Strengthening Ontario's Human Rights System: What We Heard

Consultation Report

ONTARIO
HUMAN RIGHTS
COMMISSION

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October 13th, 2005

The Honourable Michael Bryant
Attorney General of Ontario
720 Bay Street
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Dear Attorney General,

I am pleased to present this Report, which was made public today and sets out the findings of the Ontario Human Rights Commission's consultation on strengthening Ontario's human rights system.

For a number of years I have been calling on government to make changes to improve the system, either in the form of harmonizing legislation, streamlining our legislated process, or ensuring adequate resources. I, therefore, welcome the government's plans to develop a blueprint to guide the process for reform of Ontario's human rights system. I believe that the views expressed in this Report, along with the Commission's Discussion Paper outlining United Nations' principles and standards for effective human rights institutions, provide a strong base on which the government can build.

This review was not initiated to showcase our successes; although there have been many, as clearly outlined in the Commission's annual reports. Rather, the objective was to invite a broad range of individuals and organizations involved in Ontario's human rights system to engage in a critical review of that system and to discuss each others' perspectives as actors in the system. I believe the resulting Report has accomplished this objective.

I have worked in the area of human rights for over 13 years: over nine with the Commission and four with the Canadian Human Rights Tribunal. In this time, I have seen society transform and progress in its understanding of human rights. To some extent, the protections offered in the Ontario *Human Rights Code* have also evolved as society's needs and expectations with regard to Ontario's human rights system changed during this period. In response, I saw firsthand how diligent and creative staff and members of the Commission were in finding ways to be more effective amidst growing demands on the Commission's services, within the existing legislative framework and relatively diminished resources.

To be effective, a human rights system must have the confidence and support of the general public, especially those requiring its protection. Although I believe the Commission has accomplished a great deal in this regard, I would be first to agree that individuals need better access to more timely resolution of complaints. Moreover, the system still has a long way to go towards fostering the creation of a true culture of human rights in this province – essential in the creation of strong and safe communities.

As one of the consultees stated, we need to put the "human" back into the human rights system. At the same time, the Report reflects a strong divergence of views on how best to achieve this.

In my experience, there are a number of elements that are fundamental when changes to the human rights system are being considered, including:

- first and foremost, any blueprint for strengthening Ontario's human rights system should be grounded in internationally recognized standards
- the overriding importance for individuals to have a legislated process for resolving human rights matters;
- a more flexible approach to determining the most appropriate way of handling a complaint;
- easier access for resolving less complex cases;
- more flexibility to allocate more resources to more complex cases;
- the need for a stronger focus on systemic cases and initiatives that result in broader public interest remedies and impact;
- increased emphasis on public education; and
- an effective transition plan

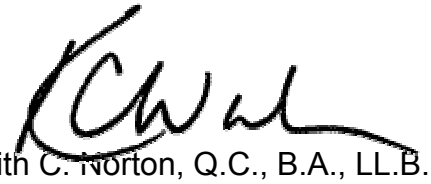
I also see a need for the Commission to better explain its functions and procedures. During my term, I have noticed that there is often misunderstanding about the Commission's mandate and the complex relationship that exists among its many functions – investigation, mediation and litigation of complaints; public consultation, inquiries and policy development; as well as public education and speaking out on matters of concern, among others. While these may appear to be discrete roles, my experience shows that each area of responsibility informs and enhances the other. Maintaining this interaction among the different functions should, in my view, be a fundamental feature of any institution that strives to achieve a thorough, balanced and just treatment of human rights issues.

In moving forward, we must not forget that Ontario has a reputation of being an historic groundbreaker in the area of human rights. With almost half a century of experience in this field, it has offered, and continues to offer, much nationally as well as internationally. We now have a unique opportunity to build on this world-renowned reputation and to take steps to ensure a renewed human rights system that best serves the people of Ontario.

My sincere thanks to all who took time to participate in the Commission's consultation. The wide ranging perspectives conveyed in this Report are a valuable step in the process to create a blueprint for reform. I am encouraged that the government is pursuing this process. We clearly heard the need for a broader and more complete consultation to build stakeholder support and community accord in order to achieve the best possible human rights system for Ontario.

As always, the Commission will welcome any opportunity to assist the government going forward.

Yours truly,



Keith C. Norton, Q.C., B.A., LL.B.
Chief Commissioner

c: The Honourable Dalton McGuinty
Premier of Ontario

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I. Introduction

The human rights system in Ontario has existed in its current form for well over 40 years. During those years, there have been many changes in society and in our understanding of human rights. The needs and expectations surrounding the human rights system have grown and in many ways the protections offered in the Ontario *Human Rights Code* ("the *Code*") have evolved with these changes. However, the basic model for the promotion and protection of human rights in Ontario has remained essentially unaltered.

There are many who believe that Ontario's human rights system must be strengthened in order to achieve the vision set out in the *Code* of a society in which the dignity of all is recognized, and all can be full members of the community. The Ontario Human Rights Commission ("OHRC") believes that, while much has been achieved, there is much more that can be done.

The OHRC has therefore welcomed the recent commitment of the Ministry of the Attorney General, which has responsibility for any changes to the *Code*, to review and strengthen Ontario's human rights system, and to develop a blueprint for change in the upcoming months.

Section 29 of the *Code* gives the OHRC broad powers to further human rights in the province of Ontario.[i] Pursuant to this mandate, and in support of this process of change, on August 23rd, 2005, the OHRC initiated a public consultation about Ontario's human rights system. The aims of this consultation were to:

- Clarify the principles and elements of an effective human rights system;
- Create an opportunity for a broad and balanced discussion on the issues and options;
- Ensure a transparent and open process leading to change;
- Develop meaningful and viable conclusions that will support a revitalization of Ontario's human rights system; and
- Assist in developing the best human rights system possible.

This report details the findings of this consultation process.

A. Consultation Scope and Process

Given that the Ministry of the Attorney General announced its intention to develop a blueprint for change in the coming months, the OHRC undertook an accelerated process to consult the public and stakeholders and report findings in time to be useful to the government. The consultation process included the three following elements.

First, the OHRC developed and released on August 23, 2005 a *Discussion Paper* entitled "Reviewing Ontario's Human Rights System". The intent of the *Discussion Paper* was to set out the principles that must be applied in the design of any human rights system, and to provide a context for reform. The *Discussion Paper* was mailed out to stakeholders across the province and was posted on the OHRC's website. The *Discussion Paper* contained a questionnaire and invited all interested to reply to these questions.

The questionnaire was posted on the OHRC website from August 23, 2005 until September 16, 2005, to enable all interested individuals to share their thoughts. A total of 56 submissions were made in response to the questionnaire.

Three focus groups were convened, involving selected stakeholders from across the province and experts from across Canada, on September 12, 13, and 14th, 2005. Participants were selected on the basis of their knowledge of the human rights system and their representation of known perspectives and major stakeholder sectors, as well as a general recognition of their ability to clearly articulate their perspective and contribute to the dialogue. A total of 31 individuals were involved as participants in the focus group sessions, including five representatives from OHRC and Human Rights Tribunal of Ontario ("HRTO") staff. The focus group questions and a list of organizations consulted are provided in the Appendices of this Report.

The main focus of the questionnaire, as well as of the focus groups, was not to assess the strengths and weakness of the current system, but to clarify the principles and issues that must be considered in any reform.

B. Concerns with the Consultation

The nature of the consultation and the significant time constraints placed on it made for a number of limitations on the process, which must be considered in assessing the findings.

While every effort was extended to conduct a neutral and objective consultation process, the OHRC is, of course, a significant component of the current human rights system, and to some degree is in the position of conducting a consultation in part on itself. A number of consultees expressed concern about the OHRC's ability to conduct a fair consultation, and a few attributed suspect motives to the entire consultation process. We have therefore made every effort to allow consultees to speak for themselves in this Report, in an effort to minimize these concerns.

The time constraints placed on the consultation, especially as the consultation period coincided with the late summer, also led to many interested parties not being able to make submissions or being able to participate in the limited focus

group sessions. Although many did participate, it is not doubted that many more would have done so were the time lines extended and more focus group sessions organized. Many who did participate in the consultation expressed frustration with the abbreviated process.

It is clear that people feel passionately about the protection of human rights in this province and that this is an important issue not just for regular users of the system, but for all Ontarians. Because of the importance of this issue, people deeply want an opportunity to be heard. They felt that this has not happened sufficiently through this or any other process. It is clear that stakeholders and the general public would like a more thorough and independent consultation to take place.

C. General Notes on the Consultation

A number of general features of the consultations conducted are notable.

First, while the *Discussion Paper* attempted to focus attention on a principled approach to reviewing the entire human rights system in the province, many consultees came to the process with strong, well-established ideas about the solution to the system's specific challenges, and came to the process as advocates for specific changes. These individuals tended to approach the review as an opportunity to express frustration with features of the OHRC and the HRTO as the main existing human rights institutions in the system. Others entered the process as an open ended and broad consultation on the human rights system. These individuals felt that wider discussion was necessary before moving to specific models and solutions.

Second, again though it was not the focus of this consultation process, there was debate, often vigorous, on specific human rights system models. In particular, much debate arose regarding the strengths and weaknesses of some type of direct access to tribunal model as opposed to the current model, which involves the OHRC receiving, investigating, and screening complaints prior to referral to the HRTO. Some participants felt that elaborating upon models would have been a more appropriate focus of the consultation.

Third, it is clear from the Consultation Report that there are deep divergences of opinion on many issues. Stakeholders to the human rights system are many and diverse and often share little in common except their involvement in the human rights system. They represent a wide variety of interests and perspectives that often clash. The goal of the process was to permit a broad discussion to take place, and to hear the range of the concerns, not to create consensus, and indeed, given the diversity of viewpoints and concerns expressed, achieving complete consensus would be a major challenge.

Fourth, while divergence of opinion is a major theme, there are some areas of broad, though not universal consensus, which this Consultation Report will attempt to identify.

Lastly, the consultation process highlighted the complexity of the issues at stake. The human rights system, envisioned properly as the complete system and not just the main state institutions involved, is broad and involves many actors. Features of the human rights system are interdependent and intertwined. Changes in one area affect other areas and the exact outcomes of changes are difficult to predict. It is clear that any change envisioned must be carefully considered.

D. This Consultation Report

This Report conveys the main themes that emerged in the consultation as much as possible in the language of those who expressed them. Recognizing that the short timelines limited the participation of many, it was decided that authoritative conclusions should not be made. Instead this Report focuses on laying out the scope of issues that were raised and identifying areas of consensus or lack of consensus. At the end of each Report section, highlights are drawn out and bolded in a section labelled "Key Themes" to summarize areas of consensus or lack of consensus and where appropriate general implications are indicated.

It is also notable that, in this Report, names or organizational affiliations are not affixed to quotations as has been the practice in previous consultation reports released by the OHRC. Consultees were promised anonymity to encourage maximum openness, and given the limited number of stakeholders involved, it was felt that anonymity could not be assured were names of organizations indicated.

II. What We Heard

A. Background

1. The Need for Change

Consultees in this process broadly agreed that there is a need to review and strengthen Ontario's human rights system. Almost all consultees indicated that the current human rights system is not working as well as it should be and is in need of some form and degree of change. In fact, a few consultees indicated frustration with not seeing change coming out of previously held consultations.

> *One could only hope that this round of consultation, unlike all the previous consultations over the past 20 years, will be different and that real and progressive change will in fact be instituted.*
>
> Legal Clinic

While almost all consultees agree that change is needed, there is a significant divergence on what type of change is necessary and to what degree. Some called for small procedural changes on the part of the OHRC, while others suggested that the OHRC's mandate and structure were adequate, but that the OHRC simply had failed to adequately fulfil its responsibilities.

> *While some may argue that more power should be handed to the Commission to make its job easier, the problem in our view has been that the Commission has failed to adequately exercise the power it already has in order to fulfil its mandated role.*
>
> Legal Clinic

A few called for the complete reorganization of the human rights system, including significant reduction of OHRC powers.

The bulk of consultees fell in between these views, and called for varying degrees of change related to different features of the human rights system. This diversity of outlooks is apparent in each of following sections of this Report, which highlights the large number of themes of concern to consultees, and the range of changes they called for.

Key Themes

Stakeholders are not satisfied with the current human rights system and are looking for effective change.

2. A Principled Approach to Human Rights

The OHRC believes that any review and reform of the human rights system must proceed in a principled manner, building on established international conventions and standards, and on administrative legal requirements.

Correspondingly, the OHRC's consultation relied on the United Nations' resolution known as the *Paris Principles*[ii]. The *Paris Principles* and related guidelines identify key responsibilities and roles for an effective human rights system to operate. Canada has affirmed these principles at the United Nations, and Ontario must abide by these commitments. The *Discussion Paper* identified the following seven effectiveness factors, based on the *Principles* and related guidelines:

1. Independence
2. Defined jurisdiction
3. Cooperation
4. Adequate Power
5. Accessibility
6. Operational Efficiency
7. Accountability

In addition, the consultation relied on legal requirements and principles governing administrative agencies in Canada, including the duty of fairness, which complement and mirror the *Paris Principles*.

Some of the consultees did not believe that this type of principled approach was either appropriate or required. One consultee stated that international standards should not be considered, as these only reflect the political agendas of member states of the United Nations.

Others did not see the value of beginning with the identified principles and effectiveness factors because they saw them as "motherhood statements" that few would dispute, and that were too abstract. These individuals felt that real practical issues of the current system and proposed reforms to it should be the focus of discussion.

> *I think the principles are there. I think it is about the model. I think at the end of the day we simply have a system that there is nothing wrong fundamentally with the legislation; it just doesn't work at the ground. And that to me is about a delivery model, how do we deliver on a system that in fact is able to deal with complaints in a fair and reasonable way and in a timely way and with appropriate processes? How are we able, within the same system, to get at systemic issues? How do we bring in a social marketing and a public education feature so that we are in fact eliminating future complaints?*
>
> Government Agency

Others felt that a fundamental level of discussion on human rights was indeed necessary. One consultee expressed concern that the real challenge was on fundamentals and principles.

> *… to so many of these effectiveness factors, I mean, I just say yes; yes, we need to have this, we need to have that and we need to have that. I'm more concerned about a more …fundamental re-think of human rights … is anybody besides me noticing the irony that we are talking about strengthening the Commission, strengthening the Ontario approach for human rights based on a set of principles that is supposed to be universal, international, and here everybody is talking about, well, in B.C. they do*

> *this, and in Quebec they do this, and in Ontario they do this. … We are taking a very parochial approach to human rights.*
>
> Community Organization

Most consultees did not explicitly address the issue of a principled approach to human rights as opposed to some type of pragmatic approach. Most provided feedback within the category of principles as developed by the OHRC for its consultation tools without issue. In fact, many specified significant concern with the fulfilment of international standards related to some of the effectiveness factors such as independence, defined jurisdiction, accessibility, and operational efficiency.

Key Themes

While some stakeholders spoke either positively or negatively about the principled approach to reviewing the human rights system detailed in the *Discussion Paper*, most accepted the value of this approach and were concerned about the fulfilment of effectiveness factors identified.

3. Resources

Over the past ten years, the OHRC's budget has remained largely flat: in 2004-05 the budget was $12,519,000, compared with $11,306,000 in 1995-96. Yet, the demands on the OHRC's resources have continued to grow and become more challenging. In terms of cost, the current OHRC budget amounts to merely one dollar per Ontarian per year.

Almost all consultees agreed that resources are a significant issue, and that the human rights system is presently under-resourced, and should receive greater priority.

> *I am seriously concerned with the lack of funding of the human rights system. It is appalling that the OHRC's budget has remained essentially the same over the past 10 years. This has clearly weakened the OHRC's ability to handle the increased volume of cases.*
>
> Individual

Some consultees held government primarily responsible for the shortage of resources. Some questioned the commitment of governments in Canada to human rights work.

> *… adequate funding for the Commission and the Tribunal is absolutely essential to the successful operation of Ontario's human rights system. The lack of such funding erodes the effectiveness of the Commission and Tribunal and undermines the principles upon which any functioning system*

> *is based … The failure of the previous government to increase funding for Ontario's human rights system must be seen as a failure to prioritize human rights issues in Ontario. Governments who claim to be committed to protecting the right of all Ontarians to equal treatment regardless of immutable personal characteristics must be willing to commit money to the funding of institutions designed to safeguard such rights. Rhetoric alone is insufficient.*
>
> Union

Representatives of disability communities indicated that lack of funding has a differential impact on individuals with disabilities filing human rights complaints.

> *Historically, OHRC and HRTO constantly face limited funding that leads to unnecessary delays in the handling of human rights complaints. We have been informed by several deaf, deafened and hard of hearing OHRC complainants who experience these delays. In addition, they must wait for a longer period of time than average human rights complainants because of the need to book sign language interpreters/captioners, which are disproportionately affected by the operational delays. Some of them reported fearing the cancellation or postponement of scheduled OHRC meetings due to lack of availability of appropriate communication accommodation. For example, cancelling and postponing OHRC or HRTO meetings would mean a wait of at least three to six months more just to set up another meeting or hearing.*

Some consultees offered various methods of determining budgeting for human rights institutions. Some suggested that funding be determined by a multi-party legislative committee; others that the OHRC's budget for compliance activities be tied to the number of complaints received, so that there is an automatic increase when the number of complaints rises, or that it be tied to demographic factors like population increases and the percentage of persons with disabilities and racialized persons in the population.

Some consultees were cynical about calls for more money in the absence of a clear plan or model.

> *What is on the table ... is what the Commission wants. It wants more money, and I think that we could all say, "Okay, you can't have an effective system without more money." … I don't think throwing money without a plan is a good idea, so we need a model.*
>
> Academic

Many others urged pragmatism. All government agencies currently face resource issues. Significant infusions of new funds are unlikely, and the focus should be on the best use of available resources; for example, through streamlining

processes, greater emphasis on sharing of resources and expertise among agencies with similar mandates, and re-focussing of priorities.

> *... the Commission is not unique, and just about every other regulatory agency in Ontario right now is facing the same challenges in terms of budgetary pressures and financial constraints. That is not going to change I don't think in the near future; there is not going to be a pot of gold at the end of the rainbow to restructure everything, and I think that point has been made before. Looking at it from the private sector perspective, I think it is increasingly important for the Commission and other related agencies to start looking for opportunities to share resources and expertise, especially on those complaints that have overlapping subject matter, where you do have these multiple complaints really dealing with the same dispute and the same parties. Leaving aside the compliance issues, I'm just talking about really more (sharing) some of the expertise and administrative resources that are there.*
>
> Respondent's Counsel

Others felt that reform of the human rights system should not be pre-determined by resource limitations: given the importance of human rights, the focus should be on the creation of a significantly improved system, placing aside considerations of cost.

> *We seem to have the discussion with the assumption that resources will remain the same. … I think, to me, there is a fundamental issue of Governmental commitment to human rights in this country, and that's true for any of our Governments, Federal or Provincial. Human rights is low on the Governmental agendas everywhere. They don't want to give out sticks to be beat on the head with. And we all seem, everywhere, to have simply abandoned the idea that the budgets for such issues should not be doubled. They should be multiplied tenfold because our social cohesion is -- this is key to our social cohesion.*
>
> Academic

Many consultees commented that effective changes would likely involve a significant infusion of resources, both in terms of transition and maintenance costs.

> *I know it all comes down to money in the end, but the money will be spent somewhere, in the Tribunal system and in the Commission system, if the system is going to work. So I think it is not just taking away money from investigation and putting it elsewhere. A lot more money has to be put in the system if it is going to work.*
>
> Expert

Key Themes

Underfunding of the human rights system is a significant concern for many stakeholders, some of whom believe that consideration should be given to determining and implementing objective measures for funding human rights institutions.

4. Creating a Culture of Human Rights

Although there were a few consultees who did not value a human rights culture and who felt that human rights institutions are too interventionist, most indicated that a primary focus of any discussion must be the creation of a true culture of human rights in this province. These individuals indicated that such a culture was lacking, that human rights are not considered a priority, and that there exists a lack of a broad understanding of the importance and impact of human rights, and a commitment to the vision of the *Code* and the *Charter of Rights and Freedoms* ("the *Charter*").

> *I think that our population at large, the dominant group or whoever, I think actually don't care. I think we are cogs; we are a very little community and we care very deeply, but I don't think we represent the majority of people in this country. I don't think they do care.*
>
> Complainant's Counsel

> *I think that a lot of people feel that the Government has an obligation to provide health care. But the same cannot be said about human rights. There is a lack of human rights culture, and part of that is because of the Government abrogation of that responsibility. They set out the Human Rights Commission and said, "You do the job, and I don't care. This is how much money we are giving you, and that is the end of the story.*
>
> Legal Clinic

One consultee offered an explanation for the lack of commitment to human rights in Canada.

> *Why don't most people care about human rights? …[U]nless you have been called names because of who you are, you don't know what racism is all about, you don't know what it is to lose your human rights. … people take human rights for granted because in some places most or many Canadians have never had to fight for them.*
>
> Community Organization

The fostering of a human rights culture was seen by some consultees as instrumental to effective human rights enforcement.

> *All governments face cost challenges, particularly at the present time. The government can take steps to reduce cost by creating a province in which human rights are ordinarily protected and cherished. For example, the new disability legislation is a very positive step forward. When fully implemented it should significantly reduce the number of human rights complaints by individuals.*
>
> Advocate

As is further discussed in the section on Harmonization, many consultees believed that human rights measures should be introduced in all sectors and activities in society. For example, some consultees called for routine reviews of all legislation for compliance with the *Code* and the *Charter*, as a fundamental expression of commitment to human rights.

Widespread and multifaceted human rights education was seen by many consultees as being vital to establishing a human rights culture, and a role that should be central for state human rights institutions.

> *So policy, of course, drives the planning, and education needs to be a key component, public education, constant education. I mean, I'm one of those where, just like in real estate, they say, "Location, location, location"; so I'll say, "Education, education, education".*
>
> Community Organization

> *The Commission's educational mandate should be broad and comprehensive...A proactive approach to human rights issues requires we change both attitudes and behaviour. This means that education on human rights issues should begin early, in the school system, where concepts like substantive equality, discrimination and harassment can be made part of the school curriculum.*
>
> Union

> *But the Commission and a tribunal is what I would argue is needed. And I know in B.C. that it has been contracted out in terms of the education to a coalition, and however much expertise that coalition has, however well intentioned, however dedicated, however strong they are as advocates, cannot achieve what a Commission can achieve in terms of public education. There is a much stronger message when there is public education done from a Commission's point of view, all right, and how the public looks at it. And that's the reality of it.*
>
> Union

Some consultees were most concerned that there be much more grassroots education and outreach on human rights. Some stated that to be effective, human rights must be brought to where people are.

> *A long time ago I read a study about the EOC [Equal Opportunity Commission] in the States; they did a multimillion dollar campaign on public education and assessed it after. The single most effective measure were posters in laundromats, not the internet access, not the public, you know, high glossy stuff. So are they there in the community?*

One member of OHRC staff pointed to the value of the processing of independent complaints and incorporating public interest and systemic remedies in resolutions in promoting culture change.

> *… Almost every case has a public interest element. Even the small or medium size workplaces benefit by systemic remedies, such as training and policies that change the "culture" of that place. If this is done one workplace at a time, as is currently the case, it changes, over time, the whole culture.*

Key Themes

The lack of a human rights culture is a concern for most stakeholders. They would like to see increased efforts throughout society to foster this culture, including foremost measures in primary education and public education centred at state human rights institutions.

B. Principles

Some of the effectiveness factors supporting the *Paris Principles* were addressed directly and in some depth by consultees. These include independence, defined jurisdiction, cooperation, and accessibility. These considerations affect the operation of all aspects of the human rights system and are addressed below.

Other effectiveness factors were not addressed as explicitly; these include operational efficiency, adequate power, and accountability. These principles also have a broad impact, and surfaced as considerations and key factors in discussions regarding the human rights complaints mechanism, and will be referenced as appropriate in Section C of this Report

1. Independence

The *Paris Principles* indicate that independence is a cornerstone of any effective state human rights institution. An effective human rights system requires the establishment of state institutions that are capable of acting independently of power brokers in society, particularly government. By definition, state institutions are constituted by government and hence are not fully independent. However, this principle needs to be guaranteed, preferably in the founding charters of these institutions, to ensure that an institution maintains adequate independence to

discharge its responsibilities effectively. Independence has been formulated to include three areas of autonomy involving: legal and operational, financial, and appointment and dismissal matters.

Many consultees felt that the OHRC is insufficiently independent, and that this has a significant impact on its effectiveness.

> *In my view the Commission is not independent of the "power brokers' in our society … the Commission is vulnerable to political considerations and extraneous factors in its decision making process. As a result, the Code's enforcement is ineffective and selective.*
>
> Individual

The most common recommendation for instituting further independence was the call for the state human rights institution to report directly to parliament, as opposed to the government and its ministries.

> *The OHRC appears to report to the Office of the Attorney General. There should be no perception that a government office could interfere with the operations of the Commission, even if this, in practice, does not happen. The Code should be amended to ensure that the Commission reports directly to Parliament.*
>
> Expert

Several consultees pointed to the lack of independence as exemplified by the inability of the OHRC to effectively deal with the issue of discrimination in funding for religious education in the province, where the Catholic school system is funded while other faith-based schools are not. They point to the United Nations confirmation of this practice as discriminatory and to the silence of the OHRC on this issue.

Other measures identified to enhance independence of the human rights system included: revising appointment processes for Commissioners and adjudicators; ensuring the Commission's ability to control its own budget and resource allocations, and severing employees from the government public service.

Key Themes

Many stakeholders are concerned that the current human rights system does not ensure that state institutions maintain international standards for independence and that this has been detrimental to the effectiveness of the system, and believe that consideration should be given to reviewing and strengthening the independence of state institutions involved in the system.

2. Substantive Jurisdiction and International Obligations

Based on the *Paris Principles* and related guidelines, an effective human rights framework must have a clearly defined jurisdiction for established state institutions. Such a definition of jurisdiction should cover off a wide mandate to protect and promote human rights, including the following specific functions.

- Review legislation and administrative decisions;
- Examine alleged violations of human rights;
- Prepare reports;
- Express opinions on the position or reaction of government to human rights evaluations;
- Conduct research, education, and publicity programs;
- Promote and ensure the harmonization of legislation, regulations and practices with international human rights instruments; and
- Protect and promote the public interest.

A number of consultees suggested that a review of the substantive grounds covered by the *Code* was necessary, and that grounds indicated by international conventions but not currently included in the *Code* should be protected, such as social condition and political affiliation rights. As well, human rights institutions should be given the mandate to protect economic, social and cultural rights.

> *The … human rights system can only adequately fulfil its mandate when its subject matter jurisdiction is broadened to include the protection of economic, social, cultural and political rights. Canada is a party to at least two international instruments that seek to preserve and protect such rights: The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.*
>
> Union

Finally, although there were some dissenting voices, many suggested that direct and explicit reference should be made to international conventions in human rights legislation.

> *The Code does not refer to International Human Rights Treaties. Many Commissions reference International Human Rights Treaties directly in their mandating legislation. Even if the mandate of the Commission is not enlarged, it would be symbolically important to reference international treaties as the source of the rights being protected.*
>
> Expert

Key Themes

Some stakeholders are concerned that the current human rights system in Ontario does not afford protections for social condition and political affiliation, as called for by international conventions to which Canada is a signatory and that consideration should be given to how such protections can be implemented into the system.

3. Integration of Functions

As indicated above, the *Paris Principles* call for the establishment of state human rights institutions that possess a wide mandate to protect and promote human rights. It is generally recognized on the international level that promotion and protection functions build on each other and are most effectively fulfilled when intimately related to each other and integrated in a single institution.

> *Clearly, the Paris Principles, first of all, require promotion and protection, the guidelines for national institutions, for the promotion and protection of, so those two functions have to fall within any agency that hopes to meet the Paris Principles. The list of functions that are provided in the Paris Principles are there because they are mutually reinforcing … The investigative function informs education, or it should, in many ways, directly and in determining perhaps where education is, in what areas, what issues, as a requirement for a remedy. The same thing for policy. And the reverse is also true. And I think that if you don't have that symbiotic relationship in one body, then you lose something.*
>
> Expert

This support for an integrated approach for promotion and protection functions was echoed by a number of OHRC staff and some stakeholders.

> *In my experience, there is considerable benefit in the current integrated approach that combines the Commission's different investigation, legal, and policy functions. The Investigation branch is able to draw on the combined expertise from the Legal and Policy branches when investigating and analysing a complaint, permitting shorter and more focused investigations; the policy branch has access to the pragmatic perspective of the other two branches in designing policies, and the legal branch, having been involved in the creation of Commission policies, is better able to promote advancement of human rights jurisprudence*
>
> OHRC Staff

Most consultees did not take a strong position on this issue. However, some felt that, at least in some realms, there were significant risks and downsides to

integration, arguing that the processing of individual complaints inevitably swamps the ability to carry out other functions.

> *So keeping and fixing the complaint-based model is the most conservative option that we could adopt, and if we are going to keep a complaints model, in my view, we need a separation of functions, not an integration of functions. So separation would allow the government-funded agency to be proactive in public advocacy, in complaints initiation, in inquiries, in broad issues.*
>
> Academic

Some referred to the potential biasing effects of the multiple hats currently worn by the OHRC, particularly the housing of a disposition function within the same body as an advocacy function.

> *Under the current system, there is an institutional conflict between the Commission's role as decision maker and advocate. In a similar vein, there are the competing goals of advancing the public interest, on the one hand, and protecting and enforcing individual rights … Freeing the Commission of its investigatory function would allow it to embrace its role as advocate and champion of human rights unencumbered by the yoke of neutrality.*
>
> Complainant's Counsel

> *There would be many in the respondent community who would view the housing of advocacy, education and addressing systemic issues in the same house as the investigative or adjudicative gatekeeping function as a conflict of interest, as an abuse, as biased.*
>
> Respondent's Counsel

On the other hand, OHRC staff noted that the combined investigation/litigation role is common to government institutions. For example, employment standards, health and safety and labour relations officers all have the power to investigate and make determinations as to whether their enabling act has been breached, and where an order is challenged, lawyers from the Ministry of Labour defend the order before the Labour Relations Board.

Key Themes

Stakeholders are divided on the value of full integration of functions within a state human rights institution, so that careful consideration must be given to maximizing the strengths of integration and minimizing the weaknesses in any review and reform of the human rights system.

4. Harmonization

One of the functions cited by the *Paris Principles* and related guidelines is that of promoting and ensuring the harmonization of legislation, regulations and practices with international human rights instruments. In addition, one of the effectiveness factors identified in United Nations guidelines is that of "Cooperation". Accordingly, an effective human rights system requires the establishment of state institutions that are willing and able to develop and strengthen cooperative relationships with other organizations and groups involved in the system.

Almost all consultees agreed on the value of "harmonization" of the system and tended to employ the term at different times referring to either or both aspects of harmonization of legislation, regulations, and practices with international instruments, and the fostering of cooperative relationships and coordination of key elements of the human rights system. As a result, several areas of emphasis arose around the theme of harmonization.

a) A Cooperative Approach to Promotion and Education

Some consultees called for greater cooperation with other bodies on the promotion and education of human rights, such as the Ministry of Citizenship's Policy Services Branch, the Ontario Women's Directorate, and the federal Office for Disability Issues.

> *The OHRC should consult with other government bodies to minimize duplication of information that each body provides about human rights and identify programs that are complementary to the programs provided by the OHRC.*
>
> Legal Clinic

As well, it was suggested that the OHRC could work more closely with NGOs and other community organizations.

Some union representatives called for the development of mandatory human rights committees in cooperation with the OHRC, as a further means at extending and harmonizing human rights enforcement into the daily activities of workplaces.

> *The Union recommends that the Code be amended to establish mandatory human rights committees in the workplace. We submit that such committees could operate in the same manner as mandatory health and safety committees under occupational health and safety legislation … With proper, education, training, and monitoring by the Commission, these committees could have a positive impact on preventing discrimination in*

the workplace and resolving issues without the necessity of the filing of a human rights complaint.

Union

b) Harmonizing the Work of Administrative Tribunals

Much of the discourse around harmonization related to the relationship between other administrative tribunals and the provisions of the *Code*. Questions arose as to how far other tribunals are able to apply the *Code* and the *Charter*, especially where their legislation does not specifically authorize them to do so. Some pointed out that labour grievance arbitrators are already required to consider the *Code* in their decision-making processes by the *Labour Relations Act*. Most acknowledged that tribunals already had the ability to apply the *Code* and *Charter* and to some degree the obligation, but did not have the remedial powers of the HRTO.

In the end, most consultees indicated that the role of other tribunals in applying *Code* principles must be strengthened and clarified.

[T]here should be a mandate imposed on other statutory bodies who have the power to affect this to make sure that their decisions don't discriminate or create barriers or whatever. I also don't think it is a huge leap, though I think it would be good to codify it so they get it.

Advocate

All administrative tribunals – indeed all public and private agencies – have a role in promoting human rights. In the case of administrative tribunals such as the Ontario Rental Housing Tribunal and the Ontario Labour Relations Board, etc. it is important that these tribunals be guided in all their decision-making processes by the principles of the Charter as well as the Code.

Legal Clinic

Some raised concerns as to the willingness of other tribunals to actually deal with human rights matters, due to rigid and narrow interpretation of their founding legislation.

I think it is clear that everyone who has a mandate under a specific statute kind of sticks to that and they have blinders on with respect to everything else. And it is problematic, there is no question.

Government Agency

Others cautioned that most tribunals lack understanding of human rights legal principles and are presently incapable of applying the *Code* and the *Charter* and, as a result, are reluctant to do so.

> *… it is a legal fact that every tribunal should be considering the Human Rights Code and every administrative tribunal should be considering the Charter and they should be making sure that their decisions are consistent with both, full stop. It is not complicated, but the kind of smoke and mirrors that you get met with when you try to advance. And of course, in many of these tribunals, they are non-lawyers, and so they are going, "Oh, my God, I can't look at the Code. I can't look at the Charter. Like there is no way I can consider that." And then their fear just gets fed into, and it is actually not even complicated adjudication to think about that I shouldn't make a decision which is going to negatively impact on somebody's rights. It is not so difficult, right. And I mean, I think they want to do it instinctively … the law is there; the common law is there to tell them that, but it is not being applied.*
>
> Complainant's Counsel

Discussion also considered whether human rights complainants should be able to choose between forums when raising human rights allegations or whether such choices should be limited. Some emphasized the needless expense, delays, and difficulties of having multiple forums for addressing a single issue, while others emphasized the importance of access to the human rights system and the ability of individuals to seek the most effective remedies.

Respondent counsel were most concerned about the ability of complainants to raise similar issues in multiple forums.

> *You deal with the Commission, and suddenly these complaints are alive for two years at a time, and there are quite often parallel, overlapping proceedings at the Ministry of Labour, civil litigation, the Worker's Compensation Board, all dealing with essentially the same case and all of those bodies taking the view that they are uniquely positioned to deal with that complaint and none of them are willing to throw it out, and so suddenly you are defending against three and four pieces of litigation at the same time all dealing with the same employee dispute.*

Some respondent counsel argued for exclusive jurisdiction to be given to specialized tribunals in situations also involving human rights matters, because they have area expertise that allows them to better and more quickly deal with the central issues.

> *I would suggest that there are areas, such as special education, such as the workplace, where there are tribunals that are set up that do have expertise and who have a better understanding of the workplace and the context and the complexities and that it is important that those complaints be dealt with by (these) tribunals ... I would say that work-related complaints should end up at the Labour Board ...because they have an expertise.*

Others from the complainant perspective argued for the right to ultimate recourse to the state human rights institution regardless of whether this represented "two kicks at the can".

> *... I disagree with ... (the) suggestion that there be exclusive jurisdiction taken away from the Human Rights Tribunal and given to an employment or a labour tribunal or an educational tribunal with respect to these issues. That works to the benefit of respondents; it does not work to the benefit of complainants.*
>
> *I don't think it is an either/or situation. I think it has to be part of everything that is done when you look at it through a human rights lens. But ultimately, if the issue is not dealt with, at whatever tribunal level, the person maintains the right then to go to a human rights complaint. And some people will argue that is two kicks at the can. Well, that's fine.*

Union representatives argued for the right of ultimate recourse to the OHRC, even in the unionized context where the OHRC has taken the position that human rights matters adequately dealt with through the grievance arbitration process should not be allowed recourse to the OHRC complaints process.

> *It is essential, in our view, that public bodies like the Commission and Tribunal be accessible to all members of society. Denying unionized workers access to the Commission and Tribunal prevents them from utilizing services established for their benefit merely on the basis of their union membership. Having said that, we recognize that the re-litigation of issues which have already been tried and determined are not in the best interests of any party. Such duplication is costly for everyone involved, and needlessly expends scarce administrative resources. As a result, we recommend that the Commission's role in dealing with complaints that could or have been heard in other forums be clarified.*

A consultee from Quebec raised caution regarding suggestions made that human rights matters be dealt with in non-human rights tribunals, based on experience in that province.

> *The Quebec Commission has been systematically stripped of its jurisdiction by appeal court after appeal court saying that the equivalent of the special education and workplace grievance systems and so on have the sole jurisdiction to address these issues. And what has been happening is the Quebec Commission has been stripped of its capacity to address systemic issues and to take the case and say, "Yes, you have addressed the technical administrative issue in your tribunal, but we would like the capacity to address the human rights issue which has not been*

> *properly adjudicated in this forum and which can't be properly adjudicated in that forum", and they can't do it.*

Some called for the development of a super tribunal or other structural changes to enhance competence of tribunal members to deal with human rights matters and to affirm and clarify jurisdiction. Some looked to structural changes, such as formal negotiated protocols, or cross-appointments as a way to better deal with these issues:

> *The idea I mentioned earlier of having the actual tribunals themselves have coordinating bodies for their intake processes I think would help the flow or the streaming of complaints to appropriate areas. And maybe having… have a legislative change that would allow a Human Rights member to sit on the tribunals of these other specialized bodies … So the important thing I think is to try to find systemic and structural ways of integrating that expertise into the tribunals.*
>
> Expert

There was general consensus that the OHRC should be involved in training and educating other tribunal members, and in monitoring activities of various tribunals to ensure competence and consistency.

> *Every tribunal should be looking at the aspect of human rights and constitutional rights, but they have received no training (and) ... I would argue that (training) is the role of the Human Rights Commission …*
>
> Union

c) Other Forms of Harmonization

Some consultees approached harmonization from the perspective of enhancing legislative harmony with the *Code* and *Charter*. In this regard, some consultees suggested the development of mandatory legislative review committees that include a human rights expert.

> *… a legislative review committee, I would like to see that pressed very hard by the Commission, because that is public policy and education right there, and it is far better than trying to get legislators to talk about human rights. I mean, they are not interested. They are interested in getting votes. But if a review system is put in place for all their legislation, then maybe some of their legislation is going to have to be changed or amended.*
>
> Advocate

A few consultees were concerned that human rights legislation is not harmonized across Canada.

> *.. is it in keeping with the UN covenants, the international covenants which Canada goes out like a boy scout and signs and they are applauded, but we don't see the implications for the province, let alone the federal Government. There is no integration between the feds and the provinces in reviewing this. When we go to Geneva for the Human Rights Committee to really look at our performance, it is left to the civil servants. I mean, the last time they had an intergovernmental meeting was 13 years ago.*
>
> Government

Key Themes

Many stakeholders are concerned that the current human rights system lacks coordination, especially regarding the role, activity, and capability of specialized administrative tribunals. They suggested greater cooperation in human rights promotion and education. In addition, some stakeholders are concerned that legislation, regulations, and daily activity in key sectors are not harmonized with Canada's international human rights obligations and norms and are not harmonized across the country.

5. An Accessible Human Rights System

Based on the *Paris Principles* and related guidelines, an effective human rights system requires that state institutions are readily accessible. Prominent factors affecting accessibility include physical location and design, employment of communication technology, receptivity of service, perception of service, timeliness of service provision, and representative composition of membership and staff.

Consultees employed the term accessibility in a variety of ways, and identified a number of concerns about perceived deficiencies and features in the current human rights system. One consultee, however, spoke of the fundamental accessibility to a set of principles and laws that a human rights commission was uniquely capable of providing.

> *… this speaks to accessibility, because the question really is, accessibility to what? You can get accessibility to adjudication through a whole range of forums, but it seems to me what we are particularly concerned about here is accessibility to a particular set of principles and laws around human dignity, respect, looking at different power cultures or imbalances of power … and that particular is uniquely, in my view, available in a human rights commission.*
>
> Expert

a) Legal Representation

One major theme on accessibility revolved around access to legal representation, which some felt was pivotal to a truly accessible human rights system. These consultees felt that no system could be accessible without adequate representation, at no cost, to all complainants and to respondents as required. Some felt that access to representation would resolve most if not all other accessibility issues, such as power imbalances and financial means.

> *… if you only have a certain envelope of money, it might be worthwhile considering whether the investigation bureaucratic money go to representation. And I don't know exactly how to fashion it. I don't have a complete model, but it deals with power imbalance if people get counsel*
>
> Legal Clinic

On the other hand, many questioned the feasibility and effectiveness of a system that was centred on the guarantee of legal representation, based on the expectation of high cost and the current environment of limited and inadequate access to legal aid that they believed was not likely to change.

> *I mean, the reality is community legal clinics are stretched to capacity and beyond, and Legal Aid Ontario has not had a funding increase in six years of any kind. And you know, CPI has had 2 percent, and LAO has got nothing in six years, in addition to which [LAO has] had to absorb the cost of an increased tariff to pay lawyers who are already paid well below market rate, who don't even have parity with the Crowns.*
>
> Government Agency

Some cautioned that a move to an improperly funded legal representation model would inevitably lead to a two-tiered complaint system.

> *… if you don't have a system that supplies full legal representation to everyone, you are going to have a two-tiered complaint system; you are going to have individuals who can't afford a lawyer and simply won't fare as well …. So the only way to address the power imbalance is you have to have full representation. I don't think we have a Government that has the money to provide that kind of expensive legal aid.*
>
> Commission Staff

b) Timeliness and Complexity

As discussed elsewhere, many believe that excessive delay in the system represents a barrier to accessibility for many.

> *To me, a barrier to accessibility is actually the length of time it takes; you know, it isn't accessible to a child if they can't get an answer while they are still a child.*
>
> Legal Clinic

Similarly, many consultees indicated that the complexity of the current system is a barrier to many, not only because it contributes to delay but also for intrinsic reasons.

Consultees were divided on the complexity inherent in different human rights models and their implications for accessibility. Some indicated that the current model that centralizes human rights activity through a single administrative body is more complex than an alternative model that is centered on direct access to a tribunal.

> *And so even though the current process is strictly complying with what the courts have said is required in an investigative process, it is not working because it is alienating people and it is adding an extra layer of unnecessary complexity … by putting in place this investigation that is required in every single case, which when in reality … there are many, many cases where no investigation is required at all.*
>
> Complainant's Counsel

In response, some expressed concern that any system that included direct access to a tribunal had a natural tendency to "judicialize" the system and add increased complexity, which would not only increase barriers of financial cost, but also add further barriers of complexity to complainants employing the system. One consultee with first hand experience of the direct access model instituted in British Columbia referred to the increased judicialization that followed introduction of that system.

> *Human rights is about people and people getting along with people; that's people respecting other people for their values, whoever they are. And the system that we currently have in British Columbia is about paper; it is not about people. It is driving paper through, so there is no gatekeeping and it is grinding to a halt. It is becoming laden with rules. It has got 50 pages of rules. It has got 390 decisions as of the last time I checked, and 95 percent of those are procedural-based decisions. It has got an average of three to four days of hearings. It has got an average of 30-page decisions. ... It is not about solving people problems, and human rights is around -- I think it should be, but it isn't -- but it should be around solving people problems. And if you are moving to a system which is a more direct access model, it will grind to a halt if you just put it to paper and not have people.*

c) Access to Information and Regional Barriers

One consultee indicated that a significant barrier to the human rights system was represented by the lack of knowledge of this system in the general population, especially outside of Southern Ontario.

> *. The larger problem is a lack of knowledge. Knowledge is power, and knowledge is access. People don't even know. And I think most of the folks in this room are of Southern Ontario, the Golden Horseshoe. Well, the folks here have a much greater idea of what is available and the remedies that they can access. Outside of here, best of luck to you, mate. It is tough. So anyway, I think geography is huge, and knowledge. I would love to see more resources devoted to education.*
>
> Human Resources Professional

Other consultees agreed that the current system did not provide uniform accessibility across Ontario. Commenting on the future he envisioned for the OHRC and HRTO, one consultee commented:

> *It would need to be more geographically accessible, in the way the Commission used to be. Do you remember when the Commission had regional offices?*
>
> Complainant's Counsel

Another consultee from the north of Ontario was in favour of major decentralization of the system.

> *Yeah, accessibility to the community is really crucial. I'm a fan of decentralization and I don't know if that is ever going to happen, and regionalism and I don't know if that is ever going to happen. That's because I live in Northern Ontario now and not in Toronto any longer. But you know, I think that this is part and parcel of my vision of early dispute resolution, is that I think what many complainants are looking for is some kind of hearing, which is the title of an old administrative law paper, and that kind of hearing could be effected in a regional storefront kind of structure.*
>
> Academic

d) Culture and Language

Some consultees indicated that there are significant barriers based on culture and language that are not currently being addressed by either the OHRC or the HRTO.

> *[T]he inaccessibility of the Commission is one of the biggest challenges facing our clients who lack proficiency in English or French...In our view, the barriers faced by these individuals are analogous to those faced by deaf or hard of hearing individuals. In either case, the individual is unable to communicate effectively with the mainstream society, due to barriers of one form or another. The result is the same – that they are denied the very services that they need to protect their rights and dignity as human beings. If the Commission is to remain relevant to the people of Ontario, then it must make itself truly accessible to all Ontarians, regardless of their language ability.*
>
> Legal Clinic

> *A lot more has to be done to deal with the issue of culture, because right now I wouldn't know how new immigrants would even know or understand how to gain access to the human rights system, whether it is the model we have now or later. Public education, I don't think that that's being done in a way that those community groups that are there now who would service those folks, have that information. Translation for folks who come in, back again in the late '80 and '90s, I mean, there was funding, lots of funding for that. I'm not even sure how much funding the current system has for that or if we have any at all.*
>
> OHRC staff

e) Accessibility for Persons with Disabilities

Representatives from disability communities and organizations also indicated that accessibility for persons with disabilities, including both physical and other barriers, remained a concern.

> *The Commission lacks clear policies and procedures for providing access and accommodation for deaf, deafened, and hard of hearing participants in the human rights complain process. We have identified major barriers and gaps in accessibility for deaf, deafened, and hard of hearing individuals to the services of the Ontario Human Rights Commission and Human Rights Tribunal of Ontario.*
>
> Community Organization

f) Other Issues

One consultee indicated that the OHRC and HRTO and the human rights system as a whole are instruments of the dominant culture, or at the least are perceived by many marginalized communities as institutions of the dominant culture. From his perspective, the reality or perception of such an association with the dominant culture leads to barriers to use of these institutions by marginalized individuals and communities.

Further reflecting this idea, another consultee indicated that many marginalized communities don't trust the OHRC and don't see it as credible in dealing with their concerns.

> *In terms of the cultural piece of it, it is also about trust and communities' trust in the Commission and about making the Commission relevant to communities again. And that's a big factor, that communities feel that they are being heard; in systemic type issues, that communities feel that whoever is leading the charge at the Commission, that they are sensitive to the issue and they have an understanding, that they know how to relate and there is a relationship. And that's where the outreach and public education comes in. It is about building public trust and about building public confidence and relationships that will once again make the Commission relevant.*
>
> Legal Clinic

Key Themes

Stakeholders raised concerns regarding a number of barriers to accessibility, including lack of representation, complexity of judicial and administrative processes, cost, inordinate delay, lack of knowledge of the system, geography, culture, language, failure to accommodate disability, marginalization, and lack of trust.

6. Addressing Systemic Issues

There was broad, though not universal, agreement that any human rights system should have a stronger and more effective focus on addressing systemic issues. Consultees, to varying measures, included as systemic activities:

- maximizing systemic and public interest remedies in individual complaints,
- the processing and initiation of systemic complaints by the state human rights institution,
- developing and enforcing human rights standards,
- public education activities, and
- inquiries and research into human rights concerns.

Many criticised the current system as not adequately addressing systemic issues in society or even enforcing these when systemic remedies have been obtained.

> *In light of the importance of a pro-active approach to addressing issues of discrimination and harassment, we are concerned that the Commission*

> *has not adequately focused on pursuing complaints designed to eliminate systemic discrimination in the workplace.*
>
> Union

> *... one of the problems that I'm seeing with systemic complaints where you get systemic remedies is an implementation function for the Commission, being able to have a sector or a team within the Commission that will look at effective implementation, particularly in those big corporations or public institutions that ….. will be able to, with the involvement of the Commission, eliminate some other potential human rights violations within those big public institutions and to work on the implementation or really successful implementation of those public remedies.*
>
> Legal Clinic

Some felt that the primary focus of the OHRC and the system as a whole on processing individual complaints compromises the ability of the system to address systemic issues.

> *..the problem with the current process and the problem that has plagued human rights, the system in this province for decades, is that the Commission has been burdened by the obligation to devote a considerable amount of its resources and energies towards the individual processing of complaints, and that has detracted the Commission away from the ability to devote resources to doing the kind of public advocacy, public policy and public education that properly the Commission should be doing …*
>
> Complainant's Counsel

Some felt that advancing the public interest in the course of processing and litigating human rights cases must be a primary role of any human rights institution.

> *We have to be concerned about advancing and protecting and representing the public interest, and the public interest in the advancement of human rights is, in large part, the mandate of the Commission, which again is always overshadowed by the individual complaint process. So I want to sort of give a resounding endorsement for keeping the public interest on the table as part of the definitional mandate of the institution.*
>
> Academic

Some indicated that individual complaints are not the most effective means of addressing systemic issues, and it was pointed out that individual complainants, and the clinics and lawyers representing them, have an overriding interest in the resolution of their individual dispute, and that systemic or public interest issues may therefore get lost. OHRC staff, in particular, indicated that one of the

strengths of the current system is that it retains as a standard feature the advancement of public interest in individual complaints and thereby addresses systemic issues. They indicate that the public interest would be diminished as a factor in the human rights system if any change to the system did not involve one party that was acting principally in the public interest at the adjudication hearing.

> *… under the current system in Ontario, the Commission itself is a separate and distinct party at hearings before the Tribunal. And, even prior to referral of a complaint to the Tribunal, Commission mediators and investigators are trained to require broader public interest remedies beyond the self-interest of the parties.*
>
> *… The private bar and clinics would have no real motivation to ensure that public interest remedies are part of any resolution or that public interest issues are argued at a hearing. Their interest, understandably, will be focussed on the individual client. While some lawyers and complainants may want public interest remedies to form part of a resolution of a case, they would surely focus on the individual interest especially where the public interest component may serve as deal breaker (in the case of a settlement) or as taking away from the individual's argument (in the case of a hearing).*

Key Themes

Stakeholders value systemic approaches to human rights promotion and protection and most are significantly concerned that systemic approaches are not being maximized in the current system. From this perspective, enhancing systemic approaches should be a priority in any human rights system review and reform.

7. Skills/Expertise/ Community Representation

Many consultees believed that the level of expertise and skill in human rights staff, commissioners, and tribunal members was insufficient and needed to be advanced. Several emphasized that much greater attention must be paid to skill and expertise in the appointment of Commissioners and HRTO members. As well, the appointment process should be open, transparent, and based on clear criteria.

> *[T]he Commissioners should be chosen from their communities. They should be accountable. We should have a representative Commission that guides the policy direction of the Commission… There has to be a really different appointment process.*

Legal Clinic

One consultee indicated that regardless of where or how decisions are made, the skill and expertise of human rights workers and the decision makers will have the most significant impact on the quality of decisions reached.

> *… it is not a matter of what forum. It is a matter of expertise and understanding. That's the bottom line .. you are sitting there for months frustrated, in one case for years, frustrated sitting in a hearing where the adjudicator isn't getting it, is darn well not understanding it. And this person is the independent, objective arbiter and they have an agenda going here, and what, I have to tell this poor person who is sitting through this, this complainant, "You know, give me a team" -- and I have said this at the Commission, at the Tribunal -- "Give me a team of people who can investigate race cases and disability cases. Give me a team of people who can adjudicate and hear this. And give me a team of Commissioners who will understand the nuances of race and disability cases".*
>
> Legal Clinic

In terms of the OHRC, there were particular concerns raised regarding front-line positions, such as inquiry and intake, mediation, and investigation. One consultee indicated that human rights issues have increased in complexity and therefore greater skills and expertise are required to adequately address these issues.

> *This whole Commission system the way we have it in Canada was really developed, you know, in the '40s and '50s in order to conduct investigations by people who sort of had, you know, relatively junior level public servants conducting investigations on facts on relatively simple matters that are susceptible of relatively easily resolution… I think the current social reality has out-stripped the structure for which the human rights system was created. In other words, I think it was a system that was designed in a time and in a space and in a demographic reality that does not exist today, and my personal view is that the balancing of that tension has to happen through a fundamental re-think of the level of staff who are doing the work at the Commission, of the type of work that is being done and the professional qualifications they have in order to do that.*
>
> Expert

Representatives from disability groups and organizations called for dedicated, trained staff to be hired to help facilitate accommodation of disabilities. For example, one consultee made the following recommendation in relation to the needs of the deaf, deafened, and persons with hearing impairments.

> *It is recommended that the OHRC and HRTO hire trained and specialized OHRC and HRTO staff who are to communicate using sign language and who have knowledge, understanding of and sensitivity to Deaf, deafened, and hard of hearing needs during intake, screening, scheduling of mediation meetings and investigation of human rights complaints*
>
> Community Organization

Some consultees were concerned that human rights staff and decision makers, including at the HRTO, must be more representative of the communities in order to better meet their unique needs and foster greater accessibility.

> *I think the Commission is generally inaccessible to Aboriginal communities... I think the Commission could bridge this gap by, first, acknowledging, acquainting themselves with, and giving appreciation to the various tribes that populate Ontario. This is best initiated through internal restructuring, hiring Aboriginal personnel at all levels, seeking an Aboriginal Commissioner, revisiting the barriers that have prevented these hires/appointments from happening in the past and adopting aboriginal-centred approaches to mediation and resolution.*
>
> Commissioner

Key Themes

Many stakeholders believe that skill and expertise levels of human rights staff, Commissioners, and adjudicators are not sufficient to fulfil the current demands of the work. Some are also concerned that human rights staff, Commissioners and adjudicators do not appropriately represent the communities that they serve. Consideration should be given to the appropriate skill levels and levels of community representation for human rights institutions in Ontario

C. The Complaints Process

Much of the Report thus far has focussed on broader issues in the Ontario human rights system. At this point, the discussion will turn to the individual complaints process, which is an area of primary concern for many who participated in the consultation process. The complaints process is the most visible of the human rights system's functions, and most of the OHRC's and HRTO's resources are devoted to it.

While there are many other functions performed by the human rights system, such as research, public inquiries, education, and policy development, these were not a specific focus of discussion, except insofar as consultees felt that any reform of the human rights system should increase the focus on these types of activities.

Many feel that the complaints resolution process is not working as well as it should be, and that problems with this aspect of the system are impeding the effective functioning of the system as a whole. Criticisms of the current complaint resolution system include:

- The process is too slow to be meaningful;
- It is open to abuse by both respondents and complainants, particularly through the refusal by parties to cooperate in the process and disclose relevant information in a timely manner; and the excessive use of procedural tactics to cause delays and wear the opposing parties down;
- Parties do not have sufficient access to the decision-maker;
- The process is overly litigious;
- The process is excessively complex and thereby inaccessible; and
- The system is sometimes poorly administered and at times fails to provide good customer service to parties.

Some consultees pointed out that the system cannot be expected to tackle systemic issues effectively, and to create and maintain a culture of human rights unless the complaints resolution process can be made to function better.

This is a contentious area. There are many competing principles and issues at stake. As well, one's perspective is likely to be influenced by one's role in the system: respondent counsel will be likely to perceive different problems and suggest different solutions than complainant counsel, for example. There are many different ideas about how to improve the complaints mechanism. For example, while many may agree that the system should be simplified, fewer would agree on how that might best be done.

The issues affecting the complaints resolution process are complex. For simplicity's sake, the issues have here been broken down into a number of themes: timeliness, simplicity and fairness, flexibility, being heard, administrative and adjudicative processes, and gatekeeping. However, all of these issues are intimately linked. One cannot, for example, expect to create a more timely system without simplifying and streamlining it. As well, many consultees recognized that there are tradeoffs between these concerns: for example, some stated they would be satisfied with a simplified system with fewer procedural safeguards, if it meant that more complaints could be heard by a decision-maker.

Two principles were identified that should be kept in mind when considering all of these themes. These two principles will often support each other, but sometimes will compete. The first is that the complaints resolution process should be first and foremost about the people: any system design should consider the experiences of those who actually use the system, and how it feels to them:

> *I really think that whatever decision is made or however it is approached, it really has to start with the complainant and the respondent…[Y]ou have to*

> *start with the people that … are the people for whom the Code is designed, which is all the people of Ontario and everyone who might be affected by discrimination and harassment.*
>
> Government Agency

Some consultees also emphasized a second principle, that while the complaint resolution process is concerned with resolving individual disputes, it is not only about that. There is also a public interest at stake in the resolution of these issues.

Finally, a few consultees cautioned against focussing on the "efficiency" of the system to the detriment of its effectiveness:

> *While we are sure one can always find numerous ways to improve the efficiency of any bureaucracy – the Commission is no exception – we want to add a word of caution about the blind pursuit of efficiency, particularly by an organization presumably dedicated to the promotion of human rights. .. Better efficiency,* per se*, will not resolve any of the current challenges faced by the Commission. On the other hand, the pursuit of efficiency has the potential of making the Commission even less accessible and less responsive to the needs of those it purports to protect.*
>
> Legal Clinic

1. Timely Resolution of Complaints

The ability of a human rights system to provide meaningful and timely resolutions to human rights complaints is a key factor in assessing not only the operational efficiency of a human rights system, but its accessibility and its ultimate effectiveness. As many consultees pointed out, decisions rendered years after the events in question are no longer meaningful to the parties involved.

> *[O]nce a resolution is reached so far removed from the events, the outcome has often lost any meaning to the parties… Justice delayed is justice denied, and in taking so long to have a complaint resolved, the system has failed to adequately protect our clients' basic human rights in a timely manner. The delay in the system is not only frustrating to complainants that have launched complaints but may also act as a deterrent to potential complainants who never end up filing a complaint, due to the prospect of a multi-year delay. Knowledge of the delays in the system can also influence a complainant's decision to accept a poor settlement offer at mediation.*
>
> Legal Clinic

The OHRC also heard that these concerns are particularly pressing for those who are most vulnerable, and simply cannot afford to wait around for a decision.

The loss of housing, or employment, for example, can have an immediate and devastating impact on those with limited financial, social or psychological resources, and who are struggling simply to survive.

> *For poor people and recent immigrants it is just a joke if you are saying that you file something now and three years from now – I mean, these are my clients, so I can tell you they can't stick around for a legal process that takes that period of time.*
>
> Legal Clinic

As well, in some cases, a timely resolution may enable the parties to salvage or restore an important relationship; for example, in the workplace.

> *[I]f it is a workplace accommodation issue or a harassment in the workplace issue, it becomes critically important to see if that relationship can be repaired and sustained going forward. And the nature of the process can be quite critical to salvaging that relationship, and the more quickly the Commission can intervene in that regard and probably the less formal the process is, at least in the initial stages, the more successful that may be.*
>
> Respondent's Counsel

However, a cautionary note was sounded by one consultee, who pointed out that a quick process is not in itself the be-all and end-all of a human rights system, and the quest for timeliness should not be pursued to the detriment of the ultimate goal.

Many stakeholders raised concerns regarding the slowness of the current compliance system. The average age of complaints at the OHRC is currently 12.1 months. Those complaints that do not settle, and are fully investigated and receive a decision under section 36 of the *Code* take considerably longer: the average age of cases at the time of a section 36 decision is currently 28.8 months. Approximately 20% of complaints reach this stage. Hearings at the HRTO add an additional period of time, which may range from months to years, depending on the complexity of the case, and there may be an additional lengthy wait for the issuance of a decision following a hearing. The consensus is that even at its best, this process is simply too slow.

> *A process that takes twelve months as a standard is not appropriate. You know, even if you met that a hundred percent of the time, it is too long. It is too long. No one in the real world is going to accept that.*
>
> Expert

Many reasons were identified for the slowness of the process, including lack of resources, too many steps in the process, poor administration, a lack of power at

the OHRC to compel parties to cooperate in the process, and excessive proceduralism at all levels.

Most consultees agreed that the human rights compliance process must be streamlined all the way through the system, at both the OHRC and HRTO levels. Suggestions ranged from minor adjustments, such as allowing complainants to themselves serve complaints on the respondents and consolidating the settlement processes that now take place at several points in the system, to broad ranging reforms to the powers of the OHRC and the roles of the OHRC and HRTO. These suggestions are dealt with throughout the following sections.

As well, many felt that there must be more emphasis on resolving simple cases quickly, at the front end of the system. Some consultees referred to the Early Settlement Initiatives that are undertaken by some human rights commissions and have been carried out in the past (and to some degree at present) by the OHRC. These involve commission staff intervening and seeking settlements in human rights issues that have the potential for quick resolution, immediately after, or even prior to the filing of a complaint.

> *I think it would be fantastic to have a group of people who, after it goes through an inquiry and intake process, end up acting not so much mediators, but almost advocates for settling an issue in a very short-term framework.*
>
> Expert

The same person suggested that structural changes must be made to the system to allow for early, quick, and informal resolutions.

> *It is simply unrealistic to expect the formal process to respond to the kind of urgent issues that were raised… because it simply can't do it; it is not resourced to do it; and under the current structure, it is simply not realistic. But I think it can be resourced to deal with these issues effectively, and that involves an investment of time and money and in essence, a new structural function that the Commission has not been mandated to do in the past.*

Some also suggested a more flexible system, which could deal with simple cases in an expedited fashion. This proposal is discussed at more length in the section on Flexibility.

Key Themes

The timeliness of the current human rights compliance system is a key element of concern for stakeholders, and impacts on the accessibility, efficiency, and effectiveness of the current system. Consultees recommended that consideration be given to creating a more timely complaint process through streamlined and simplified processes, a more flexible approach, and early interventions.

2. Simplicity and Fairness

As discussed in the section on Accessibility, many consider the current system to be too complex, both at the OHRC and the HRTO. They pointed out that a simpler complaint resolution process is likely to be a more timely one, which has significant benefits for all parties to a human rights complaint.

> *As soon as we get into this formal process, no one wins; we have a dispute. We can save relationships if we solve things fast…*
>
> Respondent's Counsel

Simplicity of process is also an accessibility issue, particularly when we consider that many potential human rights complainants are among the most vulnerable members of our society. Processes that are overly complex will exclude those who are poor, are new to Canada, have literacy issues, have disabilities, or are marginalized in other ways:

> *For persons with learning disabilities and individuals who are marginalized in society, procedural simplicity is more important than an overly legalized system which they would not understand.*
>
> Community Organization

Although there may at times be a trade off between simplicity of process and procedural fairness, this will not always be the case. Some consultees pointed out that sometimes greater simplicity can lead to greater fairness. For example, many pointed out that respondents at times use procedural motions at both the OHRC and HRTO to delay the process and wear down complainants, and that reducing such proceduralism may benefit complainants as well as the complaints resolution mechanism as a whole.

> *Certainly lawyers sometimes, from a strategic point of view, want to litigate another party to death… but I don't think your right to a fair hearing is undermined because you are not allowed to call irrelevant evidence.*
>
> HRTO

The power imbalance between the parties, one consultee suggested, should be considered when determining what is fair: if the process feels fair to the most vulnerable party, it probably is fair enough.

However, one consultee cautioned against excessive simplicity:

> *You can certainly go too far down the road of simplicity and give up fairness.*
>
> Legal Clinic

A few consultees felt that the key issue was not simplicity of process but the lack of adequate checks and balances throughout the process. From this viewpoint, there are currently inadequate mechanisms for the judicial review and appeal of decisions regarding a complaint: it is indicated that the courts have awarded excessive deference to the decisions of the OHRC, so that there is insufficient scrutiny and opportunity for review.

> *Fundamentally, the reconsideration doesn't operate effectively and judicial review is almost meaningless in Ontario given the huge discretion granted to the Commission to toss a complaint.*
>
> Legal Clinic

Those who hold this viewpoint believe that what is needed is not greater simplicity of processes, but adequate, affordable representation for all complainants. An oral hearing, with proper representation, could balance out many accessibility barriers.

> *For people who don't have good English language skills, who may be illiterate, any written hearing process is problematic. It may seem simple, but it is not simple if you don't have the language skills. So the oral process works well in terms of removing barriers for large numbers of people.*
>
> Legal Clinic

This issue is further discussed in the section on Administrative and Judicial-Type Decision Making.

However, the majority of the consultees felt that a simplified process could have benefits, at least for some cases, as is further discussed in the section on Flexibility.

A number of cautionary notes were sounded regarding any attempt to significantly simplify the human rights complaints process. Given the stigma attached to any finding that a respondent has breached the *Code*, there is a substantial incentive for respondents to make strenuous attempts to resolve the matter on a procedural basis, rather than on the merits:

> *[N]o matter how often when I was teaching public law I said "Human rights legislation is not punitive, it is remedial" , there is no one in the world who believes it. There is nothing that seems more stigmatizing than to be a discriminating human being. It makes you evil to be a person who discriminates. So because they can't stand the stigma of the result, you fight to the death to make sure you never get to that.*
>
> Legal Clinic

As well, the use of procedural motions and objections may be perceived to be the most effective way for respondents to deal with some complaints.

> *[T]he only way the lawyers on the respondent's side are able to avoid the 50-day or 60 day hearings is to bring the procedural motions, because they are not going to settle for some complaint they feel is not meritorious.*
>
> Counsel for respondents and complainants

Finally, as one consultee pointed out, the balance between fairness and simplicity is not ultimately in the hands of administrative bodies, it is in the hands of the courts.

> *We are not going to decide it [the balance between fairness and simplicity]; the courts are going to decide it by common law principle. And my guess is you would have a more efficient system if you couldn't have procedural complaints at every damn level, delay, disclosure, access to witnesses, expert right to lead evidence at the investigation. The fewer the processes, the less procedural fairness will slow us down … We can't solve what the courts are going to do in procedural fairness. The best you can do is to get an expertise clause that allows for more deference.*
>
> Academic

Key Themes

Many feel that the current process is too complex, procedural and legalistic, and that a simpler system would be more accessible, more timely, and could be equally fair, particularly for cases that are themselves simpler. Some cautionary notes were struck, however, as to the ability of a human rights system to achieve this. On the other hand, some feel that the core issue is not simplicity, but the lack of checks and balances on decision-makers and of adequate representation for complainants.

3. Flexibility

a) Streaming

A number of consultees pointed out that the human rights complaints mechanism deals with different kinds of cases. There are large and small cases; those dealing with complex issues and those dealing with more straightforward ones; cases involving only the parties and those with systemic ramifications; cases that turn on issues of credibility and those that require extensive investigation.

Many felt that part of the difficulties under the current system is that all cases are treated the same. Generally settlement is attempted, and where settlement is unsuccessful, an investigation is conducted, a case analysis is drafted, a section 36 decision is made, and where evidence warrants, a full hearing is held before the HRTO. Some believed that this fulsome process is neither necessary nor appropriate in all cases.

> *Part of the problem is treating each complaint as the same kind of complaint, and you are putting far too many resources … into the average simple complaint. [Y]ou got bogged down in that and didn't deal with the systemic.*
>
> Counsel for respondents and complainants

These consultees indicated that some cases, which involve individual rather than systemic issues and are relatively uncomplicated, could be dealt with through a much simpler process than the one that currently exists. As one consultee put it, "the forum should fit the fuss". For simpler cases, we may not need an extensive process with elaborate safeguards in order to meet the duty of fairness.

> *Where that trade off [between fairness and simplicity of process] exists in any individual case depends on its complexity and various other things, and I think one of the challenges here of trying to build a system in which there is the same process for everything is wrong …maybe there is a way of looking at how you would expect cases could reasonably be streamed so that the process fits the nature and complexity of the case.*
>
> Government Agency

Some put forth the view that a benefit to this kind of streaming would be the ability to allocate more resources to those cases that have broader ramifications.

> *The ability to take the small claims cases, small claims type cases that don't need to be fought to the death, that can be mediated and go through a small claims process and … have those move forward and then free up a qualified set of investigators and the policy staff working together … the way they did in the last couple of years on the autism cases.*
>
> Expert

A number of criteria were suggested for determining how to stream cases. Some suggested looking to the nature of the issues at stake:

> *[In determining criteria to determine the level of process required] it really depends on the nature of the case, and to me the criteria is what are the issues, the relevant issues, that are involved in the case.*
>
> HRTO

Many suggested that the so-called "he said/she said" cases, which hinge on determinations of credibility, could be streamed into a simpler process. That is, the essential determination in streaming would be the nature and extent of the investigation required, if any:

> *[T]here are a whole lot of cases in the Commission that are he said/she said cases, that are simple, factual, credibility cases and they are not very complicated and they need a couple of days where people will tell little stories, and at the end of the day the adjudicator will say, "I believe you but not you". .. I wonder whether one could have a direct access model for those cases that proceed in a much more summary way, and for those cases which require an investigation, because somebody is going to have to do an investigation, that they stay behind.*
>
> Complainant's Counsel

A few suggested that consideration also be given to whether there are ongoing relationships at stake that could be salvaged:

> *One of the critical factors is the existence and importance of an ongoing relationship between the parties…The nature of the process can be quite critical to salvaging that relationship. If you go to a formal hearing, you are either going to have a winner and a loser, or in some cases, a loser and a loser where you eliminate the possibility of a win-win situation.*
>
> Respondent's Counsel

A wide range of options was put forward as to what this simpler process could look like. As discussed below, some felt that certain steps of the current process, such as investigation, could be omitted in some cases. Some suggested a combination of fewer steps and a scaled-down hearing process, as is further discussed in the section on Administrative and Judicial-Type Decision-Making.

Some OHRC staff members cautioned that it may be difficult to make a clean distinction between individual and systemic cases. One said:

> *[I]f you try to carve up what type of representation is afforded – for instance, some have suggested the Commission should be more involved in systemic complaints than in individual complaints … it is very difficult to*

> *actually make that clean cut because you can have an individual coming in with an individual complaint, and when you start investigating, you realize that there are systemic ramifications.*

This issue is closely linked to the earlier discussion under Addressing Systemic Issues.

In a similar vein, a few raised concerns regarding the current legislated requirement that the OHRC attempt settlement in all cases, noting that public interest issues may not be addressed through settlement that deal only with individual redress.

b) Investigation and Disclosure

Part of the discussion around streaming of complaints involves a consideration of the value of investigating human rights complaints, and when and how it should be done. Here, there was no clear consensus among the variety of perspectives and concerns raised.

To begin, there was no apparent dispute that there must be some process, in at least some cases, of compelling parties to disclose information, and bringing all relevant facts to light prior to a hearing. Early and thorough disclosure of information can assist parties to reach resolution. As one lawyer who does private investigations noted,

> *[M]y experience as an investigator is that when you actually sit down with a thorough report, with parties who started with one position, at the end, and people are rational, when they read it, if it's all there, they'll come to grips with the reality of what your findings are and they'll come to grips with what their own self-interest is.*

Tactics used by parties to delay or avoid disclosure, such as the refusal of some respondents to file a response to a complaint, were identified as significant barriers to the effective functioning of the complaints process. There was general consensus that the system must have effective processes for compelling early and full disclosure.

Consultees question whether investigation is required in all cases; whether a simpler process be designed for those cases that require little or no investigation; and whether there is a better way of conducting investigations?

There was significant agreement that there are some complaints that do require thorough and effective investigation, such as systemic complaints, and some that require little or no investigation.

> *There are many, many cases where no investigation is required at all. You can go straight to the Tribunal; you can call your person who says they were sexually harassed; the respondents call their person who says they weren't and whatever other witnesses there may be; and you get it over with and you move on.*
>
> Complainant's Counsel

> *One way to help move matters forward more quickly and enhance the cost-effectiveness of the process, while ensuring other complainants are not denied access due to lack of resources, is to make the investigation by the OHRC optional. If the complaint is relatively straightforward or the complainant has gathered all of the evidence needed, they should be able to opt-out of the investigation stage. For complaints that are more complex and require a lot of resources to gather all of the evidence and documentation, the OHRC should still handle the investigation.*
>
> Legal Clinic

This supports the notion of a flexible approach to complaints, and streaming based on the nature of the complaint.

However, there is significant dispute as to how investigation is best carried out. There seemed to be two models at play in the discussion. One might be termed an "administrative investigation model", as is used in the protection of employment standards, environmental protection, and currently by the OHRC, for example. While the powers given to such investigators vary, the model generally involves a neutral person or persons who have a variety of means at their disposal to compel information, including the powers of production, search, and interviewing witnesses. Persons in favour of such a model in the human rights context generally advocated strengthening the powers given to human rights investigators, in order to make the process more effective.

The other model might be termed a "civil litigation model", in which investigation is carried out by representatives of the parties, and enforced by the adjudicator through motions for production and disclosure. It should be noted that most, though not all of those advocating for a civil litigation investigation model in the human rights context did not advocate it in all cases; for example, in complex systemic cases, there could still be a need for a neutral, effective third-party investigator.

Some object to a civil litigation investigative model on the basis that it would unfairly shift the burden to complainants.

> *Under the Human Rights Code, as long as we have had one, complainants in human rights cases have been guaranteed two things:*

> *they have been guaranteed specific statutory equality rights, and they have been guaranteed a statutory right to have complaints … investigated. That second right has not been sufficiently honoured because of the combination of the underfunding and the administrative issues and perhaps the opportunities for legal impediments to be put in the way. I think that right needs to be fixed, and I fundamentally disagree with those who would frankly take it away or privatize it or give it to others hoping the Government will give them money. Government won't… I think this is going to be lose-lose. I think it is going to be very destructive for those equality complainants who are already underserved.*
>
> Advocate

On the other hand, those advocating for a civil litigation investigation model saw it as streamlining the process, and avoiding waste and duplication.

> *If the case goes to Tribunal, what happens to that entire investigation is we take it all up, scrunch all the paper up, throw it in the garbage, and we start afresh before a Tribunal; we call all the same witnesses; we call all the same documents; and we go through this process where we are repeating everything that happened in the investigation process … the investigation serves absolutely no purpose in the process.*
>
> Complainant's Counsel

One must factor into this discussion the concerns that were outlined elsewhere regarding the quality of some of the investigations that are currently carried out by the OHRC. That is, a few who might in theory prefer an administrative investigation to a civil litigation model feel that it might be simpler to move to the latter model than fix the flaws in the current investigation process.

c) Who Decides on the Stream?

If complaints were in fact to be dealt with flexibly, and placed in various streams, who should decide what stream a complaint should fall into? A number of consultees felt that it should be the complainants who decide, based on the notion of choice, as well as the belief that complainants are in the best position to make a decision.

> *Complainants usually are pretty aware of whether they think they are talking about something systemic or individual, and they know what kind of allegation they are making and whether they want it to be a narrow case or a much bigger one.*
>
> Legal Clinic

Others advocated caution. One legal clinic pointed out the pressures that complainants are under, such that systemic issues could be lost in favour of individual resolutions:

> *This is not to say that the OHRC should be moved out of the advancement of individual cases … The OHRC has played a significant role in advancing human rights jurisprudence in Ontario through the prosecution of complaints before the HRTO and, before that, the Boards of Inquiry, and the pursuit of appeals and reviews before the courts. This role is distinct from that of individual litigants, who, by the fact that they are seeking remedies for the discrimination they suffered personally, tend to prioritize individual solutions over systemic relief. Rare is the individual who is willing to reject a settlement that is favourable to them on an individual level, in order to pursue a systemic principle or remedy through ongoing litigation. Similarly, these systemic issues tend to be secondary concerns for individuals when framing the relief they seek. Indeed, individuals should not have that responsibility; it is too much to ask of those people who have, typically, been disadvantaged in society already.*
>
> Legal Clinic

As well, counsel with experience in the B.C. system noted that although there is an expedited process available, it is rarely used.

> *You have to have the ability in the tribunal or adjudicative body to force the bodies into a particular stream, because if you leave it to say that we have this expedited process here and the simpler complaints can go there, the reaction of many respondents will be "we don't want to go. If we want to do the procedural objections, we are going to go and pull it into the more complex stream" or there are also complainants out there who will take a little thing and view it as a universal thing.*

As well, one consultee noted that, in a situation where a human rights commission is involved in only some cases, complaints in which the commission is not involved may face a disadvantage.

> *We thought in Quebec that there was going to be a real rush to use this direct access, now you can decide to go to court or not. But there was a stigma, if you will, attached to the Commission having made the decision, that had it not been for the direct access provisions, that the matter would not in fact have been able to move forward, and so most of the complainants would in fact have dropped their cases.*
>
> Expert

Key Themes

Many consultees were interested in the development of a more flexible complaints processing model, where complaints could be dealt with according to their complexity and the nature of the issues that they raise. They suggest that "simple" cases could be dealt with through a simpler, expedited process, while more resources could be allocated to complex, systemic cases. However, beyond agreement on the broad concept, there was less consensus on how such a system could work.

4. Being Heard

Many believe that one of the fundamental human needs that is not sufficiently being met by the current system is the need of those who believe their rights have been violated to have their stories truly heard.

> *[J]ust based on experience, there are times when people come to the table and, honestly, all they want is the respondent to know how they felt.*
>
> Legal Clinic

> *I actually think we have to look at a system where there is going to be the right for somebody to talk about the discrimination they have experienced… there has to be a way and that's why process is important, because process is often more important than substance, where people feel like they have been heard. They are not feeling like that at the Commission right now, and I can tell you that they are not feeling like that before the Tribunal now either. The whole system is a mess.*
>
> Complainant's Counsel

A paper process for assessing a complaint, some feel, cannot provide complainants with the sense that their story has been heard.

> *[E]ven though, strictly speaking, the Commission's process complies with the duty of fairness … the reality is parties, all parties, feel fundamentally alienated from the process because they don't have direct access to the decision-maker. They don't have an opportunity of interaction with the decision-maker. They get these reasons that are incomprehensible because they are so brief, and they don't understand why the decision has been made against them or for them.*
>
> Complainant's Counsel

"Being heard" does not, however, necessarily mean an adjudicative process, or one that is formal, procedural or litigious. Many felt that what is needed is a system that is focussed on the essential issues, and allows those to be heard.

> *I think that what many complainants are looking for is some kind of hearing … and that kind of hearing could be effected in a regional storefront kind of structure, not necessarily in front of an adjudicator or*

> *whatever we want to call that person, arbitrator, adjudicator, decision-maker, that sort, but that their concerns are heard by the other party in a forum which is safe, not necessarily neutral, but safe for them and allows them the opportunity to have their concerns heard.*
>
> Academic

Some offered the OHRC's mediation process as an example of a process that offers complainants the opportunity to tell the essence of their stories in a way that is simple, fair, and not overly formalized.

Based on this, many felt that the OHRC's processes for making determinations under section 34 and most particularly under section 36 of the *Code* are overly paper-based, and do not sufficiently give parties this opportunity to feel heard on the substance of their stories, with the effect that the process is ultimately unsatisfying to them.

Key Themes

Many who participated in the consultation process felt that the human element of a human rights system should be a primary consideration. A process that allows parties to talk about the essence of their stories can be more meaningful and satisfying to them. This does not necessarily mean full and formal hearings.

5. Administrative and Judicial-Type Decision-making

The courts have recognized that a decision-maker's duty of fairness can be met in variety of ways. Depending on the circumstances, either administrative or judicial-type decision-making may be appropriate. Administrative decision-making is generally intended to be speedier, simpler, and more accessible. Judicial-type decision-making offers a higher-level of procedural safeguards, but generally is more complex and slower.

It is important to keep in mind that this is not a dichotomy, but a spectrum. There are numerous decision-making methods in the realm of public law, each with its advantages and disadvantages. For example, decisions may be made by hearings officers, who essentially issue orders following a fact-finding meeting. In the labour relations context, a single arbitrator may conduct both mediation and arbitration together. Small claims courts provide a very simple hearings process, with a minimum of technicality. Hearings need not be lengthy, inaccessible, or technical.

It is also important to keep in mind that the discussion of decision-making forums need not be tied to the structure of the current system. That is, one need not assume that only a body like the OHRC could do administrative-type decision-

making, or that only a Tribunal could hold hearings. There are Tribunals that provide both more administrative and more judicial type decision-making, and administrative agencies that do the same. The workers' compensation system was offered as an example of a system that provides many forms of decision-making, tied to the nature of the dispute at issue.

Many consultees expressed enthusiasm for the idea of simpler hearings for simpler cases, reserving the large hearings like those currently done by the HRTO for more complex cases. For example, a significant number of consultees expressed interest in processes currently used in employment standards and health and safety, whereby officers hold fact-finding meetings with the parties, and can issue orders at the end of that meeting; those against whom an order is issued have a right of appeal. Such a process, proponents felt, can offer speed, accessibility, simplicity, and a hearing for the parties.

> *The Human Rights Code must be amended to give the Commission powers to impose fines and penalties, as well as compliance orders, without the necessity of an independent arbitrator. An analogy is the power of the Ministry of the Environment to impose orders, fines and penalties without going to court… Respondents fight back precisely because there is no advantage in doing otherwise. Whereas, if there was a short investigation, and the facts obtained, and a fine or penalty and an order established, the wrong can be rectified much more speedily and more fairly.*
>
> Complainant

Others pointed to the labour arbitration system:

> *Maybe there is another type of forum that would mirror the arbitration system for non-union employees that could be approved by the Commission but could be faster, that employers could buy into, that employees could buy into, that would allow relationships to be maintained in the workplace in a positive way.*
>
> Human Resources Professional

Such a process, some felt, should be as non-legalistic as possible:

> *Litigation is not the panacea. That is television. I tell my clients if you can resolve it, resolve it, because you will be hurt through the litigation process. You will not be vindicated; you will not be nurtured; you will not be acknowledged. You will be hurt very deeply in most cases.*
>
> Complainant's Counsel

> *I don't want the lawyers to have an incentive to litigate. The only one that wins in litigation is the lawyers, as far as I am concerned.*
>
> Respondent's Counsel

> *I think that problems that people have between themselves are easier to solve earlier on in the process. I'm concerned about positional bargaining and congealment of positions and polarized positions between the parties as more and more legal layers become associated with complaints.*
>
> Academic

As noted elsewhere in the section on Simplicity, some consultees felt that such simplified processes may be difficult to achieve when dealing with human rights, and a few expressed concerns that the nature of the right might not be amenable to more modest forums:

> *Although we have all been gushing over the labour relations arbitration system, I think part of the reason labour relations arbitration and arbitrators have been so successful in mediations and resolutions is because they are dealing with a different kind of right; they are dealing with contractual rights and they are dealing with the fundamental principle that there has to be trade-offs. Whereas you have to be very careful when you are adjudicating human rights issues, because those are quasi-constitutional rights and these are not things that are to be traded off.*
>
> HRTO

Others noted that no system should move too quickly towards an adversarial, positional process, and that a variety of other forms of dispute resolution, such as mediation, must be available early on in the process.

Key Themes

There was considerable, though far from unanimous, interest in designing a hearing process for the less complex human rights complaints that would be simpler, quicker, and much less formal. This could be done by strengthening the powers of investigative officers, similar to those of employment standards officers, or by moving to something closer to an arbitration process for these cases. Many felt that complex hearings should be reserved for complex cases.

6. Admissibility and Assessment of Complaints

In most human rights complaint systems there are a number of steps, or turning points, at which a decision is made as to whether a complaint is admissible according to stipulated criteria. This may involve a stage of assessment and decision on the evidence, to determine whether a full hearing on the merits of the case should be held.

There was considerable discussion among consultees on the admissibility and assessment function of state human rights institutions, much of it centred around

activities of the OHRC. Discussions about these issues was challenging because of the complexity of the issues involved and because of difficulties in the terminology. There were a number of terms in use to refer to this function such as "triaging", "screening", and "gatekeeping", and these terms were often used interchangeably to refer to a variety of functions and processes. In order to have a meaningful discussion, it is important to clarify terms.

In discussing admissibility and assessment functions the following five different processes were referred to by consultees:

1. **Informal barriers to accessing the system**, such as lack of knowledge of one's rights and of the system, language barriers, and lack of confidence in the system. These prevent potential complainants from even attempting to exercise their rights. These have been considered in this Report in the Accessibility section.
2. **Informal triaging and filtering at the point of contact with the system**. Not every contact with the human rights system results in a formal complaint. For example, based on advice from front-line staff or from legal counsel, potential complainants may decide not to pursue the matter, or to seek assistance from another body, or they may be discouraged by the formality and the administrative requirements associated with filing a complaint.
3. **Determining admissibility of complaints on jurisdictional criteria:** that is, complaints that do not fall within the scope of human rights legislation are not proceeded with.
4. **Determining of admissibility of complaints on policy criteria:** there may be criteria for refusing to deal with complaints that respond to concerns such as fairness of process, or efficiency. For example, there may be time limits on the filing of complaints, or the human rights institutions may be given the ability to defer or refuse to deal with complaints that could be dealt with by other bodies or processes.
5. **Assessment and determination of complaints on an evidentiary basis:** there may be criteria requiring that complaints meet a certain evidentiary standard prior to a full hearing on the merits.

While the informal triage and filtering at the front-end raises important issues, it received relatively little attention from consultees. This discussion will therefore focus on determination of admissibility on the basis of jurisdictional and policy criteria, and assessment and determination on an evidentiary basis.

In the current system, the determination of admissibility of complaints on jurisdictional and policy criteria are set out in the application of section 34 of the Code by the OHRC. Also in the current system, assessment of complaints on an evidentiary basis is manifested in the application of section 36 of the *Code* by the OHRC. Given the current context, many consultees tended to refer to the

OHRC's application of these sections of the *Code* directly rather than to the generic types implicit in the discussion.

a) Is it Necessary?

There appears to be general consensus that some determination of admissibility and assessment of complaints is inevitable somewhere in the system, even if for some it is not desirable in an ideal world. In order to ensure that the system is reasonably efficient and can continue to function, there must be, for example, some way of determining at an early stage whether or not a matter is even within the ambit of the *Code*.

> *[T]he Paris Principles state quite clearly that a national institution should have a defined jurisdiction and should have the authority to investigate any matter that falls within their jurisdiction. And someone has to determine whether the matter does fall within the jurisdiction*
>
> Expert

> *[T]here is the need I think for a triage system to help decide what may be well-founded and not well-founded in the beginning stages, the initial stages. Otherwise, there is the risk … that that process could be abusive to responding parties by putting through – quite often a responding party will incur tens of thousands of dollars of costs going through the defence, the response process and the investigation process, only to have the complaint go nowhere.*
>
> Respondent's Counsel

There is, however, less agreement on the appropriate criteria for admissibility and assessment of complaints, and how it should be done.

b) The Process

One of the areas in which there was significant divergence of opinion was on whether the best process for making these types of admissibility and assessment decisions was an administrative or an adjudicative one. There was no consensus on this issue.

Some were less concerned with the forum than with the expertise of the decision-makers. One consultee pointed out that the deciding factor should be the effectiveness of the process:

> *[I] personally think the real issue here is speed and fairness and access, and whether it happens adjudicatively or administratively is I guess a policy question.*
>
> Expert

The debate is a complex one. Those who advocate for an adjudicative decision-making process before a tribunal indicate that such a process is more open, more transparent, and more likely to lead to an effective decision because arguments can be made directly to the decision-maker. As well, the parties would have broader opportunities to appeal the decision, leading to greater checks and balances.

> *[T]he Commission does a horrible job in dealing with that gross gatekeeping section 34 function. I believe that that function would be improved, not in a judicialized setting, but in a Tribunal where people had direct access to the individual who is the decision-maker, who is actually making the decision, could interact with that person, have an exchange so that they would promote an understanding of why their case is being dismissed.*
>
> Complainant's Counsel

Those who are in favour of retaining an administrative process believe that an adjudicative process would be lengthier, more costly to both the system and the parties, and more lawyer-driven, as well as exacerbate the power imbalances for complainants, who tend to have fewer financial and psychological resources than do respondents.

> *I know of no evidence that suggests that the Tribunal will discharge the gatekeeping function more quickly or more efficiently. I do know that the Tribunal could not undertake the gatekeeping function without both a significant infusion of resources and a dramatic change in their roles… I also don't know that judicializing it is going to make it any better. It will make it more expensive. It will make it take longer. It will provide more opportunities for anyone who wants to slow it down or grind people down with motions. That it will do. But I don't believe it will make it any better or any fairer in the long run.*
>
> Advocate

Some pointed out that an adjudicative process for admissibility and assessment would only work if representation was provided for parties:

> *Putting all of that stuff in front of a judicial or an adjudicative tribunal, in my view, will only work if the human rights tribunal has duty counsel that are appointed, that are in place, that are state-subsidized to make sure that accessibility is not compromised.*
>
> Expert

c) The Criteria

(1) Jurisdictional and Policy Criteria

There was a general agreement that the criteria for admissibility must be clear, transparent, adjudicable, and communicated.

There was also general agreement that there must be determinations made on jurisdictional criteria. However, concerns of one degree or another were raised with all of the policy criteria currently contained in the *Code*.

For example, a number of participants raised concerns about filtering out complaints that could be appropriately dealt with under another Act, and particularly with how this is applied to complaints arising in unionized environments.

> *I know when section 34 was put in place, the perception was that if you were a unionized worker, you had less rights to access the Human Rights Code than a non-union worker because you were bounced back, and there were all of these assumptions over the power of a union local of 30 people.*
>
> Union

Concerns were also raised regarding the impact of a time limit on filing complaints on persons with disabilities:

> *The current six month rule for initiating complaints is also a barrier to those who have mental health and other disabilities, as their disability may interfere with their capacity to proceed with a complaint within the required time frame.*
>
> Community Organization

Some participants were concerned, not so much with the criteria themselves, than with whether they were being properly applied. Some in the complainant community indicated that the criteria are too expansively applied; while some in the respondent community feel that the OHRC is admitting too many complaints without merit.

(2) Evidentiary Assessment and Disposition

A number of participants reacted particularly strongly to the concept of a assessment of complaints on the merits to determine which ones warranted a full hearing. Some referred to this as a "veto power". For these participants, this was the core issue at stake in any reform of the current human rights system.

> *[T]he Commission can do the early settlement and all of that stuff at the front end. I don't care really whether it is at the Commission or at the Tribunal, frankly, but the one piece I'm objecting to is the Commission having a veto over the right of the claimant, the equality-seeker to have a hearing. If the Commission doesn't want to take it, fine, but should the person have the option of taking their own run at it at a hearing?*
>
> Legal Clinic

There were opposing views on this issue. Some supported the retention of this type of assessment and disposition function in order to ensure efficient use of resources and to protect the system from abuse.

> *[T]here also has to be, in terms of transparency and gatekeeping … a specific level of evidence raised. You can't just make allegations … without a foundation there. There has to be some level of evidence that is raised; otherwise the system will fall into disrepute because the respondents are going to have to deal with complaints that have marginal or no value.*
>
> Respondent's Counsel

One legal clinic made the suggestion that the evidentiary threshold be lowered, to whether there is some evidence that could support a finding of discrimination.

Those who opposed an assessment and disposition on the evidence by the OHRC tended to be in favour of what they termed "direct access". While some consultees conceived of this discussion as one between two opposing viewpoints –"direct access" vs. the status quo – there were actually a broad range of positions and nuances on this issue. The term "direct access" meant different things to different people. Some conceived of it as a system in which individual complaints should be referred directly to a tribunal for a decision. Others conceived of it as a system in which an administrative body continues to receive complaints but where an option of some type exists to arbitrate some matters somewhere within the administrative process or to take the matter to a tribunal as an alternative. A number of variations of this latter type of "direct access" were raised in the consultation.

Many made it clear that their position on this issue was dependent on whether the system would include funding for adequate, affordable representation for all complainants (and potentially for some respondents).

Discussions on this topic were lively and heartfelt. There was no consensus; rather, strong disagreements. There were certainly differing viewpoints depending on relationship to the system (e.g., respondent, complainant), as well as within communities.

Key Themes

The determination of admissibility based on policy and jurisdictional criteria and assessment and disposition of complaints based on the evidence is the area of the consultation in which there was the greatest divergence of opinions. While there was general agreement that determinations of admissibility of complaints must be done based on jurisdiction, there was no agreement on other criteria, nor on the appropriate process for such determinations.

III. Summary Findings and Conclusions

At the outset of this consultation process, the OHRC set five goals:

- Clarify the principles and elements of an effective human rights system;
- Create an opportunity for a broad and balanced discussion on the issues and options;
- Ensure a transparent and open process leading to change;
- Develop meaningful and viable conclusions that will support a revitalization of Ontario's human rights system; and
- Assist in developing the best human rights system possible.

Some of these goals have been met, but much remains to be done. As is evident throughout this Report, this consultation sparked a lively and wide-ranging response from a broad range of stakeholders. However, there is a clear message that there must be further opportunity for open discussion, in order that all voices may be heard.

Further, the OHRC believes that any reform of the human rights system should involve, and have the support of, those whom the system is intended to serve – the people of Ontario.. Given the multiple perspectives on the human rights system, full consensus on directions for reform may be difficult to achieve. However, change can be credible if it is based on broad, open and transparent dialogue among the public as well as the full range of stakeholders, and if it builds on shared principles and goals.

There was convergence among stakeholders regarding the basic principles and elements of an effective human rights system. Building on the principles identified in the *Discussion Paper,* and on the themes emerging from the consultation, the following elements can be identified as to what the *Paris Principles* effectiveness factors mean in the Ontario context.

An effective human rights system must be:

1. *Independent*, both in appearance and substance;
2. *Adequately resourced* to ensure effective advancement of its mandate;
3. *Fostering a culture of human rights,* in particular through a broad and multifaceted educative mandate;
4. *Integrating promotion and protection* to ensure that these functions build on each other;
5. *Harmonized with international obligations* to give effect to Canada's international commitments;
6. *Internally harmonized* so that all actors in the human rights system work cooperatively;
7. *Accessible*, regardless of disability, financial means, geography, language, culture or other power imbalances;
8. *Systemic* in its approach to human rights issues;
9. *Expert and representative* at all levels;
10. *Timely* in resolving human rights matters;
11. *Flexible* in its approach to human rights complaints;
12. *Allow people to feel heard* on their stories and experiences at key phases of the process; and
13. *Fair and effective,* both procedurally and substantively, in admitting and assessing human rights complaints.

While there was some general convergence around these principles and elements, there was relatively little consensus on how these principles and elements could best be achieved. This is not surprising, given the broad range of stakeholders who play a role in the human rights system, as well as the complexity of the issues. Through the consultation, a number of key areas for further consideration have emerged.

Independence: we heard that further consideration must be given to how independence can be achieved, and what the elements of that independence are – for example, in reporting to a ministry versus directly to a legislature, appointments of commissioners, and administration of financial and human resources.

Adequate Resources: while we heard that the human rights system must be adequately resourced, there was not general agreement on what, realistically, that means. There were a number of suggestions as to how objective funding measures might be developed.

Integrating Promotion and Protection: the promotion and protection functions of the human rights system such as investigating complaints, public inquiries, policy development, and public education are integrally linked. However, there was no convergence of opinion on whether this integration is best achieved through a single state human rights institution, or on what system could best maximize the strengths and minimize the weaknesses of integrating these functions.

Cooperating with Other Actors: in this area, the greatest complexity and diversity of opinion surrounded the role of the various administrative tribunals that deal with issues associated with human rights. We heard that the desire to increase efficiency, and to encourage the development of a human rights culture in which human rights is a part of all that we do, must be weighed against concerns about lack of human rights expertise in some of these other forums, and restricting the access of complainants to human rights principles.

Accessibility goes to the core of the mandate of a human rights system. There was significant divergence among stakeholders as to how accessibility could best be maximized – for example, whether through simplification and decentralization of the system, or increased legal representation.

Systemic Approaches: while there was general agreement that any reform must strengthen the ability of the human rights system to deal with systemic issues, there was divergence of opinion as to how this could best be done; for example, through a strong role for a human rights institution in advancing the public interest through the compliance system, or by reducing the focus of human rights institutions on individual complaints.

Expert and Representative: while many expressed the opinion that a system must build in sufficient expertise and representation of the population among the staff and members of any of its institutions such as the OHRC or the HRTO, few were able to offer ways to ensure these, or considered the notion that some degree of trade off between expertise and representation may be necessary in the working of a system.

Timely Resolution of Complaints: while there is agreement that the current system is too slow, there has not been sufficient discussion to clarify what would constitute an acceptable time period for the resolution of human rights complaints. Nor is it clear how best to speed up the resolution of complaints: several options have been offered, including creating an early resolution function, streamlining procedures in the processing of complaints, and creating an expedited process for simple complaints. However, we heard that any streamlining of the system must be balanced by the need to maintain fairness, and ensure appropriate checks and balances.

Flexibility: while many were agreed that a human rights system should have the ability to treat different types of cases differently, further discussion is required to clarify how cases could be effectively differentiated, what the various streams should look like, and what checks and balances would still be required.

Allow people to feel heard: the need of complainants to have their stories heard was a theme throughout the consultation. However, there was not agreement on how and when this should happen. For example, what kind of a process could allow people to feel heard?

Fair and effective assessment: we heard that some assessment must be done, at least in order to determine the admissibility of complaints. Beyond this, however, viewpoints diverged widely on where in the system and at what point in the timeline this should be done. Further consideration must be given to the appropriate process and criteria for admitting and assessing complaints.

Based on the above, the OHRC recommends that the government develop a blueprint for a process leading to reform that includes further consultation. Such consultation should be:

1. Based on the principles and elements identified through this consultation process;
2. Seeking to build understanding and consensus around the outstanding issues identified above;
3. Broad and balanced, to allow involvement from those whom the system was intended to serve;
4. Open and transparent, to develop support for any changes; and
5. Aimed at building a truly "human" human rights system that fosters the creation of a culture of human rights.

The OHRC would like to extend its thanks and appreciation to all those individuals and organizations that supported this process and provided feedback. Many are concerned with the state of Ontario's human rights system and there is resounding belief that the system must be strengthened in order to achieve the vision set out in the *Code*. The issues affecting the human rights system are complex and contentious, and each element of the system affects all of the others. Given the importance of the human rights system to the people of Ontario, a thoughtful and open process of change is essential to ensure that the vision of the *Code* can become a reality for all.

IV. Appendices

A. List of Participating Organizations

56 submissions were received from individuals and organizations representing a broad cross section of perspectives on Ontario's human rights system. As well, 31 individuals participated in three focus group sessions. Consultees included complainants, advocates and other interested individuals; complainant and respondent counsel; human resource professionals; specialty and community legal clinics; community organizations; government agencies; unions; academics and other experts, including international human rights consultants; and staff of the OHRC and HRTO.

Advocacy Centre for Tenants Ontario
African-Canadian Legal Clinic
ARCH: A Legal Resource Centre for Persons with Disabilities
Association of Human Rights Lawyers
Autism Society of Ontario
Canadian Hearing Society
Canadian Human Rights Commission
Canadian Race Relations Foundation
Civil Rights in Public Education
Community and Legal Aid Services Programme
Education Equality in Ontario
Foundation for Children, Youth, and the Law
Hicks Morley
Human Resources Professionals Association of Ontario (HRPAO)
Human Rights Tribunal of Ontario
Learning Disabilities Association of Ontario
Legal Aid Ontario
Manitoba Human Rights Commission
Magna International
Metro Toronto Chinese and Southeast Asian Legal Clinic
Ontarians with Disabilities Act Committee
Ontario Human Rights Commission
Ontario Federation of Labour
Ontario Public Service Employees Union (OPSEU)
Sanson & Hart
Saskatchewan Human Rights Commission
Scott & Oleskiw
Stringer Brisbin Humphrey
Toronto Catholic District School Board
Toronto Family Network
Union of Ontario Indians
United Steelworkers

Workplace Safety and Insurance Board (WSIB)

B. Consultation Questions

1. Online Questionnaire

Questions:

1. Making reference to the principles outlined in the Discussion Paper and given the state of the current human rights system in Ontario, do you have concern that the fulfillment of any of the following international human rights effectiveness factors and domestic administrative law requirements is not being maximized:

   Please identify only those areas where you have concerns.

   - *Independence* (state institutions are capable of acting independently of power brokers in society, particularly government)
     - What are your concerns?
     - What reforms do you feel would best address these concerns?

   - *Defined Jurisdiction* (state institutions are endowed with clearly defined mandates that in totality cover off all relevant internationally recognized protected rights and functions necessary for an effective human rights system)
     - What are your concerns?
     - What reforms do you feel would best address these concerns?

   - *Cooperation* (state institutions are able and willing to establish and strengthen cooperative relations with other actors in the human rights system)
     - What are your concerns?
     - What reforms do you feel would best address these concerns?

   - *Adequate Power* (state institutions are vested with adequate power to accomplish all mandated objectives and functions)
     - What are your concerns?
     - What reforms do you feel would best address these concerns?

   - *Accessibility* (state institutions are accessible to individuals and groups whose interests they are established to protect and promote)
     - What are your concerns?
     - What reforms do you feel would best address these concerns?

   - *Operational Efficiency* (state institutions are efficient and effective in operation)
     - What are your concerns?

- What reforms do you feel would best address these concerns?

- *Accountability* (state institutions are accountable to all stakeholders)
  - What are your concerns?
  - What reforms do you feel would best address these concerns?

- *The administrative duty of fairness, balancing with the demands of procedural simplicity*
  - What are your concerns?
  - What reforms do you feel would best address these concerns?

2. Below is a list of potential actors in a human rights system. Please identify the specific actors with regard to whom you wish to make comment. Please respond to the questions raised bearing in mind the contents of the Discussion Paper.

- *State human right institution(s)*
  - What should be the roles, responsibilities, and structures of state human rights institution(s) in Ontario?
  - Are there reforms to the role, responsibilities, and structures of the OHRC and the Ontario Human Rights Tribunal that you feel would be beneficial for the Ontario's human rights system?
  - If proposing change, what would be strengths and weaknesses of the proposed changes?

- *The Provincial Government*
  - Are there reforms to the role of the Government and the Ministry of Attorney General (as the current Ministry responsible for Provincial human rights institutions) that you feel would be beneficial for Ontario's human rights system?

- *Administrative Tribunals that participate in Ontario's human rights system* (For example, the Special Education Tribunal, Workplace Safety and Insurance Board, the Ontario Labour Relations Board, the Ontario Rental Housing Tribunal, labour arbitrators, *etc.*)
  - What should be the roles of these types of bodies in the human rights system in Ontario?
  - Are there reforms to the roles of these types of bodies that would benefit the human rights system in the Province?

- *Other Government bodies that participate in Ontario's human rights system* (For example, the Accessibility Directorate, the Women's Directorate, the Seniors' Secretariat)
  - What should be the roles of these types of bodies in the human rights system in Ontario?

  - Are there reforms to the roles of these bodies that would benefit the human rights system in the Province and what would they be?

- *Non-Government Organizations that participate in Ontario's human rights system* (For example, legal clinics, advocacy groups, private corporations)
  - What should be the roles of these bodies in the human rights system in Ontario?
  - Are there reforms to the roles of these organizations that would benefit the human rights system in the Province and what would they be?

- *Governments of other jurisdictions* (such as municipal and federal governments, and the United Nations)
  - What interaction and coordination should happen and would benefit the human rights system in the Province?
  - How do we enhance the interaction and coordination between these participants to improve the human rights system in the province?

2. Focus Groups

Question 1: Integration of functions

The Paris Principles and UN guidelines identify a number of functions and powers that can be used by state human rights institutions for the promotion and protection of human rights including: receiving, mediating, disposing of and/or litigating complaints; conducting research, consultation and policy development; advising; public reporting; cooperation; and public education. All these functions currently, though not exclusively, form the broad mandate of the OHRC, which acts to integrate these various functions.

Recognizing that compliance, litigation, policy and education functions are all parts of an advanced human rights system how should these functions be integrated in a human rights system?

Question 2: Harmonization of the system

The Paris Principles and UN guidelines also recognize that other government and non-government institutions and organizations also play important roles to carry out similar functions and are competent to act in the protection and promotion of human rights. There are a variety of government bodies that are currently performing functions that directly deal with or touch on human rights. These include the HRTO, Ontario Women's Directorate, the Accessibility Directorate, the Workers Safety and Insurance system and the Special Education Tribunal.

What functions should be established or strengthened under other institutions and organizations and how should these be coordinated?

Question 3: Duty of fairness and complexity

Administrative law recognizes the right of individuals to provide meaningful input when decisions are made affecting them. This can take many forms. The more extensive the opportunity to provide input, the more lengthy and complex the decision-making process will likely be.

Recognizing that duty of fairness and simplicity of process are often a trade off, what is the proper balance of these principles in a human rights system in Ontario?

Question 4: Administrative and Judicial Processes

Both administrative and judicial-like decision-making processes can meet the duty of fairness; however, depending on factors such as impact and complexity of

the decision, one or the other type of process may be more appropriate in a given circumstance. Currently, the Ontario human rights system involves a mix of administrative and judicial-type decision-making, with administrative decision-making at the Commission and judicial-type decision-making at the Tribunal, and the courts as a last resort.

What is the appropriate balance between these two processes for a human rights system in Ontario?

Question 5: Accessibility

Accessibility is a fundamental component of a human rights system. This means not just access to a particular institution or to a hearing, but more broadly to an effectively functioning mechanism for raising human rights issues. All individual should be able to raise human rights issues safely, regardless of circumstances such as financial means, culture, or power imbalances.

Recognizing that accessibility to the human rights compliance system is a vital human rights principle of concern, how should barriers of cost to client, culture, and power imbalance be overcome in a human rights system?

Question 6: The "Triaging" Function

One of the key functions of the Commission is to assess complaints and allocate resources to those complaints that most appear to warrant it, based on the criteria set out in section 34 and 36 of the Code. Thus, the Commission acts to triage complaints in the current system. Any human rights system will need some method of triaging in order to assess the admissibility of complaints based on defined jurisdiction and in a manner that avoids misallocation of human and financial resources.

Recognizing that some form of "triaging" is an unavoidable reality in any human rights system,

a. What are the criteria through which it should be done?
b. What are the advantages and disadvantages of having triaging decisions made through an administrative decision-making process, or a judicial-type one?

Question 7: Other comments

Are there any issues regarding the human rights system in Ontario not covered in the Discussion Paper or in today's focus group session that you would like to comment on?

C. Paris Principles

Principles relating to the status of national institutions – "*Paris Principles.*"

Competence and responsibilities

1. A national institution shall be vested with competence to promote and protect human rights.
2. A national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence.
3. A national institution shall, *inter alia*, have the following responsibilities:
    a. To submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights; the national institution may decide to publicize them; these opinions, recommendations, proposals and reports, as well as any prerogative of the national institution, shall relate to the following areas:
        i. Any legislative or administrative provisions, as well as provisions relating to judicial organizations, intended to preserve and extend the protection of human rights; in that connection, the national institution shall examine the legislation and administrative provisions in force, as well as bills and proposals, and shall make such recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights; it shall, if necessary, recommend the adoption of new legislation, the amendment of legislation in force and the adoption or amendment of administrative measures;
        ii. Any situation of violation of human rights which it decides to take up;
        iii. The preparation of reports on the national situation with regard to human rights in general, and on more specific matters;
        iv. Drawing the attention of the Government to situations in any part of the country where human rights are violated and making proposals to it for initiatives to put an end to such situations and, where necessary, expressing an opinion on the positions and reactions of the Government;

b. To promote and ensure the harmonization of national legislation regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation;

c. To encourage ratification of the above-mentioned instruments or accession to those instruments, and to ensure their implementation;

d. To contribute to the reports which States are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations and, where necessary, to express an opinion on the subject, with due respect for their independence;

e. To cooperate with the United Nations and any other organization in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the promotion and protection of human rights;

f. To assist in the formulation of programmes for the teaching of, and research into, human rights and to take part in their execution in schools, universities and professional circles;

g. To publicize human rights and efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness, especially through information and education and by making use of all press organs.

Composition and guarantees of independence and pluralism

1. The composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of, representatives of:

   a. Non-governmental organizations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organizations, for example, associations of lawyers, doctors, journalists and eminent scientists;

   b. Trends in philosophical or religious thought;

   c. Universities and qualified experts;

   d. Parliament;

   e. Government departments (if these are included, their representatives should participate in the deliberations only in an advisory capacity).

2. The national institution shall have an infrastructure that is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control that might affect its independence.
3. In order to ensure a stable mandate for the members of the national institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured.

Methods of operation

Within the framework of its operation, the national institution shall:

a. Freely consider any questions falling within its competence, whether they are submitted by the Government or taken up by it without referral to a higher authority, on the proposal of its members or of any petitioner;
b. Hear any person and obtain any information and any documents necessary for assessing situations falling within its competence;
c. Address public opinion directly or through any press organ, particularly in order to publicize its opinions and recommendations;
d. Meet on a regular basis and whenever necessary in the presence of all its members after they have been duly convened;
e. Establish working groups from among its members as necessary, and set up local or regional sections to assist it in discharging its functions;
f. Maintain consultation with the other bodies, whether jurisdictional or otherwise, responsible for the promotion and protection of human rights (in particular ombudsmen, mediators and similar institutions);
g. In view of the fundamental role played by the non-governmental organizations in expanding the work of the national institutions, develop relations with the non-governmental organizations devoted to promoting and protecting human rights, to economic and social development, to combating racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees, physically and mentally disabled persons) or to specialized areas.

Additional principles concerning the status of commissions with quasi-jurisdictional competence

A national institution may be authorized to hear and consider complaints and petitions concerning individual situations. Cases may be brought before it by individuals, their representatives, third parties, non-governmental organizations, associations of trade unions or any other representative organizations. In such circumstances, and without prejudice to the principles stated above concerning the other powers of the commissions, the functions entrusted to them may be based on the following principles:

a. Seeking an amicable settlement through conciliation or, within the limits prescribed by the law, through binding decisions or, where necessary, on the basis of confidentiality;
b. Informing the party who filed the petition of his rights, in particular the remedies available to him, and promoting his access to them;
c. Hearing any complaints or petitions or transmitting them to any other competent authority within the limits prescribed by the law;
d. Making recommendations to the competent authorities, especially by proposing amendments or reforms of the laws, regulations and administrative practices, especially if they have created the difficulties encountered by the persons filing the petitions in order to assert their rights.

ENDNOTES

[i] The functions of the OHRC under section 29 include:

- Forwarding the policy that the dignity and worth of every person be recognized and that equal rights and opportunities be provided without discrimination that is contrary to law;
- Developing and conducting programs of public information and education, and undertaking, directing and encouraging research designed to eliminate discriminatory practices that infringe rights under the *Code*; and
- Examining and reviewing any statute or regulation, and any program or policy made by or under a statute and make recommendations on any provision, program or policy that in its opinion is inconsistent with the intent of the *Code*.

[ii] Principles Relating to the Status of National Institutions, annex to National Institutions for the Promotion and Protection of Human Rights, CHR Res. 54, UN ESCOR, 1992, Supp. No. 2 of UN Doc. E/1992/22, chap. II, sect. A; GA Res. 48/134, UNGAOR, 1993, Annex. Please refer to Appendix C.