

Making Ontario's Human Rights Commission work

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Authorized for distribution:

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Introduction

Last year, the Ministry of the Attorney General began preparing a blueprint to reform the human rights system in Ontario. Since then, the Attorney General and his staff have met with a number of stakeholders, including the Ontario Public Service Employees Union (OPSEU).

OPSEU represents the frontline workers of the Ontario Human Rights Commission (OHRC), including support and administrative staff, inquiry service representatives, intake officers, mediators, and investigations officers. OPSEU's membership is as diverse as the population of Ontario and has a long history of involvement in social justice and human rights issues.

Over the past year, OPSEU held roundtable discussions with legal clinics and community-based organizations representing racialized communities, lesbian, gay, bisexual and trans-gendered peoples, and people with disabilities – those most often in need of the Ontario Human Rights Commission. These discussions dealt with the needs of the communities, their experiences with the Commission and the barriers they face.

The following report represents OPSEU's position on reforming Ontario's human rights system, based on the round table discussions and years of frontline experience working for the OHRC.

Executive summary

The Human Rights Commission has a public interest mandate to prevent and eliminate discrimination in Ontario.

There is no doubt that the Commission is effective in several key respects:

- more than half of all complaints brought to the Commission are resolved without having to resort to lengthy and expensive hearings
- ensures resolutions and decisions of the Human Rights Tribunal of Ontario (Tribunal) benefit all of society and not just the individual
- advances human rights law through progressive policy development and the litigation of individual and systemic complaints
- provides equal access to all members of the public, particularly low-income persons, because its services are free

However, a lack of adequate funding has led to:

- barriers in filing complaints
- delays in investigating complaints
- compromised quality in some settlements and investigations

- inadequate preventative measures, such as public education

Some lawyers in Ontario are proposing that the Commission's mediation, investigation and litigation functions be abolished or significantly reduced. They are advocating complaints of human rights violations should proceed directly to the Tribunal.

OPSEU strongly opposes the adoption of any form of direct access system. Instead of resolving the problems in the current system direct access would undercut public interest, increase costs, financially benefit lawyers and create a barrier for low-income citizens to access the resolution process. Direct access systems in other jurisdictions such as B.C., are far less effective in preventing and eliminating discrimination. Abolishing or diminishing the Commission is not a solution to problems created by years of under funding.

OPSEU also believes the consultation process engaged by the Attorney General's office must be more open and transparent. Concerns were continually raised in the community-based roundtable discussion about an imbalance in the consultation process. It was felt the legal community, many of whom will benefit financially under a direct access system, were receiving privileged access to the Minister and his staff. At the same time they felt the perspective of grassroots human rights and social justice organizations was not being heard.

Recommendations

OPSEU recommends that the following reforms be implemented to strengthen the system to protect and promote human rights in Ontario:

1. The government should amend the Ontario Human Rights Code (*Code*) to make the Commission truly independent. The Commission should be made an independent office of the legislature and report directly to the legislature, not a government ministry.
2. The government should amend the *Code* to ensure that all appointees to the Commission and the Tribunal are experts in human rights. Commissioners and Tribunal members should be selected by an all-party committee of the legislature, not the Cabinet, and the *Code* should require that they be experts in the field of human rights.
3. The government should provide additional funding and resources to achieve the following:
 - Significantly reduce processing time of complaints. Mediations should be completed within three months, complex investigations should be completed within one year, and Tribunal decisions should be rendered within two years of the filing of the complaint.
 - Procedures to ensure that complaints involving minimal investigation, crisis situations, and significant public interest issues are fast-tracked through the system.

- The implementation of a long-term plan to prevent discrimination and reduce the number of individual complaints. The plan should include a significant increase in the number of Commission-initiated complaints, public education activities and other systemic initiatives.
 - Guaranteed interpretation services for parties who communicate in languages other than English or French.
4. The government should not adopt any kind of direct access system in Ontario. The implementation of such a model will privatize the human rights system, undercut the public interest, be more expensive, and benefit lawyers rather than complainants.
 5. The government should have a province-wide consultation on reforming the human rights system in Ontario, which is open, transparent and accessible.

Why was the Ontario Human Rights Commission established?

Until the mid-1940's Ontario had no laws protecting people against discrimination. Any claims brought before the courts were rejected on the grounds that discrimination was neither illegal nor contrary to public policy. For example, in 1924, a court rejected the claim of a black man who was refused service in a restaurant in London, Ontario because of his colour, on the basis that he had no right of action.¹

In the 1940's and 1950's, the Ontario government passed a series of anti-discrimination laws. These laws banned discriminatory signs or other representations; outlawed paying female employees less than male employees for the same work; and outlawed discrimination in hiring, access to public places and access to rental accommodation.

Although these laws prohibited various forms of discrimination, the number of complaints and prosecutions were small. The law prohibiting discriminatory signs required that an offence be proven beyond a reasonable doubt, which made claims difficult to prove. The other laws were administered and enforced by a government ministry, which was hampered by a lack of expertise in human rights and political interference.

In 1962, following lobbying by Black and Jewish activists, civil liberties organizations and organized labour, the government passed the Ontario Human Rights Code (*Code*), which consolidated previous anti-discrimination legislation. The Ontario Human Rights Commission was created and given a mandate to administer and enforce the *Code*. These changes were strongly supported by human rights advocates. The number of complaints increased significantly as a result of clear laws and a more accessible system. As a result Ontario is a world leader in human rights.

¹ *Franklin v. Evans* (1924) 55 OLR 349 (KB).

What is the mandate of the Ontario Human Rights Commission?

The Commission has a public interest mandate to prevent and eliminate discrimination in Ontario. That mandate has developed and expanded considerably over the years.

The *Code* prohibits discrimination in the areas of services, goods and facilities; employment; housing; contracts; and membership in vocational associations and trade unions. The *Code* prohibits discrimination based on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, same sex partnership status, family status, disability, receipt of public assistance (housing only) and record of offences (employment only).

The *Code* is quasi-constitutional in nature, and therefore, has primacy over most other laws in Ontario. It is also remedial, rather than punitive, and provides for civil remedies, rather than criminal penalties. In other words, the *Code* seeks to remedy discrimination, through financial compensation and changes in practice, rather than punishment of perpetrators. The standard for proving a discrimination complaint at the Tribunal is a “balance of probabilities” rather than the more stringent “beyond a reasonable doubt”.

Other important elements of the Commission’s mandate are:

- The Commission protects and promotes human rights through integrated functions of mediation, investigation, conciliation, litigation, policy development and public education.
- The Commission represents the public interest in the performance of all its functions because discrimination affects society as a whole, not only the parties involved.
- The Commission maintains an unbiased position in relation to the parties when it performs its mediation and investigation functions. Thus, while the Commission does not advocate for either the complainant or the respondent, it is an advocate for the *Code* and for advancing human rights in Ontario.
- If the Commission refers a complaint to the Tribunal, it then carries and litigates the complaint in the public interest before the Tribunal.
- The Commission’s services are provided free of charge to members of the public.
- The Commission has specialized expertise in human rights, including in the areas of anti-racism, gender discrimination, sexual harassment, LGBT issues, disability issues, age discrimination, and the challenges facing low-income families in Ontario.
- The Commission is an independent agency, operating at arms length from the government.

How does Ontario's human rights system work?

i. Accountability and structure

The Commission reports to the Attorney General and is accountable to the Ontario Legislature through him or her.

The Cabinet appoints no less than seven Commissioners, including the Chief Commissioner. The Commissioners meet regularly to review cases and make decisions on whether or not to proceed with complaints, refer complaints to the Tribunal for a hearing, and approve settlements. The Commissioners also direct policy and public education on human rights in Ontario.

Staff in the Commission's various offices perform the day-to-day work, including reception; inquiry and intake; mediation; investigation; reconsideration; legal; policy and education.

i. Inquiry and intake

Members of the public who want to find out about their rights or obligations under the *Code* first make contact with the Commission's Inquiry and Intake Unit, which is centralized in Toronto. Most people call a toll-free Inquiry Line.

In the 2004-2005 fiscal year, the Unit's inquiry staff received 60,698 telephone calls, 1,648 written inquiries, and 886 in-person inquiries. In addition to performing a public education function, the Unit's intake staff opened 2,399 formal complaints, served each complaint on the named respondent, and requested the respondent to provide a formal answer to the complaint.

ii. Limited early dismissal

The case is then sent to the Commission's Mediation Office, where requests for early dismissal of the complaint, pursuant to Section 34 of the *Code*, are processed. Either the respondent or Commission staff initiate such requests.

Section 34 provides the Commission with the discretion to decide on whether or not to proceed with a complaint in four limited situations, namely when the complaint:

- a. could be dealt with more appropriately under other legislation
- b. is trivial, frivolous, vexatious or made in bad faith
- c. is not within the Commission's jurisdiction
- d. is filed more than six months after the last alleged incident of discrimination unless the delay was incurred in good faith and no substantial prejudice will result to the respondent.

Commission staff disclose a case analysis report to the parties recommending either dealing with or not dealing with the complaint and the parties are given a chance to respond before a decision is made by the Commissioners.

iii. Mediation

The Mediation Office also provides the parties with a voluntary and early opportunity to resolve the complaint through mediation. The Mediation Officer assists the parties in reaching a resolution, which satisfies both the parties and the Commission. **In the 2004-2005 fiscal year, the mediation settlement rate was 73%.**

iv. Investigation

If mediation does not take place or is unsuccessful, or if the Section 34 recommendation to deal with the complaint is followed by the Commissioners, the case is sent to the Investigation Office.

An Investigation Officer interviews the parties and witnesses and collects information and documents that may be relevant to the complaint. The *Code* gives Investigation Officers the power to access premises and to collect the relevant evidence. At the end of the investigation, the Investigation Officer reviews the findings of the investigation with the parties, and attempts to settle the case through conciliation.

If conciliation is unsuccessful, the Investigation Officer discloses a case analysis report to the parties. The report summarizes the evidence and recommends either referring or not referring the complaint to the Tribunal. The recommendation is based on whether or not there is sufficient evidence of discrimination to prove any of the complainant's allegations at the Tribunal.

v. Commission decision

Commission staff submit all reports with recommendations to the Commissioners for decisions.

The Commission is obliged to follow rules of procedural fairness in its decision-making. As such, the parties have the right to send written submissions to the Commissioners explaining why they agree or disagree with the report and recommendation made by Commission staff. The Commissioners make their decision based on the complaint, the answer to the complaint, Commission staff's report, the submissions of the parties and input from the Commission's Policy and Public Education Branch and Legal Services Branch.

vi. Breakdown of case closures

In the 2004-2005 fiscal year, the Commission closed 2,215 complaints. The majority of complaints were settled or resolved. The breakdown of closures may be summarized as follows:

- 998 (45.08%) were settled through mediation or conciliation
- 261 (11.79%) were resolved in some other manner
- 320 (14.45%) were withdrawn by the complainant
- 28 (1.26%) were closed because of a failure to provide evidence
- 196 (8.85%) were not dealt with pursuant to Section 34 of the *Code*
- 262 (11.83%) were dismissed because of insufficient evidence of discrimination
- 150 (6.73%) were referred to the Tribunal because of sufficient evidence of discrimination

vii. Reconsideration

Only the complainant has a right to request that the Commission reconsider its decision. The complainant's application for reconsideration is sent to the respondent for a reply. A Reconsideration Officer will investigate where appropriate and prepare a report with a recommendation to uphold or reverse the Commission's original decision. The process for disclosure of the report to the parties and providing the parties' submissions to the Commissioners is the same as in the original process. The Commissioners' decision is final. Either party may file an application for judicial review to the courts, but there is no right of appeal.

viii. Litigation

A lawyer from the Commission's Legal Services Branch will litigate a complaint that the Commission has referred to the Tribunal.

The Tribunal is a quasi-judicial, independent agency, which is separate from the Commission. The Commission, the complainant and the respondent all appear before the Tribunal as separate parties. The Commission represents the public interest, not the complainant, but in practice, the complainant often agrees with the Commission's litigation strategy and submissions.

The Tribunal is usually composed of one person, who hears evidence and decides whether or not discrimination occurred. The standard of proof is a balance of probabilities, which means that the Tribunal must find that it was more probable than not that the complainant's allegations are true in order to decide that discrimination occurred. In such cases, the Tribunal can order the respondent to financially compensate the complainant and change its practices.

Any of the parties – the Commission, the complainant or the respondent – can appeal the Tribunal's decision to the courts.

The vast majority of complaints before the Tribunal are settled. In the 2004-2005 fiscal year, the Tribunal made six final decisions (two complaints were successful and four complaints were dismissed) and 17 interim or ancillary decisions, and there were 43 settlements.

The Legal Services Branch of the Commission was also involved in 14 cases, mainly judicial review applications and appeals, before Ontario courts, and two cases before the Supreme Court of Canada.

ix. Policy and public education

The Commission also protects and promotes human rights through its policy and public education.

The Commission's Policy and Public Education Branch conducts research, holds public consultations, releases discussion papers, drafts policies and guidelines for approval by the Commissioners, and conducts public education on human rights.

The Commission has 19 policies and/or guidelines, which are based on Tribunal and court decisions and set out the Commission's interpretation of provisions of the *Code*. These policies and guidelines set standards and assist the parties, the Commission, and others in understanding how the *Code* applies in a given situation.

In the 2004-2005 fiscal year, the Policy and Public Education Branch also conducted 96 public education events on the *Code*, which reached 7,500 persons.

What are the positive aspects of the current system?

Half a century ago there were no laws against discrimination and it was practiced openly and without shame in Ontario. Today, human rights legislation has quasi-constitutional status, a significant number of employers, landlords and service providers have anti-discrimination policies, and it is stigmatizing to be labeled as a discriminator. One of the reasons why these changes have occurred is because several aspects of the current system to protect and promote human rights work well. The positive aspects of the current system are set out below.

a. Free services

The Commission's services – mediation, investigation, conciliation, and litigation – are provided free of charge to the parties. As a result, a significant number of complainants are able to have their concerns addressed without having to pay costly legal bills. Many complainants are new immigrants, people with a disability, and many are economically disadvantaged.

While many respondents hire lawyers, their legal fees are kept down by the fact that the Commission investigates and facilitates the settlement of complaints. Furthermore, a number of small and medium size respondents, including non-profit and community organizations, are able to resolve complaints during mediation, investigation or conciliation without having to hire and pay fees to a lawyer.

b. Integrated functions

The Commission's mediation, investigation, litigation, policy development, and public education functions are all integrated. Mediators and investigators can and often do seek the advice of policy analysts and lawyers during the settlement and investigation processes. Furthermore, following an investigation, the investigator's case analysis report is reviewed and must be approved by the Legal and Policy Branches of the Commission.

The purpose of these internal checks and balances is to ensure that settlements and investigations are thorough, legally sound and advance the public interest in preventing and eliminating discrimination.

c. Advancing the public interest

The Commission's various functions are also integrated with its public interest mandate to prevent and eliminate discrimination. As a result, settlements and Tribunal decisions address both the discrimination experienced by the individual and the public interest in preventing and eliminating discrimination.

The Commission has been successful in advancing anti-discrimination law through the integration of its functions and public interest mandate in several groundbreaking cases.

For example, in 2001, the Commission's Policy and Public Education Branch released a discussion paper, *An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims*. In 2003, the Commission's Legal Services Branch litigated a complaint filed by a Black woman, and asked the Tribunal to find that the discrimination that she experienced was intersectional as set out in the 2001 discussion paper. The Tribunal found that the complainant was discriminated against because of her sex and race and (for the first time) explicitly found that the discrimination was intersectional in nature.

Most settlements in which the Commission is involved include public interest remedies, such as:

- The respondent writes a letter assuring the Commission that it will comply with the *Code*.

- The respondent puts up human rights posters in public areas, which explicitly state that the respondent observes and upholds the *Code*, and provide the Commission's telephone number should the respondent's employees believe they are being subjected to discrimination.
- The respondent implements policies and procedures to prevent and remedy harassment and discrimination.
- The respondent implements a training program on harassment and discrimination issues.

d. High settlement rate

The current system is highly effective in settling complaints. Approximately half of all complaints are settled either during the Commission process or at the Tribunal. As a result, full-scale hearings, which are always costly and usually stressful for the parties, are often avoided.

Most settled complaints are resolved during the voluntary mediation stage, which takes place prior to the investigation of a complaint. An independently conducted client survey showed that the vast majority of parties would be willing to use mediation again if they had another human rights complaint. The majority of complaints that are referred to the Tribunal also end up settling. One of the main reasons for the high settlement rate at the Tribunal is the fact that a thorough investigation has already been completed and the parties are aware of the evidence that may be considered at the hearing.

e. Strong policy development

The Commission has developed a significant number of policies which are at the forefront of policy development in the human rights field in Canada and internationally. Notably, the Commission has written and published policies and/or guidelines on the duty to accommodate workers and students with disabilities, racism and racial profiling, drug and alcohol testing, the accommodation of religious observances, and discrimination based on sex, gender identity, and sexual orientation. These policies are particularly useful in educating the parties about human rights during the settlement and investigation of complaints.

The Commission has also written and published discussion papers that outline the issues facing transgender persons, families with children, and older persons, and commented on legislation, such as the *Safe Schools Act* and the *Ontarians with Disabilities Act*, from a human rights perspective.

f. Complainant never pays the respondent's costs

Under the current system, if the Tribunal dismisses a complaint, it may order the Commission, but not the complainant, to pay the costs incurred by the respondent in defending itself. From a public interest perspective, this is very positive. Many

people, particularly those of low-income, would never file a human rights complaint if they knew that they might be ordered to pay the respondent money out of their own pocket if they lost their case. This is particularly important in racial discrimination cases, which often involve subtle and systemic discrimination that can be difficult to prove in a legal forum. The current system of costs also ensures that, where appropriate, the Commission will pay some or all of the respondent's legal costs.

g. Discouraging complaints that undermine substantive equality

Every year, a number of individuals file or attempt to file complaints with alleging some form of reverse discrimination. In most of these cases, the individual is a man who is targeting a program or job for women. The respondent is often a public service, non-profit or community organization. The *Code* protects programs, facilities, clubs, and employment situations that further equality of opportunity and/or are reasonable and bona fide. As such, Inquiry and Intake staff strongly discourage members of the public from filing this type of complaint, particularly where the express purpose is seen to undermine substantive equality. Where such complaints have been filed and investigated, the Commission has never referred one to the Tribunal for a hearing.

What are the problems in the current system?

Although there has been significant progress in preventing and eliminating discrimination, members of historically disadvantaged groups continue to experience discrimination in employment, housing and services. The Commission's intake of complaints remains high and there is no evidence that recent complaints are less meritorious than those in the past. One of the reasons why discrimination persists is because several aspects of the current system to promote and protect human rights do not work well. The problems in the current system are set out below.

a. Inadequate funding

The Commission has never received adequate funding and resources from the Ontario government. Additionally, the Commission's workload has increased exponentially for several reasons: the government has added new grounds of discrimination to the *Code*; the courts have expanded the meaning of existing grounds of discrimination, the courts have required the Commission to add layers of procedural fairness; and the number of complaints filed has increased annually.

Despite this steady growth and consequent stress on the Commission's capacity, successive Ontario governments have failed to provide additional funding and resources. In real terms, the Commission's budget in the 2004-2005 fiscal year (\$12.5 million) was approximately the same as it was in the 1995-1996 fiscal year (\$11.3 million).

The lack of funding and resources has a number of undesirable side effects:

- **Some members of the public experience difficulty filing complaints.**

The Commission receives tens of thousand of inquiries each year, but the system only has the capacity to handle 2,000 to 2,500 formal complaints. As a result, inquiries staff have to be rigorous and only send out complaint forms to callers who present clear allegations of discrimination. Inevitably, some members of the public, who are not able to clearly articulate their allegations because of lack of formal education, lack of fluency in English or French, or due to a disability, encounter difficulties filing complaints.

- **There are significant delays in the investigation and litigation of complaints.**

The Commission currently has about half the number of investigators that it needs to investigate complaints in a timely manner. It normally takes two to three years from the time a complaint is filed until the time it is fully investigated. Cases are investigated in chronological order and, due to large caseloads, cases that have been assigned to an officer may sit for six months to a year before the officer is able to begin the investigation.

The Tribunal is also inadequately funded and resourced. As such, where a complaint is referred to the Tribunal and does not settle, it normally takes four to five years from the time a complaint is filed until the time a final Tribunal decision is rendered.

- **The quality of settlements and investigations can be compromised.**

There is significant pressure on mediators and investigators to close cases. As a result, there is always a tension between operational efficiency and quality. Inevitably, in some cases, the parties may be encouraged to settle a complaint where it is not appropriate, settlements may lack proper public interest remedies, or complaints may not be properly investigated.

- **The Commission's prevention work is limited.**

Although the Commission has the power to initiate complaints, particularly where there are systemic issues, it has only done so three times in the last five years. The Commission's public education function is the least developed part of its mandate. As a consequence, the Commission has been unable to adopt a discrimination prevention strategy that would sufficiently reduce the number of individual complaints in the long-term.

b. Lack of independence

The Commission's independence is compromised by its relationship with the executive branch of the Ontario government.

While the Commission is supposed to be an independent agency, it is under the Ministry of the Attorney General and reports to the Attorney General. The Commission investigates a significant number of complaints filed against Ontario government ministries, including the Ministry of the Attorney General. It is highly problematic for the Commission to investigate the same ministry that it reports to and is dependent on for ongoing funding.

In 2004-2005 the Commission investigated and referred over 200 complaints against the Ministry of Health and Long Term Care, the Ministry of Education and the Ministry of Community, Family and Children's Services to the Tribunal in which parents were alleging that the government's decision to discontinue autism services at age six was discriminatory. In 2005, the Commission also initiated and investigated a complaint against the Ministry of Education alleging that the Safe Schools provisions of the *Education Act* had a disproportionate impact on racialized students and students with disabilities. All these complaints challenged the programs and services of the very government that funds the Commission.

Now, the Ministry of the Attorney General is embarking on a process of human rights reform that may ultimately remove or significantly reduce the Commission's ability to investigate and refer complaints to Tribunal. This problematic conflict of interest must be acknowledged and addressed by removing the Commission from any government ministry and making it directly accountable to the Legislature.

Other agencies with public interest mandates, such as the Office of the Auditor General and the Office of the Information and Privacy Commissioner, report directly to the legislature. Earlier this year, the government announced that it would introduce legislation to have the Office of the Child and Youth Advocate report directly to the legislature, rather than the Ministry of Child and Youth Services, on the basis that "[t]here is no room for political interference when it comes to the rights of our youngest citizens." The same must be said about the rights of victims of discrimination.

c. Lack of expertise in human rights

The Commissioners and Tribunal members, who are the most important decision makers in the human rights system, are appointed by the Cabinet, not an all-party committee of legislature, as is the case with the Auditor General and the Information and Privacy Commissioner. Furthermore, there is no legislative requirement that the Commissioners and Tribunal members have expertise or experience in the field of human rights. As a consequence, while some Commissioners and Tribunal members

have knowledge of human rights, most are not experts in human rights and some do not have any background in human rights at all.

Why would a direct access system hurt Ontario?

The Attorney General is being lobbied by an element of the legal community, to reform the human rights process in Ontario by adopting a direct access system. They are proposing abolishing or significantly reducing the Commission's mediation, investigation and litigation functions and providing every complainant with the opportunity to go directly to the Tribunal for mediation and/or a hearing.

OPSEU strongly opposes the adoption of any form of a direct access system because it will not resolve the problems in the current system. In fact, it will increase problems by privatizing the human rights system and undercutting the public interest. It will also be more expensive to run than the current system.

a. Moving the gatekeeper

The lobbying slogan of proponents of the direct access system is "Getting Rid of the Gatekeeper." Specifically, they propose eliminating the Commission's authority to dismiss complaints without a hearing and establishing a new system with the right of direct access to a hearing at the Tribunal.

This implies that under the new system complainants will no longer face a gatekeeper but rather have direct access to a hearing on the merits of their complaints. While this notion is superficially attractive, it is misleading. Under a direct access system, the Tribunal will have its own gate-keeping function, which will result in the dismissal of a significant number of complaints prior to a hearing. The circumstances under which the complaints will be dismissed prior to a hearing will likely be the same or similar to the current circumstances, as prescribed by the *Code*.

The proponents of direct access have, in fact, proposed that every complainant would have the right to go to a hearing at the tribunal, subject to an application by the responding party, or by the Tribunal on its own motion, to have the complaint dismissed before a full hearing if the complaint is (i) without merit, (ii) based on events that took place too long before filing, or (iii) outside the jurisdiction of the *Code*. This is clearly gate keeping, even if the proponents of direct access fail to name it as such.

In B.C., the government abolished the human rights commission and implemented a direct access system in 2003. The B.C. Human Rights Tribunal explicitly admits that it has a "gate-keeping function."² In the 2004-2005 fiscal year, the Tribunal closed 871 cases of which 39 were final decisions rendered after a full hearing. In other words, final decisions after full hearings were rendered in only 4.48% of closed cases.

² See, for example, *Hayes v. Vancouver Police Department and Barker*, 2005 BCHRT 590.

The other cases were closed because they were not accepted, withdrawn, abandoned, settled, or dismissed prior to the hearing.

Although the total number of complaints that reach full hearings is clearly higher in a direct access system, a number of points need to be kept in mind. First, the number of final decisions is still relatively low (less than 5% of closed cases). Second, the lack of an investigation inhibits the parties from settling cases, which results in more full-blown hearings. Third, the hearings avoid dealing with systemic issues. And finally, some cases involve reverse discrimination complaints that undermine, rather than promote, substantive equality.

b. Privatizing human rights

Under a direct access system, the parties (who have private interests), not the Commission (which has a public interest mandate), will investigate and litigate complaints. The complainant will lack either the incentive (particularly where the respondent makes a monetary offer to settle the case) or the institutional power and authority to request public interest remedies. Discrimination will therefore be treated as a private dispute between the parties, rather than a public interest issue that affects society as a whole.

In B.C., the Tribunal's standard practice has been to award monetary damages to the complainant and order the respondent to cease and desist from contravening the *Code*. It appears that the Tribunal has only ordered substantive public interest remedies in one case since 2003.

c. Neutralizing the commission

Proponents of direct access in Ontario insist they are not proposing a B.C. model for Ontario. They state that, like in B.C., the Commission's mediation, investigation and litigation functions should be abolished, but unlike in B.C., the Commission should continue to exist and focus on its public education, systemic investigation, and research and policy development roles. They state that direct access will liberate the Commission from its gate keeping role and allow it to effectively represent the public interest.

It is not surprising that proponents of direct access in Ontario are now distancing themselves from the B.C. model, which has been a disaster from a public interest perspective. The problem with their proposal is that the Commission relies on the integration of its functions – investigation, settlement, litigation, policy development, and public education – to effectively promote the public interest. Employers, landlords and service providers comply with the Commission because it has enforcement powers. Compliance with a Commission that lacks the power to mediate, investigate and litigate complaints is much less likely. For example, many employers and service providers comply with the Commission's policies because they know that the principles and guidelines set out in the policies will be key

considerations in investigations and in the decision to refer a complaint to Tribunal. A Commission that loses its enforcement powers will be neutralized, rather than liberated. The situation will, in fact, be very similar to B.C.

d. Individual vs. systemic complaints: A false distinction

Proponents of direct access are proposing that:

- individual complaints should go directly to a hearing at the Tribunal without an investigation
- the Commission retain the right to initiate public interest and systemic complaints and intervene in complaints before the Tribunal where there is a broad public interest issue.

There are a number of serious problems with this proposal, most notably the fact that it creates a false distinction between individual and systemic complaints.

First, it is almost impossible to determine in advance if a particular case is going to be one of significant importance. This is only determined during or after an independent investigation. That is why it is necessary to have a body primarily concerned with the public interest remedies involved at all stages in a case.

Second, the Commission currently treats all cases as "systemic", to the extent that means a case in which it is necessary to seek remedies to a system of operation or management. In every case that is settled or litigated by the Commission there is a mandate to seek and obtain public interest remedies, such as the implementation of policies, procedures and/or a training program on harassment and discrimination. It is wrong to assume that only the rare case requires such remedies. Without a body representing the public interest at all stages, including the hearing, there will be no incentive on the part of the parties to seek such remedies.

e. No guarantee of full legal representation

In a direct access system the Tribunal, which is a much more formal and legalistic body than the Commission, will adjudicate complaints and the parties, rather than Commission staff, will be responsible for investigating and litigating complaints. As such, unlike in the current system,³ the parties will have to hire lawyers to navigate through the system. Unrepresented parties, particularly complainants, will be at a severe disadvantage.

In B.C., the government is providing some funding for a legal aid clinic to assist and represent complainants. Not surprisingly, the clinic has set up its own gate-keeping function to limit the number of complainants it will represent. As a result, about half of all complainants appear at pre-hearing motions without legal representation. Most respondents, on the other hand, have legal representation.

³ Commission staff report that approximately 80% of complainants are not represented by legal counsel in the current system.

In many cases, the respondent's application for early dismissal of the complaint without a hearing is successful because the complainant is unable to properly represent him or herself. Typically, the respondent retains legal counsel and sometimes an investigator to collect documents and obtain witness statements in order to file an application. The complainant, on the other hand, is unrepresented, has little or no access to documents and witnesses, and cannot respond to the application. The following case summary illustrates what happens:

A complainant, who self-identified as Filipino, alleged that the respondents discriminated against him with respect to his employment because of race, colour, ancestry, and place of origin. Specifically, he alleged that one of his co-workers made racist comments about Asians and harassed him, and his managers did not do anything about it. The respondents, who were represented by legal counsel, applied to dismiss the complaint before a hearing and submitted three sworn affidavits with documentation to support the application. The complainant, who was unrepresented, did not file a response to the application.

The Tribunal cited a previous decision, which stated: "*As the Tribunal does not conduct investigations, it is the responsibility of the parties to put before the Tribunal the information which they believe is necessary...*" The Tribunal relied almost entirely on the respondents' application and dismissed the complaint without a hearing. Specifically, it dismissed the complaint against the co-worker on the basis that there was no reasonable prospect that the complaint would succeed, and against the managers on the basis that the acts alleged in the complaint did not contravene the *Code*, and there was no reasonable prospect that the complaint would succeed.⁴

f. Less money for complainants

One of the most significant differences between the current system and a direct access system is what the complainant takes home at the end of the process. Under the current system, most complainants never hire a lawyer, because it is not essential, and a significant number of them fully pocket the monetary damages that they receive through settlement or a Tribunal decision. With a direct access system, where hiring a lawyer is essential to navigate through preliminary motions and a hearing at the Tribunal, many complainants will end up paying a significant amount, if not all, of the monetary damages they receive to the lawyer for legal fees.

g. Complainant liable to pay the respondent's costs

The proponents of direct access have set out a number of options for costs, including the possibility that the Tribunal could order the complainant to pay some of the respondent's costs if the complaint is dismissed.

⁴ *Ventura v. Teleflex Canada and others*, 2005 BCHRT 309. See also *Mikely v. Singer Valve and Collins*, 2005 BCHRT 328.

Although a system of costs may be in the financial self-interest of lawyers, it is unacceptable in a human rights system to order costs against complainants. The chilling effect will deter prospective complainants from filing complaints and undermine the public interest in eliminating discrimination. Low-income complainants, in particular, won't file complaints no matter how meritorious the complaint is if there is any risk that they would have to pay some of the respondent's costs.

In B.C., the Tribunal has the power to award punitive costs against a party who has engaged in improper conduct or contravened a rule or order of the Tribunal. The Tribunal has been willing to award costs against complainants, particularly in cases where it has dismissed complaints alleging discrimination on the basis of race. For example:

A South Asian couple filed a complaint alleging that a transit driver uttered racist slurs towards them and refused to let them ride the bus that he was driving. The Tribunal found that the complainants (who were not represented by a lawyer at the hearing) raised a new allegation during the second day of the hearing and produced notes that had never been previously disclosed to the respondents. The Tribunal ordered the complainants to pay \$1,000 in costs to the respondents.⁵

h. Complaints that undermine substantive equality

In a direct access system where the Commission's role in protecting the public interest is cut back or eliminated, there will almost certainly be full hearings for reverse discrimination complaints that seek to undermine substantive equality.

In B.C., there have been a number of such complaints since 2003. For example:

- A man filed a complaint alleging discrimination on the basis of sex because an emergency women's shelter refused to allow a resident to hire him to take care of her children in the second stage residential facility of the shelter. The shelter was not represented by a lawyer at the hearing and was unable to present evidence establishing a full defence. The Tribunal ruled in favour of the complainant.⁶
- A white man filed a complaint alleging discrimination on the basis of race and ancestry because a non-profit, Aboriginal rights organization, which works on health and poverty issues in the downtown eastside of Vancouver, refused to consider his application for the position of Executive Director of the

⁵ *Jiwany and Jiwany v. West Vancouver Municipal Transit*, 2005 BCHRT 172.

⁶ *Johnson v. St. James Community Service Society and Goddard*, 2004 BCHRT 51.

organization. The Tribunal dismissed the complaint, but the organization had to hire a lawyer to defend itself at a full hearing.⁷

- A man filed a complaint alleging discrimination on the basis of sex because a fitness centre for women denied him membership. The complainant reportedly told the media that in response to women's equality rights, "men have to push back a bit." The fitness centre has hired a lawyer and tried unsuccessfully to dismiss the complaint in pre-hearing motions. The complaint appears to be scheduled for a full hearing.⁸
- An anglophone woman filed a complaint alleging discrimination on the basis of race, colour, ancestry and place of origin because a hospital denied her a position as a dietician on the basis that she lacked Cantonese language skills. The hospital hired a lawyer and the complaint appears to be scheduled for a full hearing.⁹

i. More expensive

Some proponents of direct access in Ontario claim that the cost would be revenue neutral. These claims appear to be aimed at assuaging the fears of the government that direct access will be too costly to implement. One of the main reasons why this model was not adopted in Ontario in the 1990s, during a previous reform process, was because the government considered the increased cost to be prohibitive.

If implemented a direct access system will be significantly more costly to run than the current system. The cost of running hearings, where lawyers have to be paid at least \$80 per hour, will be considerably more expensive than an investigation, where Commission staff are paid \$30-40 per hour. The system could only be revenue neutral if it threw out a significant number of complaints at the front end without a hearing, or it implemented measures that deterred members of the public from filing complaints.

In B.C., when the cost of providing limited legal representation is factored in, it is estimated that the direct access system is costing \$700,000 more each year than the Commission system.¹⁰

j. Ineffective in other jurisdictions

Proponents of direct access in Ontario point to the fact that some form of direct access exists in B.C. and Québec, as well as other countries such as the United

⁷ *Gillis v. United Native Nations Society*, 2005 BCHRT 301.

⁸ *Stopps v. Just Ladies Fitness (Metrotown) and D.*, 2005 BCHRT 255; *Stopps v. Just Ladies Fitness (Metrotown) and D.*, 2005 BCHRT 355; *Stopps v. Just Ladies Fitness (Metrotown) and D. (No. 2)*, 2005 BCHRT 359.

⁹ *Barberie v. Vancouver Coastal Health Authority and others*, 2005 BCHRT 384.

¹⁰ Brad Teeter, "Human rights holes: B.C. queers better off with old HR Commission: experts," *Xtra West*, April 14, 2005.

Kingdom, the United States, Australia, and New Zealand. What they do not say is that the Commission is more effective than those other systems in preventing and eliminating discrimination through policy development and the inclusions of public interest remedies in settlements and Tribunal decisions. In fact, the Commission is domestically and internationally recognized as a leader in the advancement of human rights and its expertise and leadership are sought out by other human rights organizations. OPSEU encourages readers to review the Commission's website and compare its achievements to those listed on the websites of human rights systems in other jurisdictions.

Why is more open consultation required?

During the 2003 election campaign, the Ontario Liberal Party stated that it would strengthen the human rights system in Ontario not dismantle the Commission. Now it appears as if the Attorney General and his staff have been holding closed consultations, primarily with members of the legal community, about significantly changing the human rights system in Ontario.

In January 2005, a group of legal academics and lawyers organized a symposium that was attended by Policy Counsel from the Ministry of the Attorney General and the Director of Policy of the Minister's Office. The final symposium report that recommends the government implement a direct access system, states, "This symposium was the product of informal discussions initiated by the Attorney General's office in the fall of 2004."¹¹

While the Attorney General and his staff have met privately with a number of other stakeholders over the past year, including OPSEU, these consultations have been limited and many grassroots human rights and social justice organizations have not been consulted. To date, the consultation process has lacked transparency and has left many community organizations feeling frozen out of the process while members of the legal community, many of whom will benefit financially from the implementation of a direct access system, have been seen to receive preferential access.

Conclusion

OPSEU recommends that the following reforms be implemented to strengthen the system to protect and promote human right in Ontario:

1. The government should amend the Ontario Human Rights Code (*Code*) to make the Commission truly independent. The Commission should be made an independent office of the legislature and report directly to the legislature, not a government ministry.

¹¹ Backhouse, C., Keene, J., Laird, K., Penn, L., Sossin L., and C. Wilkey, *Administrative Design and the Human Rights Process in Ontario: Can We Do This Better? Summary Report of the Symposium: January 14, 2005*, Final Draft, June 10, 2005.

2. The government should amend the *Code* to ensure that all appointees to the Commission and the Tribunal are experts in human rights. Commissioners and Tribunal members should be selected by an all-party committee of the legislature, not the Cabinet, and the *Code* should require that they be experts in the field of human rights.
3. The government should provide additional funding and resources to achieve the following:
 - Significantly reduce processing time of complaints. Mediations should be completed within three months, complex investigations should be completed within one year, and Tribunal decision should be rendered within two years of the filing of the complaint.
 - Procedures to ensure that complaints involving minimal investigation, crisis situations, and significant public interest issues are fast-tracked through the system.
 - The implementation of a long-term plan to prevent discrimination and reduce the number of individual complaints. The plan should include a significant increase in the number of Commission-initiated complaints, public education activities and other systemic initiatives.
 - Guaranteed interpretation services for parties who communicate in languages other than English or French.
4. The government should not adopt any kind of direct access system in Ontario. The implementation of such a system will privatize the human rights system, undercut the public interest, be more expensive, and benefit lawyers rather than complainants.
5. The government should have a province-wide consultation on reforming the human rights system in Ontario, which is open, transparent and accessible.