a prohibition against unequal wages for equal work, and the equal pay for work of equal value provision of the Canadian Human Rights Act will not be enforceable.

The right to lay a complaint in employment situations should be preserved and should arise at the time of Royal Assent. The Department of Labour could be made responsible for investigations and enforcement during the interim. This could be accomplished by an Order-In-Council pursuant to
S. 22(3) section 22 (3) making the Department of Labour the interim enforcement mechanism.

Similarly, other information-gathering agencies, especially the Anti-Inflation Board, should be directed to refer for investigation those cases where it appears that differences in wages are based on sex.