

PSYCHIATRIC PATIENT ADVOCATE OFFICE

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The Chair: Next we have the Psychiatric Patient Advocate Office. Good afternoon. You may begin, but first, if you could introduce yourselves for the record.

Mr. David Simpson: I'm David Simpson, the acting director of the Psychiatric Patient Advocate Office.

Ms. Lisa Romano: And I'm Lisa Romano, legal counsel at the Psychiatric Patient Advocate Office.

Mr. Simpson: Good afternoon, Chair and members of the committee. I would like to thank you for the opportunity to present to the committee today and to be part of the discussion on the reform of the human rights system in Ontario. I would also like to recognize the courage of those who have appeared before you today as individuals to share their stories, their passion for human rights, and for wanting to make the world a better place than they found it.

The Psychiatric Patient Advocate Office is an arm's-length office of the Ministry of Health and Long-Term Care. The patient advocate office provides individual advocacy, rights protection and rights advice to clients in the current and former provincial psychiatric hospitals through its community-based rights advice service, and rights advice in nearly all of the psychiatric units of schedule 1 hospitals across Ontario. For more than two decades, our office 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, and 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.

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 will not advance the rights of our clients or Ontarians in general.

Our office 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 fulfill its mandate and function. For example, with extra money, the commission could establish a more efficient process to triage complaints, establish a process for dealing with urgent or significant 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 investment, Ontario could have a progressive and enriched human rights complaint process without the need to simply make change for the sake of making 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.

It is our opinion that the current system is effective, albeit under-resourced. 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 only 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 our 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 -- a developmental disability and a 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 a 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 become the tribunal, as opposed to the commission.

While our office 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 recommendations articulate our concerns and offer possible solutions to the government of Ontario.

Our submission is divided into two sections, the first section being positive changes to the current human rights system, and the second section called "Problems with the proposed human rights system."

Lisa will take us through the first section.

Ms. Romano: So just to clarify, the first section is based on the premise that the commission remains intact, as it is. We are going to outline why we feel that's important and the changes that can be made to the current system to enhance its efficiency.

Currently, every person who files a complaint with the commission has the right to an investigation of his or her complaint. The commission has a wide array of investigatory powers, ranging from the inspection of documents, entering buildings, questioning individuals to obtaining a search warrant if necessary to obtain evidence. Based on the outcome of its investigation, the commission may or may not refer the case to the tribunal for a hearing. Although the commission does not represent the complainant, the commission assists the complainant with the litigation process by preparing witnesses, pleadings and motions, as well as calling evidence. 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 his or her own lawyer, if he or she chooses, but it is not strictly necessary.

Bill 107, however, eliminates the complainant's right to an investigation --

The Chair: Just to interrupt, can you please slow down the pace for the translation.

Ms. Romano: Sorry; my mistake. I tend to speak too quickly.

The Chair: Go ahead.

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Ms. Romano: Bill 107, however, eliminates the complainant's right to an investigation and significantly reduces the power of the commission to advance the public interest before the tribunal.

As noted earlier this morning by a speaker -- and I regret that I didn't catch the person's name -- the current human rights system is analogous to victims of crime who approach the police for assistance. The police investigate the case for public interest reasons as well as the personal interest of the alleged victim. Their methods of investigation include collecting evidence, reviewing documents, talking to suspects and witnesses and, if necessary, obtaining search warrants. If the evidence is strong and indicates a reasonable belief 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.

If we compare 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 even obtain a search warrant. On the basis of the information acquired during the investigation, the investigator will try to conciliate the dispute, and if this is unsuccessful, the case will be referred to the tribunal.

We think it's safe to say at the PPAO that it's inconceivable that the police would ever stop investigating complaints made by victims of crime if the government wants to eliminate investigation for victims of discrimination.

The dismantling of the commission will have a profound detrimental effect on human rights advocacy. By forcing complainants to conduct their own investigations and present their own cases to the tribunal, some individuals will be faced with an insurmountable barrier. Requiring victims to investigate their claims 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 support them emotionally through this journey, causing them undue stress and potentially impacting their personal health and well-being.

The PPAO is also concerned that some of our clients may not be able to conduct their own investigation because their mental health history may be used against them to undermine their credibility.

Bill 107 disregards the tremendous inequities that are found in the very law that is supposed to protect rights and deter discrimination. 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 does recommend that the parties be given comprehensive reasons for the decision not to refer a decision to the tribunal -- or if it is referred to the tribunal, they should be given the information -- and access to the information upon which the decision was based.

It is also acknowledged that some complainants would prefer to proceed directly to the tribunal without having an investigation. So in the hope of reducing delays, the PPAO does support giving choice to complainants as to whether their complaint is investigated immediately by the commission or if it goes straight to the tribunal.

The PPAO also believes that potential complainants should receive more supports throughout the human rights enforcement process. There should be qualified intake staff to support complainants, answering questions and providing information about both the commission and the tribunal. Front-line workers should also help complainants frame allegations and complete the necessary paperwork to initiate complaints. The work of front-line staff is important since potential complainants act on this information, influencing whether a complaint is pursued or whether they would seek other avenues for assistance. Obviously, to meet these requirements and do the job to the best of their ability, front-line staff should meet prescribed qualifications and be carefully trained. It is also crucial that a person at this juncture have an opportunity to seek a legal opinion as to the merits of their case. After receiving advice, some individuals may choose not to go forward to the Human Rights Commission.

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 limited legal assistance if they are eligible. 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.

I'm going to skip to page 6 of our written submissions and discuss the Disability Rights Secretariat. Bill 107 establishes a Disability Rights Secretariat whose functions are research, education and other tasks as dictated by the chief commissioner with respect to discrimination on the basis of disability. The PPAO believes that this secretariat is a

toothless tiger because it cannot initiate its own reviews or investigate complaints. To be effective, its mandate must include monitoring, investigation, compliance and enforcement functions. The secretariat must also be able to intervene in cases at both the commission and tribunal levels with a view to promoting systemic, 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. Also, Bill 107 only allocates six members to the secretariat. We feel that number is insufficient, considering that more than half the claims being launched before the commission involve disability as a ground of discrimination.

With respect to commission and tribunal members, Bill 107 discusses their appointment and term of office but it doesn't address the qualifications of members. This is a major oversight given the important role played by members. The PPAO believes that persons should be appointed due to their relevant experience and demonstrated commitment to human rights, as opposed to political affiliations. 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 tribunal and the commission. Citizens of Ontario would have renewed confidence in both of these human rights bodies.

I'm just going to discuss training and education very briefly. Members of both the commission and the tribunal will encounter many different people from many, many different walks of life in their work, and all staff members of the commission and the 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 want to be an inclusive and caring community.

We've heard this from a few speakers today, but the PPAO also believes that the commission should report to the Legislative Assembly. That would guarantee autonomy and political independence. I'm just going to repeat a quotation from Barbara Hall, the current chief commissioner. She has stated publicly that, "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." It is troubling that the commission is not independent since in a large proportion or a large number of the complaints that go before the commission and the tribunal the respondent is the government, requiring the commission to sometimes make adverse findings against, in effect, its superior.

I'm going to discuss third-party applications briefly. Neither the code nor Bill 107 allows third parties to lodge a complaint on behalf of an individual. This right is reserved only for individuals or groups of individuals who have a common question of law or fact or the

same alleged perpetrator. 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 -- and I mean the PPAO -- 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, due to their mental illness or disability, to pursue a complaint. In that regard, we feel that stakeholders should be consulted and standards be developed to define circumstances where complaints by third parties could be accepted.

I'm also just going to briefly mention advisory groups, and that's on page 10 of our written submission. The PPAO wholeheartedly supports the creation and involvement of advisory groups, as they can offer invaluable input to the commission. Specifically, we feel there should be the creation of an advisory group committed to mental disability comprised of a majority of consumer-survivors, as they provide important expertise about the mental health and addictions system. We also feel that there should be provision in the new law about remuneration for advisory group members, to cover their travel expenses and time.

We are concerned because Bill 107 simply states that the chief commissioner "may" establish advisory groups. We feel that the language of the bill should say "shall" establish advisory groups.

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Also on page 10 of our written submission, we talk about limitation periods. Both the code and Bill 107 stipulate that a person can only bring a complaint within six months of the alleged discriminatory behaviour. There are some exceptions to that, but that's the basic rule. We at the PPAO feel that the current and proposed legislation contravene the general limitation period that's set out for most civil actions in the Limitations Act. 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 our clients or 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 even realize they've suffered discrimination until a later point. Others may have realized that their human rights were violated but were too scared or vulnerable to take action at that time.

On page 11 we discuss enforcement. Neither the code nor Bill 107 provides mechanisms for the commission to enforce its authority. This is maybe one contributing factor to the delay in the current investigation process. We feel there must be mechanisms for enforcement to ensure full compliance and compel parties to take action. The PPAO supports increased powers to the commission to make binding compliance orders and impose penalties on parties who fail to co-operate with the commission. The commission needs the necessary tools to do its job properly and to emphasize the significance of the commission's role, and this is whether it's under the current system or under Bill 107.

On page 12 of our written submission we discuss a review of the legislation. Bill 107 mandates a single review five years after the effective date of the implementation of the changes resulting from Bill 107, and then there must be a report prepared. The PPAO agrees that it is crucial to have a review of the new system, but we feel that five years is too long to wait for a review. So we propose that an initial review be conducted two years after Bill 107 comes into force and that there be subsequent reviews every three years thereafter. We also feel that it's important that there be consultations with stakeholders during this process. We also think that the person responsible for the review should not be a minister but an executive council appointment. These reports should be prepared in a timely manner and they should be presented to the Legislative Assembly and made available to the public.

Finally, I'm just going to speak about statutory timelines, which is on page 13 of our written submission. We feel that both the code and Bill 107 are lacking statutory timelines with regard to any steps in the human rights process. To be effective, there should be timely resolutions, obviously. This we think could be accomplished more easily if there were timelines in the legislation. The government should work with stakeholders to develop appropriate timelines to prevent a backlog of cases.

I'm going to let Mr. Simpson continue.

Mr. Simpson: I'd just like to take a couple of minutes here to talk about some of the issues with the proposed human rights system as envisioned in Bill 107.

On page 13 of our submission we talk about the intervenor status of the commission. Currently, the commission has a mandate to prosecute every case before the tribunal, in addition to raising systemic issues. Section 39 of Bill 107 delineates the parties to an application to the tribunal. It does not automatically grant intervenor 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 at least be 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 intervenor 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 be required by law to notify the commission and provide sufficient information about all cases scheduled for a hearing.

Under rules of practice and procedure, on page 14: Currently, the tribunal is entitled to make rules governing the practice and procedure before it, 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 to not 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 the tribunal staff or that they may be inadvertently creating barriers to access for specific vulnerable populations.

There is also no requirement 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 60 days prior to any changes being made. We would support similar language being enshrined in this bill as a way to promote both transparency and accountability.

We also comment on mediation, on page 15. We recognize that voluntary mediation can be extremely efficient. We believe, though, that it's not appropriate where there is a power imbalance between the parties, because forced mediation can have the effect of re-victimizing the complainant or replicating the injustices that they have already experienced.

On page 16, the discretion to not hold a hearing: I'd like to draw your attention to this. 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 requirement for bringing the proceeding has not been met; the facts alleged in a complainant's application are true but do not disclose a rights infringement; and the facts alleged in the commission's application are true but do 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. This has the potential of screening out certain types of complaints or complaints from certain types of complainants that would result in the denial of access to justice and the pursuit of the protection of human rights.

On page 17 we also comment on the awarding of costs. The current 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. Our concern here is that the awarding of costs could potentially act as a barrier, because some people may decide not to pursue a complaint for fear that if costs are awarded against them it would cause them financial hardship. So we are completely opposed to the awarding of costs in these circumstances.

On page 19, we also talk about user fees. The code does not provide for any user fees but section 45.2 of this bill 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.

We strenuously object to the imposition of fees as they create yet another barrier to justice, contrary to the purpose of the code.

The Chair: If you can just conclude; you have about a minute left.

Mr. Simpson: Okay. User fees, in conjunction with other financial burdens in Bill 107 - the cost of personal investigation, 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.

In conclusion, we believe 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 static for a decade despite an increasing number of complaints. If we are to ensure that all 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 forward to becoming a more understanding, tolerant and accepting society, free of discrimination and rights abuses.

Thank you very much.

The Chair: Thank you.