



Psychiatric Patient Advocate Office

*Submission Regarding
Bill 107 – Human Rights Code Amendment Act, 2006*

August 2006

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PROMOTING PATIENTS' RIGHTS



Psychiatric Patient Advocate Office

Bureau de l'intervention en faveur des patients des établissements psychiatriques

August 8, 2006

Vic Dhillon, MPP
Chair
Standing Committee on Justice Policy
Room 1405, Whitney Block
Toronto, Ontario, M7A 1A2

Dear Mr. Dhillon:

RE: Bill 107, *Human Rights Code Amendment Act, 2006*

Thank you for the opportunity to participate in the consultation process relating to Bill 107 and for the invitation to present to the Standing Committee on Justice Policy. As a rights protection organization with more than two decades of service to the people of Ontario, we believe that our recommendations, if adopted, would strengthen the proposed legislation. Through our expertise in the mental health sector, we deal with human and legal rights on a daily basis, with and on behalf of some of the most disenfranchised, vulnerable and marginalized members of our communities.

The PPAO believes that the government could, with the investment of additional resources, enhance, modernize and strengthen the current Human Rights Commission so that it is better able to fulfil its mandate and function. The result would be a progressive, enriched and world renowned Human Rights Commission that protects the rights of all Ontarians.

Equality for all demands fully realized rights. That is, rights must not only be enshrined in legislation but they must also be fully accessible and enforceable for all citizens, including those who are the most vulnerable. The Human Rights Commission and Human Rights Tribunal play a key role as checks and balances, educating the community about human rights and catalyzing systemic change in Ontario. On the fiftieth anniversary of the *Universal Declaration of Human Rights*, the United Nations adopted a saying that aptly captures the essence of ensuring that all members of the human family are protected in law - "all human rights for all." Protecting and fully realizing rights must be viewed within the broader context of human rights. We are all entitled to fundamental protections under the law, independent of physical or mental disability.

Please contact me at (416) 327-7004 should you have any questions regarding this submission.

Sincerely,

David Simpson
Director (A)

BACKGROUND

Introduction

The Psychiatric Patient Advocate Office (PPAO) is an arm's length office of the Ministry of Health and Long-Term Care. The PPAO provides individual advocacy, rights protection and rights advice to clients in the current and former provincial psychiatric hospitals in Ontario. Through its community-based rights advice service, the PPAO provides rights advice in nearly all psychiatric units of Schedule 1 hospitals (general hospitals with mental health units) throughout Ontario. For more than two decades the PPAO has advocated strenuously on behalf of consumers of mental health services in an effort to address significant rights issues and make systemic change.

Consumers of mental health services continue to face formidable barriers to inclusion in communities throughout Ontario and have limited opportunities for employment, education, housing, financial and social support. Myths and misconceptions about mental illness are plentiful and dangerous. Stigma, discrimination and the failure to adequately accommodate disabilities contribute strongly to the disempowerment and marginalization of individuals with mental illness. Discrimination is often subtle and insidious. For our clients, the consequences can be devastating, detrimentally affecting their health and well-being. Discrimination is pervasive because we are not yet an inclusive, accepting and understanding community. Statistics from the Ontario Human Rights Commission (Commission) reveal that disability discrimination complaints have represented more than fifty percent of the complaints filed over the past six years.

Our clients, in striving toward recovery and wellness, want nothing more than to live their lives free of discrimination, to exercise the same legal rights as others and to be welcome and included in their chosen communities. Some of our clients, because of their illness, cannot pursue a formal complaint through this complex and bureaucratic system, unless they have appropriate supports. At times, our role is to give a voice to those who are disenfranchised merely due to their membership in a vulnerable group – namely, people with a disability. These are the very people who require strong and effective rights protection mechanisms. Sadly, some of the proposed changes to the human rights system in Bill 107, *An Act to Amend the Human Rights Code* (Bill 107), will not advance the rights of our clients or Ontarians in general.

The Current System

The PPAO believes that the government could, with the investment of additional resources, enhance, modernize and strengthen the current Commission so that it is better able to fulfil its mandate and function. For example, the Commission could establish a more efficient process to triage complaints, establish a process for dealing with simple human rights issues, develop a comprehensive case management system, strengthen its investigative function, develop a process for the identification and resolution of systemic complaints and provide public education to Ontarians. Timelines for the resolution of complaints should also be defined in law. With further investments, Ontario could have a progressive and enriched human rights complaint process, without the need to simply make change for the sake of change, as proposed by Bill 107. The Commission will never realize its full potential unless

it is adequately resourced to take on the challenges and opportunities it is provided by the people of Ontario who approach it for assistance and support in pursuing their legal rights.

If all cases proceed directly to the Tribunal, as envisioned by Bill 107, it will simply shift the burden of the current system. The Tribunal should be the final step in the process where the parties and the Commission have been unable to resolve a human rights complaint to the satisfaction of the parties following voluntary mediation, investigation and conciliation. The Tribunal should be available to deal with the most serious human rights violations and abridgement of rights. This “two tier” approach has been effective in charting the course of human rights in Ontario.

By repealing and replacing Part III of the Code respecting the Commission and abolishing investigations in favour of a direct access model, human rights advocacy is being privatized. Victims of discrimination will be forced to investigate and prove their claims. Consumers of mental health services will be extremely disadvantaged by the proposed changes. Many of the PPAO’s clients have intersecting or cross-sectional claims, meaning that persons are members of more than one historically disadvantaged group. For instance, individuals with a dual diagnosis (developmental disability and mental illness) often experience discrimination with respect to access to supports and services that meet their unique needs. Or, consider the obstacles facing a female with mental illness who also happens to be a member of a religious minority. These individuals are twice or even three times as marginalized, making a human rights complaint exponentially overwhelming.

In those rare cases where a victim is able to overcome these obstacles, the remedy he or she will be seeking will probably be an individual, not systemic, remedy. Presently, one of the primary functions of the Commission is to represent the public interest. With the proposed changes in Bill 107, the new gatekeeper will be the Tribunal, as opposed to the Commission.

While the PPAO applauds the Ministry of the Attorney General for attempting to reform the human rights system, and we welcome improvements, there are many problems with Bill 107 that prevent it from achieving its goals. Our submission and resulting recommendations articulate our concerns and offer possible solutions to the government of Ontario.

Structure of our Submission

The PPAO’s submission is divided into two sections although there is some overlap between them.

The first section, entitled “positive changes to the current human rights system,” is based on our opinion that the roles of the Commission and Tribunal should stay intact, particularly the continued ability of the Commission to conduct investigations. We then outline potential modifications that we think would improve the system as whole. Specific references are made to some of the proposed changes in Bill 107 that we think are deficient but that could, after revision, strengthen the system.

The second section, called “problems with the proposed human rights system,” is based on the premise that the direct access model will prevail in Ontario. Our comments are directed towards the flaws in Bill 107 and how they can be improved.

I. POSITIVE CHANGES TO THE CURRENT HUMAN RIGHTS SYSTEM

Investigations

Every complainant who files a complaint with the Commission, provided it is timely and not frivolous, currently has the right to an investigation of his or her complaint by the Commission pursuant to section 33 of the Code. The Commission has a wide array of investigatory powers, ranging from the inspection of documents, entering buildings, questioning individuals to obtaining a search warrant from a justice of the peace to obtain access to evidence. Based on its investigation, the Commission can refer the case to the Tribunal for a hearing. The Commission assists the complainant with the litigation process by preparing witnesses, pleadings and motions, as well as calling the evidence. Further, at the hearing, counsel for the Commission litigates the case in the public interest and acts as a public prosecutor by attempting to prove that the complainant suffered discrimination. The complainant may retain their own lawyer, if they choose, but it is not strictly necessary. At present, a large percentage of cases are settled via mediation, investigation or conciliation, without the need for a lawyer.

Bill 107, however, eliminates the complainant's right to an investigation which has the potential to undermine the complaint, if not the process itself. As a rights protection agency, we are concerned about the elimination of the investigative function in Bill 107 as that responsibility for the investigation will fall to the complainant. For many of our clients, this will become an additional barrier to realizing their rights and having a full and complete review of their complaint – a barrier that cannot be overcome.

The dismantling of the Commission will have a detrimental effect on human rights advocacy. Complainants will now be forced to conduct their own investigations and present their own cases to the Tribunal, a task which will be insurmountable for some individuals, including those with mental illness. It is curious that the complainants, who were victims of discrimination due to their life circumstances and vulnerability, will now be required to both investigate their own complaints and present their cases to the Tribunal. More often than not, there is an imbalance of resources, weighed against the complainant, for a myriad of reasons. For instance, the complainant usually does not have the financial means to retain counsel, may not understand human rights law or legal processes, lacks the resources to conduct research and investigations or feels uncomfortable self-advocating before the Tribunal. Yet, the respondent may be represented by legal counsel, may have greater access to resources, or may understand the law and legal proceedings or simply have the financial resources to prolong a case before the Tribunal. These problems are compounded if they do not live in the city where the Tribunal meets. Bill 107 disregards the tremendous inequities that are found in the very law that is supposed to protect rights and deter discrimination. In these circumstances, even if the Commission was a party or an intervener to the proceedings before the Tribunal, a poorly prepared and investigated complaint is unlikely to be successful, despite it being valid and legitimate.

The current human rights system is analogous to victims of crime who approach the police for assistance. The police investigate the public interest, as well as the personal interest of the complainant, by collecting evidence, reviewing documents, talking to suspects and witnesses and, if necessary, obtaining search warrants. If the evidence is strong and indicates

that a suspect committed an offence, the police will lay charges. Crown Attorneys then represent the public interest via the prosecution of the crime to deter others, punish the perpetrators and gain redress for the victim.

Comparing this criminal process to human rights enforcement, the Commission investigator is analogous to the police since it gathers evidence, reviews documentation, interviews witnesses and respondents and may obtain a search warrant. On the basis of the information acquired during the investigation, the investigator will try to conciliate the dispute, and if unsuccessful, refer the case to the Tribunal.

It is unconceivable that the police would stop investigating the complaints made by victims of crime yet the government wants to eliminate investigations for victims of discrimination.

Investigation is an invaluable tool for our clients. By requiring victims to investigate their claims, as Bill 107 does, it forces some individuals to return to a discriminatory environment and to be unnecessarily re-victimized. Many complainants may not have any friends or family to emotionally support them through this journey, causing them undue stress and potentially impacting on their personal health and well-being. We are also concerned that some of our clients may not be able to conduct their own investigation for the reasons outlined above or because they will be dismissed by others because of their “mental health history” which may be used against them to undermine their credibility and the legitimacy of their claim.

Currently, the decision of whether a complaint will be referred to the Tribunal is made behind closed doors and complainants are given very few reasons for the decision by the Commission. The PPAO recommends the parties be given comprehensive reasons for the decision and access to the information on which the decision was based.

The Code does not address the qualifications of investigators despite the important role played by investigators. The PPAO believes that investigators must have demonstrated experience in the area of human rights. Also, investigators should be recruited and appointed via an open and transparent process that reflects the gender balance and diversity of Ontario. Additionally, they should also receive training to better understand mental health, mental illness and addictions.

Recommendations:

- Amend Bill 107 so that the Commission retains its investigative role
- Appoint more investigators at the Commission to ensure investigations are completed in a timely manner
- Create an open and transparent recruitment and appointment process for investigators
- Establish criteria for the qualifications of investigators, including a demonstrated experience or expertise in the field of human rights
- Ensure that the composition of the investigatory team reflects a gender balance, as well as the diversity of the population of Ontario

- Provide the parties with comprehensive reasons regarding the decision to refer or not refer their case to the Tribunal, as well as access to the information on which the decision was based

Supports to Complainants

Currently, victims who wish to lodge a complaint can receive basic information from intake staff at the Commission. Individuals are not afforded any assistance in the completion of an application.

The PPAO believes that qualified intake staff should provide support to complainants in answering questions and providing information about the Commission and Tribunal. Front-line workers should also be able to help complainants frame allegations and complete the necessary paperwork to initiate a complaint. Potential claimants act on the information provided by front-line staff, influencing whether a complaint is pursued or if they seek help from other sources. To do these tasks properly, front-line staff must meet prescribed qualifications and be carefully trained. It is also crucial that a person has the opportunity to seek a legal opinion at this juncture regarding the merits of the case. After receiving advice, some individuals will choose not to pursue a complaint.

Many consumers of mental health services are in receipt of social assistance from the government due to their mental disability. They cannot afford to hire private legal counsel and Legal Aid Ontario provides legal assistance only in very limited circumstances. A person complaining of discrimination should not be required to pay for their own lawyer to advance their case through the human rights process. Instead, complainants should have access to publicly funded legal counsel, if they choose, throughout the process to ensure that their human rights are properly enforced.

Recommendations:

- Hire qualified front-line staff who can provide support to complainants during the intake process and afterwards
- Ensure that each complainant, if requested, is guaranteed legal representation without cost to the complainant

Case Management

The PPAO thinks the current Commission should develop a triage and case management system. Early in the process, cases could be identified on the basis of their sensitivity or urgency, allowing for the clustering of similar cases. Relatively simple cases could be dealt with sooner and more efficiently. We think that such a system is key to minimizing a backlog of complaints and providing for a more timely resolution of complaints.

Recommendation:

- The Commission should develop a triage and case management system for the timely resolution of complaints

Anti-Racism Secretariat

Pursuant to section 28 of the Code, the Commission is required to create a race relations division with a broad mandate respecting discrimination based on race, ancestry, place of origin, colour, ethnic origin or creed: inquire into incidents of and conditions leading to tension based on race and take action to eliminate the tension; initiate investigations into problems based upon race and coordinate programs to reduce or prevent such problems; assist and encourage organizations, groups or persons to engage in programs to alleviate racial tensions; and other functions referred to it by the Commission.

Thus, the establishment of an Anti-Racism Secretariat in section 31 of Bill 107 is not a novel idea. The functions of the new Secretariat are narrower than the current race relations division as it is supposed to eliminate discriminatory racial practices via research, education and any task assigned by the Chief Commissioner. Unfortunately, the Secretariat does not have a role in compliance monitoring, enforcement or investigation under Bill 107. Education and research are key to achieving change, but much more is required if racism is to be eliminated. Moreover, the work of the Secretariat is not mandatory but dependent on the “direction” of the Chief Commissioner. Bill 107 also limits the membership of the Secretariat to six members – an insufficient number to combat the systemic problem of racism.

To further strengthen and support the work of the Secretariat, the legislation should require the development of an advisory committee to provide advice on matters related to the elimination of racism. Such a strategy for community engagement and a formalized mechanism for stakeholder involvement is key to achieving “buy in” from the various sectors of Ontario. Membership on these committees should reflect the diversity of Ontario and all geographic regions and populations as a way to best support the work of the Secretariat.

Recommendations:

- Ensure that the Anti-Racism Secretariat’s mandate is as broad as the current race relations division by expanding its functions
- Remove the six-person cap on the number of Secretariat members
- Include a provision that the members have relevant experience and knowledge
- Require the development of an advisory committee to assist and support the work of the Secretariat

Disability Rights Secretariat

Section 31 of Bill 107 establishes a Disability Rights Secretariat whose functions are the same as the Anti-Racism Secretariat (research, education and any other tasks as dictated by the Chief Commissioner) but with respect to the prevention and elimination of discriminatory practices against persons with disabilities.

This Secretariat is a toothless tiger because it cannot initiate its own reviews or investigate complaints. It must have a role in monitoring, investigation, compliance and enforcement as part of its mandate. The Secretariat must also be able to intervene in cases at both the

Commission and Tribunal level with a view to promoting systemic and lasting change in the area of disability rights. This Secretariat should also work closely with those who have responsibility for implementing the *Ontarians with Disabilities Act* to coordinate strategies that protect and promote the rights and entitlements of individuals with mental illness.

As disability issues can be very diverse and not specific to one particular population, the PPAO also recommends that Bill 107 require the Chief Commissioner to establish various advisory groups for vulnerable populations within the umbrella of disability (for example: seniors, people with mental illness, youth, women, First Nations and Francophones), in addition to one main advisory committee with members representing each of the different sectors.

Recommendations:

- Remove the six-person cap on the number of Disability Rights Secretariat members to ensure it has an adequate number of members to meet its mandate
- Include a provision that the members have relevant experience and knowledge
- Ensure that the Secretariat has the authority to intervene in cases before the Commission and the Tribunal as a way to promote and protect the rights of individuals with disabilities
- Require that the Secretariat's mandate includes monitoring, investigation, compliance and enforcement
- Require the development of advisory groups specific to each vulnerable and marginalized group with one main advisory committee drawing membership from across all sectors

Commission and Tribunal Members

Section 27 of the Code and section 32 of Bill 107 authorize the Lieutenant Governor in Council to appoint, determine the term of office and fix remuneration for Commission and Tribunal members.

These sections neglect to address the qualifications of members. This is a major oversight given the important role played by members, especially if the Commission is no longer able to act as a public prosecutor and the Tribunal is given increased adjudicative powers.

The appointment of Commission and Tribunal members is a politicized process under both the Code and Bill 107. Instead, the PPAO believes that persons should become members due to their relevant experience and demonstrated commitment to the advancement of human rights, as opposed to any political affiliations. Accordingly, members should be recruited and appointed via open and transparent processes that reflect the gender balance and diversity of Ontario. The ensuing body of competent and skilled members will enhance the efficiency, quality and expertise of the work of both the Commission and Tribunal. Citizens of Ontario will also have renewed confidence in these human rights bodies.

Recommendations:

- Create open and transparent recruitment and appointment processes for Commission and Tribunal members
- Appoint non-partisan members to the Commission and Tribunal
- Establish criteria for membership, including demonstrated experience or expertise in the field of human rights
- Ensure that the composition of the investigatory team reflects a gender balance, as well as the diversity of the population of Ontario

Institutional Independence

Bill 107 does not change the fact that the Commission is susceptible to political influence due to its reporting and financial relationship with the Ministry of the Attorney General. To guarantee autonomy and political independence, the Commission should be responsible to the Legislative Assembly. Barbara Hall, the current Chief Commissioner, has stated: “International guidelines clearly indicate the preference requiring the Commission to report to the Legislature to avoid the perception of financial and administrative control by government over the activities of a human rights commission.” To maintain the status quo is troubling since a large proportion of complaints are filed against the government, therefore requiring the Commission to make adverse findings against its funder and the political structure.

The PPAO would support any move to increase the independence of the Commission to the Legislative Assembly of Ontario. This would enhance the work of the office and provide it with the necessary independence to complete its work without interference or the potential of real or perceived conflict of interest – further strengthening the mandate of the human rights organization.

Recommendation:

- Guarantee the independence of the Commission by making it accountable to the Legislative Assembly, not the Ministry of the Attorney General

Increased Access to Hearings

According to section 34 of the Code, the Commission can decide not to deal with a complaint if: the complaint could be more appropriately dealt with under another statute; the subject-matter is trivial, vexatious or made in bad faith; the complaint is not within the jurisdiction of the Commission; or it is barred due to a limitation period. Section 36(1) says that where the Commission does not effect a settlement of the complaint and it appears to the Commission that the procedure is appropriate and the evidence warrants an inquiry, it may refer the subject-matter of the complaint to the Tribunal. Critics of the current system contend that very few complaints actually proceed to a hearing because these provisions authorize the Commission to act as a gatekeeper.

The first step to increasing access to Tribunal hearings is to revisit the language of section 34. The PPAO thinks that the words “trivial, vexatious or made in bad faith” have a negative connotation for the average layperson. These terms may appear to trivialize a

matter that is very important to an individual so language should be used that more clearly describes the criteria for dismissing a claim.

A second way in which to refer more cases to the Tribunal is to allow complainants to elect the avenue of proceedings. It is acknowledged that some complainants would prefer to proceed directly to the Tribunal without having an investigation. Examples include: complainants who are certain that the respondent will not admit an infringement or settle; complainants who feel their case is airtight and they are guaranteed of success before the Tribunal; or affluent complainants with the requisite resources to complete their own investigation. For this reason, and in the hopes of reducing delays, the PPAO supports giving choice to complainants to elect whether their complaint is investigated by the Commission or it goes directly to the Tribunal.

Recommendations:

- Remove the provisions regarding the Tribunal's ability to dismiss a proceeding without a hearing except if a claim is without merit or legal foundation and there is no reasonable likelihood that further proceedings would establish that the claim has merit or legal foundation
- Amend Bill 107 to allow complainants to choose whether their complaint will be investigated by the Commission or it will proceed directly to the Tribunal

Third Party Applications

An individual who believes he or she has experienced a rights infringement can make an application to the Commission pursuant to section 32 of the Code. The Commission can also initiate a complaint by itself or at the request of any person. Two or more complainants, who have common questions of law or fact or the same alleged perpetrator, can combine their complaints, according to section 33. Similarly, section 35 of Bill 107 allows an individual to lodge an application or two or more persons to bring a joint application to the Tribunal if there is a purported rights violation.

The PPAO recommends that Bill 107 be amended to include provisions for the Commission and Tribunal to accept complaints from third parties. Over the past two decades, we have witnessed many rights infringements that go unchecked simply because the individual does not have the capacity to make a complaint in their own right. For example, individuals with dementia, acquired brain injury, a developmental disability, an addiction, or serious mental illness may experience a human rights abuse but not be able, because of their illness or disability, to pursue a complaint to the very body that is supposed to protect their rights. In that regard, standards must be developed, in consultation with stakeholders, to define the circumstances where such complaints would be accepted.

We are also concerned with any process that requires individuals to make complaints in writing. Many of our clients have literacy or other cognitive issues that would not allow them to make a complaint in writing. As such, the PPAO recommends that complaints should be able to be made in various formats, including verbal, to both the Commission and the Tribunal.

Recommendations:

- Include a provision in section 35 of Bill 107 to permit third party applications, following consultation with stakeholders, to define under what circumstances such complaints would be received by the Commission and the Tribunal
- Permit the Commission and the Tribunal to accept complaints in various formats, including verbal complaints as a way to address equity and access issues for vulnerable and disenfranchised populations

Advisory Groups

Section 31.1 of Bill 107 gives discretion to the Chief Commissioner to establish advisory groups as he or she considers appropriate to advise the Commission about the elimination of discriminatory practices under the Code. No other details are provided about advisory groups.

The PPAO wholeheartedly supports the creation and involvement of advisory groups as they can provide valuable input to the Commission. We feel there should be the creation of an advisory group committed to mental disability comprised of a majority of consumer-survivors as they can offer important expertise about the mental health and addictions system. Remuneration should be provided to advisory group members to cover travel expenses and their time. Without such funding, potential members may be excluded from the process.

We are concerned because Bill 107 simply states that the Chief Commissioner “may” establish advisory groups. This provision is not strong enough and there should be a legislated requirement for this to occur because it should not be left to the discretion of the Commissioner.

Conditions need to be established to create an open and transparent recruitment process where members are appointed due to their commitment to human rights.

Recommendations:

- Strengthen Bill 107 by stating that the Chief Commissioner “shall” establish advisory groups
- Include a provision about the creation of an advisory group committed to mental disability comprised of a majority of consumer-survivors
- Create an open and transparent recruitment and appointment process where advisory group members are appointed based on a commitment to human rights
- Remuneration should be provided to advisory group members to reimburse their time and travel expenses

Limitation Period

Both section 34(d) of the Code and section 35 of Bill 107 stipulate that a person can only bring a complaint within six months of the alleged discriminatory behaviour unless the Commission or Tribunal is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay.

It is the position of the PPAO that the current and proposed legislation contravene the general limitation period of two years for most civil actions found in the *Limitations Act, 2002*. Although the Code and Bill 107 permit an extension of time in limited circumstances, it is discretionary and not guaranteed.

A short limitation period is particularly onerous for consumers of mental health services. Due to the cyclical nature of many mental illnesses, some clients may not be able to assert their rights for an extended period of time. This short timeframe precludes many individuals from exercising their rights. Due to the pervasive stigmatization and lack of respect for the rights of consumers, some victims may not have realized that they suffered discrimination. Others may have realized that their human rights were violated but were too scared or vulnerable to take action out of fear of retaliation or concern that it could impact on their level of and access to services and supports in the future.

Recommendation:

- Amend section 35 of Bill 107 to extend the limitation period to file a human rights complaint to two years while maintaining the power of the Tribunal to accept late applications if the delay was incurred in good faith and no substantial prejudice is caused to the other parties

Enforcement

Neither the Code nor Bill 107 provides mechanisms for the Commission to enforce its authority. This is probably one contributing factor to the delay in the current investigatory process.

Enforcement must be the cornerstone or foundation on which a successful human rights system is based. There must be mechanisms for enforcement to ensure full compliance and compel parties to take corrective action. It is essential that there be strong compliance, enforcement and investigative process defined in law with corresponding penalties for those who choose to violate the law. Accordingly, the PPAO supports increased powers to the Commission to make binding compliance orders and impose penalties on parties who fail to cooperate with the Commission. The Commission needs the necessary tools to do its job properly and these powers emphasize the significance of the Commission's role (whether it is under the current system or Bill 107). Only then will the work of the Commission be taken seriously and the rights of all Ontarians advanced.

Recommendation:

- Include a provision permitting the Commission to impose compliance orders, fines and penalties if parties fail to cooperate with the Commission

Penalties

Both sections 44(2) and 46.3(2) of the Code and Bill 107, respectively, do not permit prosecutions for offences except with the written consent of the Attorney General. The decision of the Attorney General cannot be appealed.

The PPAO does not understand why such a section is necessary. It infers that the Tribunal is politicized and subject to the directives of the Attorney General. If penalty provisions are to be effective and accountability, enforcement must be a key component of any legislation to protect the rights of vulnerable populations.

Recommendation:

- Eliminate section 46.3(2) of Bill 107 respecting the necessity of the Attorney General's written consent to proceed with prosecutions for offences under this statute

Review of the Legislation

Section 57 mandates a single review, five years after the effective date, of the implementation and effectiveness of the changes resulting from Bill 107 by a person appointed by the Minister. A report must be prepared and submitted to the Minister within one year of his or her appointment.

The PPAO agrees that it is crucial to review the status of the amended Code but we do not feel that five years constitutes a timely review. Given the major changes being proposed by the government and the importance of human rights enforcement, a review must be conducted earlier to prevent the perpetuation of any problematic provisions. The PPAO proposes that an initial two-year interval is appropriate with subsequent reviews every three years. Reviews must also include consultations with stakeholders.

In order to produce non-partisan reviews, the PPAO thinks that the person responsible for the reviews should not be a Minister but an Executive Council appointment. Reports arising from reviews should be prepared within 120 days of the review date. To ensure transparency and accountability, reports should be presented to the Legislative Assembly and made available to the public.

Recommendations:

- Amend section 57 to require an initial review of the implementation and effectiveness of the changes resulting from Bill 107 within two years of the effective date and every three years thereafter
- Stipulate that the person responsible for undertaking reviews is chosen by the Executive Council
- Require that the reviews involve consultations with stakeholders
- Amend section 57 to declare that reports resulting from reviews be completed within 120 days of the review date and presented to the Legislative Assembly and made available to the public forthwith

Statutory Timelines

Both the Code and Bill 107 are lacking statutory timelines with regards to any steps in the human rights enforcement process. But, to be effective, timely resolutions are necessary. This is true particularly for the most vulnerable in society who cannot wait a long time for decisions that affect such things as housing and employment.

The government needs to work with stakeholders to develop appropriate timelines to prevent a backlog of cases. For example, there should be timely deadlines under the current system in which the Commission must commence an investigation. Under a direct access system, the PPAO recommends that matters be resolved or scheduled for a hearing within 120 days and decisions be released by the Tribunal within 30 days.

Recommendations:

- Impose time limits regarding the adjudication of a complaint, including the length of time to hear a case and to release a decision

Training and Education

Members of the Commission and Tribunal will encounter many different people from many different walks of life, including those with mental illness. Accordingly, all staff and members of the Commission and Tribunal should receive initial and ongoing training respecting mental health, mental illness and addiction. A culture of understanding and acceptance of mental illness is essential if we are to be an inclusive and caring community.

Additionally, it is our opinion that the Commission and Tribunal has a higher obligation to accommodate the special and unique needs of the people appearing before it, given the nature and type of work that they do and the rights abuses that they have experienced.

Recommendations:

- Staff and members of the Commission and Tribunal receive initial and ongoing training respecting mental health, mental illness and addictions to assist them in understanding and accommodating the special needs of the complainants

II. PROBLEMS WITH THE PROPOSED HUMAN RIGHTS SYSTEM

Intervener Status of the Commission

Section 39 of Bill 107 delineates the parties to an application to the Tribunal. It does not automatically grant intervener status to the Commission.

Since the Commission is no longer able to act as a public prosecutor under Bill 107, the PPAO thinks it is imperative that it is at least able to intervene in cases that may have wide-ranging effects. It is illogical that the Commission, despite its proven expertise in human rights and discrimination law, is not afforded any special status with respect to interventions.

If the Commission must argue for intervener status in every case it wishes to pursue, it will delay hearings and prolong legal arguments by the respondent who would not support intervention for political or self-interested reasons.

In order for the Commission to be aware of noteworthy cases where it might choose to intervene, the Tribunal must notify the Commission and provide sufficient information about all cases scheduled for a hearing.

Recommendations:

- Amend section 39 of Bill 107 so that the Commission has the right to intervene in any case before the Tribunal
- The Tribunal must notify and provide particulars to the Commission of all cases scheduled for a hearing before the Tribunal

Rules of Practice and Procedure

Currently, the Tribunal is entitled to make rules governing its practice and procedure pursuant to section 25.1 of the *Statutory Powers Procedure Act*. Section 34 of Bill 107 now specifically allows the Tribunal to make rules of practice, including: the ability not to hold a hearing; to limit the extent of parties to present evidence and make submissions; and to prescribe alternative procedures to traditional adjudicative practices.

It is the PPAO's position that the power of the Tribunal to make these rules is overbroad. Rules of administrative boards are developed and approved by internal staff. As rules of practice are flexible and subject to change, there is the possibility that they are vulnerable to the agenda of Tribunal staff or that they may inadvertently create barriers to access for specific vulnerable populations.

No requirement exists in Bill 107 for consultation with stakeholders. The development of rules governing its practice should be done in consultation with all stakeholders and implemented only after a required consultation period, similar to that enshrined in other provincial legislation. For example, other statutes require public notification and a consultation period of sixty days prior to any changes being made. We would support similar language being enshrined in Bill 107 as a way to promote both transparency and accountability.

There are mechanisms in both the current and proposed legislation regarding the ability of the Tribunal not to hold a hearing. The merits of a complainant's case should not be forfeited in order to save resources. There is also a fear that individuals with mental illness may disproportionately have their cases dismissed because of preconceived beliefs about mental illness, mental health or addictions and a clients "history" of being involved with the mental health sector. It is for these reasons that additional safeguards must be enshrined in the law to protect the interests of very vulnerable and disenfranchised populations.

Recommendations:

- Omit section 34 of Bill 107 as the *Statutory Powers Procedure Act* authorizes administrative tribunals to make rules governing their practice and procedure
- Amend Bill 107 to provide that the drafting of rules of practice involve stakeholders via consultation and submissions and that the law require a consultation period of 60 days

Mediation

Presently, voluntary mediation is provided by the Commission prior to investigation. Section 37(1) of Bill 107 lets the Tribunal dispose of an application via any alternative dispute resolution mechanism provided for by the Tribunal rules. Thus, the Tribunal can impose mandatory mediation over the objections of the complainant, if it wishes.

While voluntary mediation can be extremely efficient, the PPAO believes that it is not appropriate where there is a power imbalance between the parties. Forced mediation can have the effect of re-victimizing the complainant or replicating the injustices they have already experienced.

Recommendation:

- Amend section 37(1) of Bill 107 to state that participation in mediation is voluntary, not mandatory, and a person's lack of involvement in mediation will not bias their claim

Statutory Powers Procedure Act

By virtue of being an administrative board, the Tribunal is subject to the *Statutory Powers Procedure Act*. The purpose of this statute is to establish minimum rules or standards for the conduct of proceedings by administrative tribunals to which it applies. However, section 38 of Bill 107 says that in the event of a conflict between the *Statutory Powers Procedure Act* and the legislation, the legislation and the Tribunal rules prevail.

This provision, coupled with the overbroad rules of practice and the limited right of appeal in Bill 107, leads one to believe that the process excludes procedural fairness requirements.

The PPAO is concerned that without recourse to the *Statutory Powers Procedure Act*, the Tribunal may use its discretion, in the name of convenience and efficiency, not to advance a case. To reflect the principles of natural justice and ensure the perception of fairness, Bill 107 should fall under the jurisdiction of the *Statutory Powers Procedure Act*.

Recommendation:

- Amend section 38 of Bill 107 to provide that the Tribunal cannot override the provisions of the *Statutory Powers Procedure Act* in the event of a conflict between the Tribunal's rules of practice and the Code

Discretion Not to Hold a Hearing

Pursuant to section 41 of Bill 107, the Tribunal has unfettered discretion to dismiss proceedings without a hearing in whole or in part, if, among other things: the proceeding is frivolous, vexatious or commenced in bad faith; some aspect of the statutory requirements for bringing the proceeding has not been met; the facts alleged in a complainant's application are true but does not disclose a rights infringement; and the facts alleged in a Commission's application are true but does not disclose a rights infringement. Further, section 34(2)(a) permits the Tribunal to make rules of practice whereby the Tribunal is not required to hold a hearing.

Contrary to the government's assertions, Bill 107 does not guarantee or improve access to a hearing. The Tribunal is vested with excessive discretion to dismiss cases and there is a risk that worthy cases will not be given a hearing at either an early stage or on the merits. The danger also exists that the Tribunal might feel pressured to dismiss cases in an effort to save money and time or to simply report that they have disposed of complaints in a timely manner. The protection and promotion of human rights in Ontario must be the standard by which effectiveness is judged, not the quick disposal of human rights complaints.

The Tribunal could potentially its rules of practice to "screen out" certain types of complaints or certain types of complainants which could result in the denial of access to justice and the pursuit of the protection of human rights. It is our opinion that the Tribunal should not have unfettered discretion to dismiss cases or the authority to craft rules that would support such a practice. Instead, the decision to dismiss proceedings should be used with great care and caution and only in narrow circumstances.

Section 41(c), respecting dismissals where some statutory requirements are not met, is also problematic. This clause could be abused to reject cases if documents are not completed correctly or submitted on time. It will make the process more litigious and difficult for unrepresented individuals. The PPAO believes this provision should be eliminated. However, should the government choose to retain this section, there should be a proviso stating that there is a positive obligation on the Tribunal to assist the complainant with procedural issues. In other words, if the Tribunal chooses to invoke this section to dismiss a case, the Tribunal should notify the complainant in advance of its reasons for doing so and provide information about the complainant's options. This protection is necessary to protect complainants unfamiliar with legal proceedings who may have made a minor mistake or omission.

The Tribunal should be obligated to provide written notice prior to dismissal of a case and permit the complainant an opportunity to make submissions on the issue. Additionally, the Tribunal should provide written reasons to a complainant in the event of a dismissal so the complainant is given an explanation.

Recommendations:

- Amend Bill 107 to allow complainants to choose whether their complaint is investigated by the Commission or it proceeds directly to the Tribunal
- Remove the provisions regarding the Tribunal's ability to dismiss a proceeding without a hearing except if a claim is without merit or legal foundation and there is no reasonable likelihood that further proceedings would establish that the claim has merit or legal foundation
- Require the Tribunal to provide written notice prior to dismissal of a case and permit the complainant an opportunity to make submissions
- If section 41(c) is not revoked, stipulate that the Tribunal has a positive obligation to notify and assist the complainant concerning procedural issues
- Include a provision that requires the Tribunal to provide written reasons if a complaint is dismissed

Costs

Currently, the Code does not permit cost orders to be made against a complainant if the Tribunal dismisses the complaint. It does allow costs to be awarded if the complaint was trivial, frivolous, vexatious or made in bad faith or if undue hardship was caused to the respondent. If these costs are awarded, their payment is borne by the Commission because it referred the case to the Tribunal. Bill 107 represents a substantial change as it potentially empowers the Tribunal to award costs against the complainant. As Bill 107 gives the Tribunal the ability to make its own rules of procedure, the rules could provide that unsuccessful complainants are responsible for the costs of the respondent's case.

The PPAO thinks that the power to award legal costs is generally not appropriate in human rights cases as it will deter meritorious complaints. Not only will the victim have to finance an investigation into their human rights violation, but they may also be liable for paying a huge legal bill for the respondent. Even the mere possibility of having to pay costs may serve as a barrier to access for some clients who might be concerned that they will have to pay if they "lose." This may be a gamble that some are not willing to take, even if their rights have been violated.

Unscrupulous respondents may use this as a coercive measure to intimidate complainants who are vulnerable or who do not have adequate resources to pursue their complaints.

If the Tribunal elects to issue cost orders, complainants should receive mandatory legal advice to discuss the consequences of a potential costs order prior to proceeding to a hearing.

Recommendations:

- Include a provision in the legislation to state that the Tribunal may not make an order that a complainant pay costs to a respondent
- If the Tribunal issues cost orders, complainants should receive mandatory legal advice to discuss the consequences of a potential costs order

Right of Appeal

Currently, section 42 of the Code allows any party before the Tribunal to appeal its decision on questions of fact or law or both to the Divisional Court. Section 45 of Bill 107, however, says the Tribunal's decision is final and may only be appealed via judicial review if the ruling is "patently unreasonable." In other words, anybody can appeal a decision under the Code while there is no automatic right of appeal pursuant to Bill 107.

The proposed provision imparts an extremely high legal threshold, effectively eliminating the ability to appeal. To be patently unreasonable, it must be immediate and obvious to a judge that the decision is defective. Moreover, judicial review applications are more arduous, and thus expensive, than traditional appeals because the doctrine of curial deference stipulates that courts ought not intervene in the decisions of a tribunal if it is in a better position (due to its expertise, knowledge and experience) to arrive at a determination of the issues.

Due to the fundamental changes to the human rights regime, namely the lack of investigations and public prosecution by the Commission, it is anticipated that a higher proportion of complainants will be unsuccessful before the Tribunal. Thus, it is integral that decisions can be appealed to Divisional Court.

Over the past ten years, the Commission has been involved in numerous appeals to advance human rights law, including 72 judicial review decisions, 32 decisions on appeal from the Divisional Court, 40 decisions from the Court of Appeal and 17 Supreme Court of Canada cases. It is the PPAO's contention that the Commission should continue its appeal work.

Recommendations:

- Amend section 45 of Bill 107 to provide that Tribunal decisions can be appealed to the Divisional Court on questions of fact or law or both
- Include a provision within section 45 that the Commission be notified of any appeals and it be permitted to act as an intervener, if it deems fit

Remedies

Presently, section 41(1) of the Code provides that if there has been a breach of the Code, the Tribunal may order the respondent to make restitution for loss arising from the infringement. Where the infringement is wilful or reckless, monetary compensation may include an award not exceeding \$10,000 for mental anguish.

Section 42 of Bill 107 eliminates the \$10,000 cap on mental anguish and allows the Tribunal to order compensation for loss arising out of the infringement of the victim's dignity, feelings or self-respect. In cases initiated by the Commission, as per section 43, the Tribunal can direct any party to do anything it thinks appropriate to promote compliance with respect to future practices if the infringements have been of a systemic nature.

By lessening the requirement of proving that the discrimination was "wilful" or "reckless", the new standard of "injury to one's dignity" should make it easier for complainants to

receive monetary compensation. The PPAO is pleased that perpetrators may face harsher compensation orders in the hope that it will prevent future discriminatory behaviour.

Having said that, the PPAO thinks the number of public interest remedies will be greatly diminished in favour of individual remedies for four reasons. First, since Bill 107 prevents the Commission from investigating cases, the Tribunal will not be presented with all the underlying facts of systemic issues. Second, remedies pursuant to section 43 refer only to future, not past, practices of discrimination. Third, individual victims will likely pursue personal remedies due to limited resources and self-interest. Unlike the Commission, individual complainants are not experts in discrimination and the alleviation of discrimination so they probably do not know what systemic remedies to seek. Fourth, there is no guarantee that the Commission will be granted intervener status in cases although it feels it is in the public interest to do so.

Recommendations:

- Amend section 43 of Bill 107 to give the Tribunal the power to issue remedies for past and future discrimination
- Permit the Tribunal to make remedies in the public interest based upon the evidence presented at the hearing, in addition to individual remedies sought by the complainant

User Fees

The Code does not provide for any user fees but section 45.2 of Bill 107 permits the Tribunal to charge fees for expenses incurred in connection with a human rights proceeding. Bill 107 does not permit a waiver of these fees based on financial hardship.

The PPAO strenuously objects to the imposition of fees as this creates yet another barrier to justice, contrary to the purpose of the Code. User fees, in conjunction with the other financial burdens in Bill 107 – the costs of personal investigations, lack of clarity regarding legal assistance, the possibility of cost orders – will dissuade victims of discrimination from applying to the Tribunal.

At a minimum, if this section is not struck from the legislation, the legislation must specifically state that recipients of government assistance will never be charged fees, for any purpose.

Recommendation:

- Eliminate section 45.2 of Bill 107 to prevent the Tribunal from imposing user fees

Legal Representation

Presently, if a complaint is referred to the Tribunal, the Commission automatically becomes a party to the proceedings and has carriage of the case. Although the Commission does not represent the complainant but the public interest, many complainants do not retain separate legal representation. Instead, many complainants rely on Commission counsel due to their expertise and the high costs of hiring private counsel.

By overhauling the existing system, Bill 107 requires complainants to conduct their own investigations and argue their case without the assistance of the Commission. To allay fears about the lack of legal representation, Premier Dalton McGuinty told the Legislative Assembly:

Today, with this Bill, we would add a third pillar to the human rights system: full access to legal assistance. We would establish a new human rights legal support centre to provide information, support, advice, assistance and legal representation for those who are seeking a remedy before the tribunal.

Sadly, the proposed legislation is short on detail regarding the legal services that will be provided and uses soft language that allows the Tribunal to escape its responsibility.

Section 46.1 of Bill 107 merely says the Minister “may” enter into agreements with prescribed persons or entities for the purposes of providing legal services and such other services as may be prescribed to applicants or other parties. Section 46.2 goes on to state that an agreement under subsection (1) may provide for the payment for the services by the Ministry. Bill 107 is silent about a multitude of important issues regarding these agreements including structure, obligations, funding and limitations.

For instance, there is no commitment or requirement by the Ministry of the Attorney General to provide resources; instead, it merely says the Ministry “may” allocate funding for legal services. Irrespective of any future promises by the Ministry to provide funding, any such agreement will be unstable and can be cancelled if the priorities of the government change or a new government is elected. Consequently, the legislation should explicitly stipulate that the government provide adequate monies for legal services and supports to complainants.

Bill 107 must clearly articulate whether complainants will receive services free of charge or whether fees must be paid. The statute must be unambiguous so complainants are fully aware of the financial risks involved in making an application.

By referring cases directly to the Tribunal, it is likely that proceedings will become increasingly “judicialized.” The increasingly legalistic nature of proceedings under Bill 107 makes it essential for complainants to be given legal assistance. The majority of respondents are financially secure and they are able to retain legal counsel who can delay proceedings with procedural motions. If complainants are not represented, the proceedings will be unbalanced and unfair.

The PPAO supports the creation of community-based human rights legal support centres where all claimants receive publicly funded legal assistance. Although Premier McGuinty only referred to “a” legal centre, there should be several centres located across the province to ensure that complainants are not discriminated against on the basis of geography. Many consumers of mental health services have a meagre fixed budget that does not include a travel allowance.

These legal centres should employ a variety of staff to provide support, such as community legal workers and community advocates. Qualified lawyers, however, must have carriage of a complainant's file.

Complainants appealing Tribunal and/or court decisions should also be given legal representation if, in the opinion of legal centre staff, there is merit to these appeals.

Recommendations:

- Amend section 46 of Bill 107 to ensure that each complainant, if requested, is guaranteed legal representation without cost to the complainant
- Include a provision stating that the legal representation of claimants will be provided by lawyers at community-based human rights legal support centres
- Allow complainants to be provided legal representation if a Tribunal and/or court decision is appealed
- Amend Bill 107 to include a section requiring the government to create a non-partisan committee to determine an adequate annual budget for human rights legal support centres

Transitional Provisions

Bill 107's transitional provisions are found in sections 49 through 56. On the date that Bill 107 comes into effect, complaints filed under the current system will be restarted at the Tribunal (the only exception is those complaints where the Tribunal has already started to hear evidence).

The PPAO submits that the transitional provisions are ill-conceived, harmful to complainants and fiscally irresponsible. First, the effective date is not contingent on the appointment of new Tribunal members or the establishment of a new human rights legal support centre. Hence, it is unrealistic to expect that these institutions will be capable of performing their functions without creating a backlog – the very problem that Bill 107 seeks to resolve. Second, forcing complainants to start the entire process over after several months or years is discouraging and unfair. Complainants may perceive that their claims of human rights violations are being trivialized and, as a result, withdraw their applications. Or, complainants may not be able to afford legal representation. Third, an enormous amount of public money will be squandered on those cases where the Commission has already made efforts to resolve the claim.

Section 56(4) of Bill 107 is particularly problematic. It says that in the event there is a conflict between a provision in a regulation under the transitional provisions and a provision in the statute or one of its regulations, the transitional regulation prevails. In other words, a transitional regulation could override the statute. The PPAO does not understand why a regulation, a subsidiary piece of legislation, can override a statute, a piece of legislation which is approved by elected members of government.

Recommendations:

- Amend the transitional provisions to stipulate that applications submitted before Bill 107 comes into force will proceed under the existing Code
- Amend the transitional provisions to state that Bill 107 will not take effect until the Tribunal and human rights legal support centre are capable of performing its functions
- Omit section 56(4) from Bill 107

CONCLUSION

The PPAO believes that the solution to the problems with our human rights regime is simple: increase funding and resources to the Commission to enable it to fulfill its statutory mandate. The Commission's budget has remained basically stable for the past decade despite an increasing number of complaints. The bottom line is that the retention of the Commission is not only imperative but far less expensive than overhauling the system. If we are to ensure that Ontarians have "all human rights for all" then we must make investments in the very system that is to support them in realizing their rights and moving us towards becoming a more understanding, tolerant and accepting society, free of discrimination and rights abuses.