

**"IMPROVING THE YUKON
HUMAN RIGHTS ACT"**

**Submission by
Yukon Human Rights Commission**

October 17, 2008

To the Select Committee on Human Rights

Yukon Legislative Assembly

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This submission represents the collective knowledge and experience of members and staff of the Yukon Human Rights Commission. We considered the recommendations from Commission research reports completed over the last year with women, girls and youth and legal research comparing other Acts across the country. Commission members and staff also attended the Select Committee meetings in Dawson City, Watson Lake, Teslin, Marsh Lake and Whitehorse and listened to the comments and suggestions put forward by the public. The extent of our research and preparation of the submission was limited by Commission members' and staff time and the resources within our existing budget.

We believe that changes to the Yukon *Human Rights Act* and *Human Rights Regulations* are necessary to comply with existing human rights law within Canada and to achieve a better quality of life for all Yukoners. We must ensure that Yukon has the best human rights law and system possible.

Goals for Changes to the Act

The Commission has focused on three major goals:

1. Enhancing Protection

Through research conducted over the past year, we propose the following changes to enhance protection:

- longer time limit for making a complaint and clearer conditions under which a person or groups can file human rights complaints;
- better protection from retaliation directed against people making complaints or against witnesses;
- clearer definitions for "disability", "duty to accommodate", "harassment", "systemic discrimination" and removal of the discriminatory definition of "sexual orientation";
- new protected grounds such as aboriginal identity, social condition, and gender identity as well as violence based on any of the protected grounds;
- pay equity in the private sector;
- protection for volunteers;
- protection from hatred;
- application of the *Act* to all existing structures (buildings in the Yukon)

2. Preventing Discrimination and Promoting Responsibility and Accountability

We believe that all Yukoners have a responsibility to prevent discrimination and therefore need to be aware of both their human rights and their responsibilities. Human rights education must be available to the general public and to employers. According to the Commission's research project with youth, education on human rights and responsibilities for children and youth is urgently needed and should be delivered through required school curriculum, age appropriately, from kindergarten to grade 12.

The Commission also believes its role in preventing or eliminating discrimination needs to and can be strengthened by:

- providing advice to employers and providers of services to the public, on human rights policies, procedures, and programs and
- making recommendations to law makers.

3. Improving Efficiency and Effectiveness

In our daily work with the *Act*, we have noted areas where efficiency could be improved in terms of timelines, consequences for rejecting reasonable settlement offers, remedies and direct referral to the Board of Adjudication in certain cases or to mediation in order to shorten the time that complaints take to be dealt with. The *Act* should also be written in plain language so that people can understand it, especially given the low literacy rate in the Yukon.

Human rights complaints are important legal cases with serious consequences for both complainants and respondents. Due to the increasing complexity of human rights cases, it is important that members of both the Commission and the Board of Adjudication (the separate body that conducts hearings) have background in legal process, human rights law and issues. In terms of effectiveness, it is also important to ensure that the Commission's funding is both adequate and at arm's length from government.

Impact of Changes on the Commission

The law reform changes outlined will have a direct impact on the Commission's staff and financial resources. For example, if the time limit for filing a complaint is increased from six months to two years, this will likely increase the number of complaints, which in turn will increase the Commission's workload and the waiting period for complaints to be handled, unless additional resources are provided to the Commission.

In addition, allowing the Commission to refer some cases directly to hearing at the Board of Adjudication or to mediation would reduce the number of cases requiring a full investigation, and possibly offset an increase in the number of human rights cases that may result if the time limit for filing complaints is increased.

Mediation and other alternative dispute resolution are tools that can be used before a full investigation. New approaches to handling complaints will require more training and specialized skills in mediation and conflict resolution.

All these changes will have a major impact on the Commission's budget. The Commission submits that its funding should come from the Member Services Board of the Legislative Assembly, not the Department of Justice, and that there should be a formula including an escalator clause for adjusting funding based partly on the number of human rights cases in a given year.

Human Rights Law Reform Process

These recommendations for changes to the Yukon *Human Rights Act* are a "work in progress". They are based on our current "snapshot" of human rights issues in the Yukon and our research into human rights law in Canada. Time and resource limitations did not allow for extensive research of all of the issues.

We recommend that those issues that require immediate change and where there is consensus should be dealt with through legislative amendments. These would include changes that would update the current legislation to align it with current human rights language and practice across Canada.

We also recommend that there be a follow-up process to undertake further public education, and to engage stakeholders in dialogue on issues where there is not consensus or that require further research to come up with a "made in Yukon" approach.

Issues and Recommendations

Following are the recommendations for additions and changes to the Yukon *Human Rights Act* and the reasons why we believe these changes need to be made. These issues are presented in chronological order, based on the sections within the Yukon *Human Rights Act* and the Yukon *Human Rights Regulations*.

Issue – Right to Education about Human Rights and Responsibilities

Current Section of the *Act* – None.

Recommended Change – Add the underlined words to Part 1 and renumber as appropriate.

Every student has the right to education about his or her human rights and responsibilities as part of the required school curriculum.

Why?

In the spring of 2008, the Commission did a survey of Yukon youth between the ages of 13 to 25 years. A total of 142 youth responded: 84 from Whitehorse and 58 from Destruction Bay, Haines Junction, Mayo, Ross River, Watson Lake and Stewart Crossing. Forty percent – almost half – said they knew “nothing” about human rights and 78% said they did not know what the Commission does. Also, 62% said they experienced discrimination mainly at work or school but 59% said they “ignored it, didn’t do anything about it.” Many youth said schools should provide human rights education. The Commission agrees. Yukoners at public meetings about human rights in Dawson City, Old Crow, Faro, Whitehorse and Watson Lake have also said there needs to be more education about human rights, particularly for students.

The proposed amendment will also help to deliver on the promise of education in the *Universal Declaration of Human Rights*, which Canada has signed, that says: “Everyone has the right to education... [which] shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms.”

It is now well established in international human rights law that education about human rights is a necessary part of the rights themselves: if you do not know about your rights and responsibilities you cannot use them or protect and promote them. (See also the Commission’s submission to the Education Reform Project [August, 2007] on the Commission’s website at www.yhrc.yk.ca under the link “HR and Youth”).

Issue – Homelessness, Right to Housing, and Social Condition

Current Section of the Act – None.

However, section 6 provides: “Every individual has the right to the peaceful enjoyment and free disposition of their property, except to the extent provided by law, and no-one shall be deprived of that right except with just compensation.”

Recommended Change - Add the underlined words as Part 1, section 7 and renumber following sections.

7. Everyone is entitled to adequate and affordable housing and to protection from eviction without cause, particularly in cases where it will result in homelessness.

Why?

Two important international human rights instruments which Canada has signed provide for a right to adequate housing as a basic human right. First, Article 25 (1) of the *Universal Declaration of Human Rights* says: "Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or lack of livelihood in circumstances beyond his control." This year is the 60th anniversary of the Declaration and it is time to take responsibility for the rights and commitments it contains.

The other international treaty is the *International Covenant on Economic, Social, and Cultural Rights*, which Canada signed in 1976 as a State Party. This *Covenant* says in part in Article 11(1): "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living including adequate housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right."

The Preamble to the current *Human Rights Act* says that "The Yukon Government has a responsibility to encourage a recognition of human rights that is consistent with Canada's international undertakings." The Preamble also specifically recognizes that "Canada is a party to the United Nations' *Universal Declaration of Human Rights* and other international undertakings." The change the Commission recommends will help to deliver on promises made under both the *Declaration* and the *Covenant* and will ensure that it is not just property owners but also tenants and those threatened with or experiencing homelessness that have their rights covered in the *Act's* Bill of Rights section as well as in section 7.

There is a shortage of low-income and affordable housing in the Yukon and there is also homelessness, as documented in *A Little Kindness Would Go a Long Way: A Study of Women's Homelessness in the Yukon* (Yukon Status of Women Council, March 2007). During the Commission's research on the human rights of women and girls, women said that they want the right to adequate housing. Women reported landlords sexually harassing them, refusing to rent to single mothers with children or to women with a criminal record. They also reported that some landlords take advantage of people on social assistance and that women fear retaliation if they complain about rental housing in need of repair or about discriminatory treatment by landlords. One woman said that a tenant making a complaint about discrimination against a landlord should be allowed to stay in her house until the complaint is investigated.

Housing is also a crucial issue for people with fetal alcohol spectrum disorder and other disabilities.

Recommended Change: add the underlined words to section 7(l) and provide a definition in section 37

Section 7(l): "It is discrimination to treat any individual or group unfavourably on any of the following grounds . . . (l) source of income or social condition.

Section 37: "social condition" refers to disadvantage arising from low social and economic standing in life and from inter-generational trauma arising from the Indian residential school system and includes people who are poor, homeless, or unemployed and people who have difficulty with reading and writing or are subject to stereotypes based on intersecting or interrelated prohibited grounds such as race, sex, age and disability.

Why?

The only amendment ever made to the *Act* in December 1998 added unfavourable treatment based on someone's "source of income" as a form of discrimination. This was an important step forward in recognizing poverty as a source of inequality and discrimination.

The Commission recommends that this protection be strengthened by adding the broader term "social condition", using the definition above. This protection is already found in Quebec, New Brunswick and the Northwest Territories human rights laws. Adding this form of protection against discrimination will also protect vulnerable and disadvantaged people with no source of income and people who are homeless, which the term "source of income" does not adequately cover. This definition also recognizes the historic and ongoing disadvantage arising from the effects of the Indian residential school system on Yukon's First Nation citizens as a human rights issue.

Issue – Protection from Hatred

Current Section of the *Act* - None

Recommended Change - Add to section 7 of the Act the following underlined words:

- (2) It is discrimination to publish, issue or display or cause to be published, issued or displayed, any statement, publication, notice, sign, symbol, emblem or other representation that:
 - (a) exposes an individual or group to hatred or contempt, or
 - (b) disadvantages an individual or group by degrading, demeaning, dehumanizing, excluding or by unfavourably stereotyping or

stigmatizing the individual or group in a way that is likely to harm the social image or reputation or the dignity or self-respect of the individual or group

- (c) indicates discrimination or an intention to discriminate against an individual or group

because of a prohibited ground of discrimination in subsection 7(1) of the Act.

- (3) Subsection (2) does not apply to a private communication or to a communication intended to be private.

Why?

Freedom of expression in Canada is an important constitutional and human right, but it is not absolute and can be limited if it meets the test in the *Canadian Charter of Rights and Freedoms* for limiting a right or freedom.

The proposed amendment uses the terms "hate" and "contempt" in subsection 7(2) (a) which have both been defined by the Supreme Court of Canada in the *John Ross Taylor*¹ case where the Court found that the hate protection provisions of the *Canadian Human Rights Act* were constitutional. The wording of the proposed 7(2) (a) is also based on the current B.C. legislation (which was also held to be constitutional by the B.C. Tribunal in the *Collins*² case) but incorporates an even higher standard for proving this form of discrimination.

The test for "hatred" in human rights case law is a high one and has required extreme expression of ill will which allows for "no redeeming qualities" in the person at whom it is directed. Similarly "contempt" has been defined by the Supreme Court of Canada as "unusually strong and deep-felt emotions of detestation, calumny and vilification." It is the Commission's view that many harmful and objectively and subjectively racist, sexist and homophobic public expression, for instance, would not be found to be discriminatory under s.7 (2) (a).

Therefore, s.7 (2) (b) incorporates the elements of "harm" and disadvantage, based, in part, on language in the Supreme Court of Canada's decision in *Butler*³ upholding the obscenity provisions of the *Criminal Code* as justified in a free and democratic society even though these parts of the *Criminal Code* breach the *Charter's* guarantee of freedom of expression in section 2(b). In *Butler*, the Court recognized the harm to women from violent or degrading and dehumanizing explicit sex materials which undermines the principle of equality and dignity of all human beings. The Court recognized the harm to society and in particular to women because of the negative

¹ *Canada (Human Rights Commission) v. Taylor* (1990), C.H.R.R. 13:D/435 (SCC)

² *Canadian Jewish Congress v. North Shore Free Press Ltd.* (No. 7) (1997), C.H.R.R. 30:D/5

³ *R. v. Butler*, [1992] 1 S.C.R. 452

impact exposure to such material has on perceptions and attitudes toward women. It is harm to society that is aimed at, not poor taste or vulgar material. Also, what is done privately cannot be the subject of a complaint.

Issue – Add Protection for Gender Identity

Current Section of the *Act* - None

Recommended Change - Add gender identity to Part 2, section 7's list of prohibited grounds.

Why?

As understanding of the full range of human sexuality and gender identity increases, it has become clear that discrimination can occur in ways not well understood at the time the *Act* was first passed. There have been further developments in the area of human rights cases dealing with the rights of transgendered people.

Gender identity is linked to a person's sense of self and particularly one's sense of being male or female. Gender identity is different from and does not determine a person's sexual orientation and may not conform to a person's birth-assigned sex. Gender identity would include people who are transgendered, intersexed or crossdressers.

Issue – Add Protection for People Who Are Victims of Violence

Current Section of the *Act* - None

Recommended Change - Add "being a victim of violence on any of the other prohibited grounds" to Part 2, section 7's list of prohibited grounds.

Why?

Male violence against women has been recognized as one of the most pervasive and persistent human rights abuses in the world. According to Statistics Canada, Canadian rates of spousal violence are higher in the territories than in the provinces and are even greater for aboriginal women in terms of the severity and impact of the violence.

As part of the Commission's research into the human rights of Yukon women and girls, the lack of protection for women experiencing violence came up frequently in both the focus groups and surveys. Women experiencing violence told us that they are forced to leave their homes and communities for their safety. A senior woman reported experiencing violence in a senior's residence but the manager would not do anything about it. Another woman reported she was evicted from her new apartment because of damage done by her ex-partner which she believed he did

because she had left him. One woman spoke about her worries about being hurt at work by her abusive partner (where he would know to find her) and also about not being allowed by her boss to take enough time off work to heal from injuries due to the violence she experienced.

Currently human rights laws in Canada do not expressly include sex or gender-based violence as a form of sex discrimination that would then come within the framework of “duty to accommodate” provisions. Amending the *Act* in this way would provide a strong message to members of the community of zero tolerance for violence against women and others who are protected under section 7 of the *Act*. It would also provide legal support to women who are victims of violence by providing a remedy for discrimination against these victims. This change to the law would require a landlord or employer to take reasonable steps to accommodate the woman's needs unless it was undue hardship for the landlord or employer to do so.

This protection also extends to others who experience violence because of other characteristics protected in our human rights law. For instance, Yukon people have reported to the Commission that they have experienced violence because of their sexual orientation.

Issue – Add Aboriginal Identity as a Separate Ground

Current Section of the *Act* – Part 2, section 7 says: “It is discrimination to treat any individual or group unfavourably on any of the following grounds (a) ancestry, including colour and race.”

Part 1, Section 1(2) says: This Act does not affect rights pertaining to aboriginal peoples established by the *Constitution of Canada* or by a land claims agreement.”

Recommended Change – add “aboriginal identity” as a separate protected ground in Part 2, section 7.

Why?

Aboriginal people have told the Commission that they do not see themselves reflected in the terms “colour” or “race” which are presently used in the *Act* and within which they must fit in order to come within the protection of the *Act*. The Commission recommends that this be addressed by adding a new and separate ground for aboriginal identity which will cover First Nations, Inuit, and Métis people.

In John Dwyer and Pearl Eliadis’s “Consultation on a Proposed Report Card on Human Rights” (April, 2008), they survey the grounds of discrimination typically used in Canada and note that nowhere in any Canadian human rights law is aboriginal identity covered expressly. They recommend that the ground of “aboriginal identity” be added to their project because of the unique nature and

extent of human rights issues affecting aboriginal peoples. This recommendation is in the context of the development of a “tool [the report card] that can be used to monitor, assess and report on the progressive realization of selected rights in Canada. The report card would cover areas of discrimination and equality law that are protected by human rights legislation in Canada.” It is no less important for the human rights law in the Yukon to clearly cover the rights of aboriginal people to be free from discrimination.

Issue – Definition of Sexual Orientation

Current Section of the *Act* - Section 7(g) and section 37

Recommended Change - Remove the age-discriminatory definition of “sexual orientation” in section 37 but keep the protection in section 7 against discrimination because of a person’s sexual orientation.

Why?

In the Commission’s opinion, the current definition of sexual orientation in the *Act* discriminates on the basis of age (which is protected in section 7(e) of the *Act*) and is contrary to the *Charter* and should therefore be deleted. The current discriminatory definition says that sexual orientation refers only to “consenting adults acting within the law”. No other jurisdiction in Canada has such a definition. It is now well understood that youth typically develop their sexual orientation before reaching adulthood. The lack of human rights protection for youth who are gay or lesbian or bisexual was discussed by youth in survey research done by the Commission. This definition should simply be deleted and does not need a replacement in the Commission’s view.

Issue – Definition of Disability

Current Section of the *Act* - Section 37 definition of physical or mental disability.

Recommended Change - Replace the existing definition with the following underlined words:

A disability is a physical or mental condition or illness, including fetal alcohol spectrum disorder and addiction to alcohol and drugs, that is either permanent, ongoing, episodic or of some persistence and that may limit a person’s ability to carry out any of life’s important functions or activities.

Why?

The current definition of mental disability in the *Act* refers to “retardation”, which is a degrading and outdated term and should be deleted. The definitions of both “mental disability” and “physical disability” should comply with the *United Nations*

Convention on the Rights of Persons with Disabilities which Canada recently signed. It is also important to highlight FASD and addictions because of their seriousness and prevalence in the Yukon.

It is now well established in human rights case law that addictions are illnesses which can be a disability. For example, section 25 of the *Canadian Human Rights Act* defines disability as “any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug.” However, in the Commission’s opinion, this part of the law is not well understood by the public. An example of accommodation by an employer for an employee who is an alcoholic is time off work for treatment. This is similar to the accommodation a cancer patient might request and need for chemotherapy treatment, for instance.

Issue - Duty to Accommodate

Current Section of the *Act* – Section 8.

Recommended Change - Change the title and content for section 8(1) by substituting the following underlined words:

Duty to Accommodate

8(1) Every person has a duty to accommodate the needs of people protected under section 7 and 9 of the *Act* by taking reasonable measures to the point of undue hardship to eliminate discrimination against them.

(2) For the purposes of section 8(1), discrimination means unfavourable treatment resulting from a rule, standard, policy, decision, practice, law or physical barrier that has or may have an adverse impact on those protected under the *Act* in section 7 and 9.

(3) For the purposes of section 8(1) “undue hardship” shall be determined by considering the accommodation needs and options for meeting them, based on factors such as but not limited to health, safety and cost.

Why?

Current Canadian human rights law and cases from the Supreme Court of Canada, use the term “duty to accommodate”, rather than “special needs”. “Special needs” has been criticized by people with disabilities and human rights experts because it is outdated and demeaning and because it does not focus on inclusion and entitlement. Also, the current section 8 covers only people with physical disabilities, not those with mental disabilities or other protected characteristics: in other words the section itself discriminates. It has been interpreted to cover all grounds by the

Board of Adjudication but should be clearly rewritten to include all the protected grounds and areas set out in sections 7 and 9 of the *Act*.

Issue – Accessibility of Public Buildings and Facilities

Current Section of the *Act* – “8(3) This Act does not apply to structures which at the commencement of this Act were existing and complied with the applicable requirements of the Building Standards Act and regulations under that Act.”

Recommended Change – Delete this section.

Why?

This section is not in step with legislation in other jurisdictions and prevents people with physical disabilities from accessing many public buildings and facilities. If it is deleted, people will need to make these facilities and buildings accessible unless it would be an undue hardship to do so.

Issue – Protection for Volunteers

Current Section of the *Act* - Section 9

Recommended Change - Add the following underlined words to section 9(a):

No person shall discriminate

(b) when offering or providing services, goods, or facilities to the public, including the use of volunteers, in whole or in part;

Why?

This would provide protection to volunteers who provide valuable services to the community. The P.E.I. *Human Rights Act* at section 10(1) of the P.E.I. *Act* and the Nova Scotia *Human Rights Act* at section 5(e), both cover volunteer public service. An organization could not discriminate in selecting or assigning work to volunteers anymore than it can in selecting or assigning work to employees.

Issue – Systemic Discrimination

Current Section of the *Act* - Section 12 “Any conduct that results in discrimination is discrimination.”

Recommended Change – Replace the words in section 12 with the following underlined words:

In this *Act*, discrimination as set out in sections 7, 8, 9 and 15 includes laws, policies, procedures, standards, practices, or patterns of behaviour that are part of a

system that by design or impact has the effect of limiting a person or group's access to opportunities generally available to others or which creates or perpetuates disadvantage for people protected under the *Act*.

Why?

The current provision does not define systemic discrimination and is not helpful. The recommended change provides clarity and is consistent with the definition of systemic discrimination from the Supreme Court of Canada in the *Action travail des femmes*⁴ case.

Issue – Protection for Employment Equity and Equality-promoting Programs

Current Section of the *Act* - Preventing Discrimination: Special Programs and Affirmative Action Programs – section 13

Recommended Change - Change the title and content for section 13 by substituting the following underlined words:

Employment Equity and Equality-promoting Programs

13. Employment equity and other equality-promoting programs are not discrimination if they are designed to prevent or reduce disadvantages resulting from discrimination experienced by people protected in section 7 and 9.

Why?

The language of this provision should be modernized. The best in inclusive program design is now geared towards universal access and application, thus eliminating any need for “different” or “special” designation. The term “affirmative action” is mainly used in the United States whereas the term “employment equity” is regularly used in Canada.

Issue – Harassment

Current Section of the *Act* - Section 14 says “ (1) No person shall (a) harass any individual or group by reference to a prohibited ground of discrimination; (b) retaliate or threaten to retaliate against an individual who objects to the harassment. (2) In subsection (1), “harass” means to engage in a course of vexatious conduct or to make a demand or a sexual solicitation or advance that one knows or ought reasonably to know is unwelcome.”

⁴ *Action travail des femmes v. Canadian National Railway Co.* (1987) C.H.R.R. 8:D/4210 (SCC)

Recommended Change – Substitute the following underlined words in section 14(1) (a) and (b) and delete section 14(2) and provide a better definition of harassment and sexual harassment in section 37 of the *Act*:

14. No person shall (a) harass any individual or group protected by section 7 and 9 of the *Act*.

In section 37, provide the following definition: “Harassment” is discrimination in the form of behaviour that hurts, humiliates, frightens or embarrasses a person or group protected in sections 7 and 9. It includes bullying, unwanted actions, comments, displays or publications that the harasser knows or reasonably should know are unwelcome and offensive. Retaliating or threatening to retaliate against a person who objects to harassment is also a form of harassment. Harassment usually involves several incidents over a period of time but a single incident may be harassment if it is very serious.

“Sexual harassment” is a particular form of harassment that includes a wide range of comments and conduct such as verbal abuse and threats, unwelcome sexually-oriented jokes or remarks, taunting, insults, name-calling or unwanted comments about weight, body shape or size, and displays of pornographic material. Sexual harassment also includes unwelcome sexual advances, unwanted requests or invitations to engage in sexual relations, unnecessary and unwanted physical contact such as patting, pinching, stroking or suggestively brushing up against someone else’s body as well as sexual assault.

Why?

During the Commission’s research into the human rights of Yukon women and girls, women said they wanted a better and broader definition of harassment which makes clear what behaviour is against the law. The recommended change also makes it clear that harassment is a form of discrimination and provides a much more detailed definition and description of harassment.

The recommendation also clarifies that harassment refers to certain types of conduct occurring in areas set out in section 9, such as employment, services to the public, etc.

Issue – Pay Equity

Current Section of the *Act* – Section 15(1) says: “This section applies only to the Government of Yukon and municipalities and their corporations, boards, and commissions.” Section 15(2) says: “It is discrimination for an employer to establish or maintain a difference in wages between employees who are performing work of equal value”.

Recommended change – Delete section 15(1) so that “equal pay for work of equal value” covers all employers, not just public sector ones. Change section 15(2) so that it covers differences in pay for “the same work, or substantially the same work”, as well as “work of equal value”.

Why?

During the Commission’s research into the human rights of Yukon women and girls, women said that pay equity is still an issue for them, particularly in the private sector, as did some of the youth that responded to the Commission’s youth survey. Both women and youth reported being paid less money than men or older workers for the same or substantially the same work. The Commission has dealt with complaints on this basis in the past, as part of the general provisions making it illegal to discriminate on the basis of age or sex.

Issue – Preventing Discrimination through Public Education and Policy Development

Current Section of the *Act* - Section 16(1) describes functions of the Commission.

Recommended Change – Add the following underlined words:

16(1)(f) to examine and review any statute or regulation, and any program or policy made by or under a statute, and make recommendations to the appropriate person or body on any provision, program or policy that in the Commission’s opinion is inconsistent with the intent of the *Act*.

16(1) (g) to advise the Legislative Assembly on matters related to the *Act*.

Why?

We need to move away from an after-the-fact approach to human rights where the focus is on complaints toward a preventative approach which avoids complaints by anticipating and solving problems with effective policies, systems and services.

Section 16(1) (f) allows the Commission to make recommendations for changes to policies or programs or legislation in the Yukon that are inconsistent with the *Act*. The Commission could develop policy papers and guidelines on various human rights matters as the federal and Ontario Commissions do. The wording in 16(1) (f) is based on section 29(d) of the Ontario *Human Rights Code*. This would help strengthen the Commission’s role in preventing and eliminating discrimination and does not require that there be a complaint before the Commission provides its assistance. It is also consistent with section 39 of the *Act*, the “paramountcy” provision, which says: “This Act supersedes every other Act, whether enacted before or after this Act, unless it is expressly declared by the other Act that it shall supersede this Act.”

Section 16(1) (g) would allow the Commission to bring to the Legislative Assembly's attention the need for updates or revisions to the *Act* or the Regulations in a timely manner. This recommended change is based on section 29(f) of the NWT *Human Rights Act*.

Issue – Funding for the Commission

Current Section of the *Act* – Part 3, section 16(1) provides: “There shall be a Yukon Human Rights Commission accountable to the Legislature and the commission shall. . . .” There is no mention of how the Commission is to be funded.

Recommended Change - Add the underlined words as Part 3, section 16(3) and (4):

16(3). The Commission shall submit annually to the Members’ Services Board in respect of each financial year, an estimate of the sum that will be required to be provided by the Legislative Assembly to defray the expenses of the Commission in that financial year.

(4) The Members’ Services Board shall review the estimate submitted pursuant to subsection (1) and, on completion of the review, the Speaker shall transmit the estimate to the Minister of Finance for recommendation to the Legislative Assembly.

Why?

The proposed change is the same as the funding provision in the Yukon’s *Ombudsman Act*. This change would allow the Commission to have and maintain a fundamental arm’s length relationship with the Department of Justice. Currently the Commission submits a budget each year to the Department of Justice. The Commission’s funding is a line item within the Department of Justice’s budget [equal to approximately 1% of the Department’s overall budget]. The Department of Justice has the potential of being a respondent in human rights complaints and also lawyers from the Department of Justice represent other departments which have human rights complaints filed against them. Currently, there is no provision in the *Act* about how the Commission is to be funded. Some members of the public have told the Commission that they do not perceive the Commission as neutral, due to the current funding arrangements.

The Commission also recommends the development of a formula including an escalator clause for adjusting funding based partly on the number of human rights cases in a given year.

Issue – Merit Based Appointments

Current Section of the *Act* - section 17 Appointment of Commission

Recommended Change – The Commission recommends that the Select Committee on Human Rights consider a merit-based appointment process for both the Commission and the Board of Adjudication and that at least one member of the Commission and the Board of Adjudication be trained in human rights and/or administrative law.

Why?

Human rights complaints are important legal cases with significant consequences for both complainants and respondents. Lawyers can bring knowledge of law and legal process to the work of the Commission and indeed do so currently and have done so in the past. However, there is no requirement that this expertise be part of the membership of the Commission or Board of Adjudication or that members have knowledge of human rights and administrative law.

Issue – Direct Referral and Mediation

Current Section of the Act - Section 7 of the Regulations says that the Commission can only refer complaints to hearing after investigation.

Recommended Change – Add the underlined words as a new section 20 (d) of the Act and change Regulations 5 and 7 as shown below:

20(d) the Commission decides to refer the complaint to the Board of Adjudication or to mediation.

Regulation 5(1) The Director of Human Rights may decide on behalf of the Commission (a) to dismiss or refer to hearing or mediation a complaint pursuant to subsection 20 (1) of the Act.

Regulation 7 – delete 7(1) which says “The Director of Human Rights, the complainant, or the respondent may request the Commission ask a board of adjudication to decide the complaint.

Add the underlined words and change Regulation 7(2) to become 7(1) as follows: “The decision to ask a board of adjudication to decide the complaint may be made by the Commission before, during or after the Commission has investigated a complaint. If it is after, the Commission will give the parties (a) at least 30 days notice of when the Commission will consider whether to ask a board of adjudication to decide the complaint, and (b) will consider any written or oral submission by or on behalf of the complainant or respondent and the report of the Director about the investigation of the complaint.”

Why?

The Commission supports a “hybrid” approach to handling complaints, allowing for some cases to be referred directly to mediation or to hearing at the Board of Adjudication, without a lengthy and time-consuming investigation in certain circumstances where very little or nothing will be gained or where mediation is the preferred approach. For instance, cases could be referred directly to hearing at the Board of Adjudication in situations where mediation is not appropriate or successful and

- a) there are no witnesses to some or all of the alleged discriminatory treatment and the complainant and respondent(s) do not agree on what happened [often referred to as “he said, she said” cases]; or
- b) the complaint requires a speedy resolution, due to serious illness or other urgent personal circumstances of either the complainant, respondent or witnesses; or
- c) there is agreement on the facts but there is a legal issue to be determined, on which the parties and the Commission do not agree.

This referral tool will also provide more time for investigations on other cases where more information is needed in order for Commissioners to decide whether or not to dismiss a complaint or refer it to hearing or for settlement.

The Commission also suggests the Select Committee on Human Rights consider recommending the name of the Board of Adjudication be changed to the “Yukon Human Rights Tribunal”. This name change would clearly identify it as a body that deals with human rights issues. It is also consistent with the name used in most of the rest of Canada.

Issue – Reasonable Belief Required to File a Complaint

Current Section of the *Act* - 20(1) “Any person believing that there has been a contravention of this *Act* against them may complain to the commission who shall investigate the complaint unless”

Recommended Change - Reword section 20(1) as the following underlining indicates to raise the threshold for filing complaints from “belief” to “having reasonable grounds to believe”:

20(1) Any person or group having reasonable grounds to believe that there has been a contravention of this *Act* against them may complain to the commission who shall investigate the complaint unless

Why? It is too easy to file a complaint when the standard is whether a Complainant believes he or she has been discriminated against. The current section of the *Act* opens the door to trivial and time consuming complaints.

Issue - Who May File a Complaint?

Current Section of the *Act* - Section 20

Add the following subsections to section 20 as underlined:

20(5) The Commission may initiate a complaint in circumstances where no person or group complains of a contravention and where public interest requires that the Commission investigate whether or not there has been a contravention of the *Act*.

20(6) Subsection 4 does not apply when the Commission initiates a complaint.

Why? This recommendation is in line with similar provisions in Acts of some other jurisdictions in Canada. It allows the Commission to bring forward complaints in the public interest.

Issue – Director Dismissal Powers

Current Section of the *Act* - Section 20 and Regulation 5 entitled “Disposition of Complaint by Director”

Recommended Change - Add to and change this section with the underlined words after proposed section 20(d):

- (e) the complaint has either been abandoned by the complainant or the complainant fails to cooperate with the investigation; or
- (f) the complainant has declined what the Director considers a fair and reasonable settlement offer; or
- (g) the substance of the complaint has been or could be dealt with in another proceeding or review procedure or under another Act;

Recommended Change – Delete words “report about the investigation of the complaint” and add the following underlined words to Regulation 5(5) (a):

(5) Upon hearing the appeal the Commission shall consider

- (a) the Director’s reasons for dismissing the complaint, and
- b) any written or oral submissions by or on behalf of the complainant.

Why? The additional powers set out in section 5 (a) above will improve the efficiency and effectiveness of the Commission in dealing with complaints promptly

and fairly by reducing and avoiding unnecessary and duplicative multiple proceedings, by encouraging parties to settle complaints reasonably in keeping with the remedial purposes of the *Act*, and by ensuring that respondents are not unfairly prejudiced or held in an investigative process when the complainant either does not stay in contact with the Commission or fails to cooperate in the investigation of his or her own complaint.

All of these proposed amendments (except for the one dealing with abandonment or failing to cooperate) are in keeping with powers found in the human rights legislation in some other parts of Canada such as section 41 of the *Canadian Human Rights Act*, section 22 in the Alberta legislation and section 44 of the Northwest Territories legislation, for instance.

In addition, as a housekeeping matter, when the revised statutes were published in 2002, the sections of the *Act* were renumbered but the Regulation references to the *Act* were not correspondingly revised. This Regulation should refer to section 20, not 19.

Issue – Time Limit

Current Section of the *Act* - Section 20(2)

Recommended Change - Repeal section 20(2) and substitute it with:

20(2) A complaint must be made within two years of the alleged contravention.

Add the following subsections as underlined:

(3) If a continuing contravention is alleged, the complaint must be filed within two years of the last alleged instance of discrimination.

(4) The Commission may accept a complaint filed after the expiration of the time limit referred to in subsection (2) or (3) if the Commission determines that

- (a) the delay in filing the complaint was incurred in good faith; and
- (b) no substantial prejudice will result to any person because of the delay.

Why? The Commission previously proposed a two year limitation period, based on its research into the human rights of Yukon women and girls, who told us that the 6 month time limit is too short. For instance, some women said that they experienced clinical depression as a result of severe sexual harassment that prevented them from being able to make a complaint within 6 months. This amendment will bring our limitation provision in line with similar provisions in the two other northern jurisdictions (Nunavut and NWT) which both have a two year time limit.

Add the following definition of “Continuing Contravention” to section 37

“A continuing contravention” is a contravention consisting of a series of discriminatory acts.

Why?

This provision will clarify the ability to investigate matters prior to the last incident alleged if there is an ongoing series of discriminatory acts.

For the convenience of the reader, here in one spot are the recommended changes to the Commission’s powers in section 20 as underlined below:

Complaints

20(1) Any person or group having reasonable grounds to believe that there has been a contravention of this Act against them may complain to the commission who shall investigate the complaint unless

- (a) the complaint is beyond the jurisdiction of the commission;*
 - (b) the complaint is frivolous or vexatious;*
 - (c) the victim of the contravention asks that the investigation be stopped;*
 - (d) the commission decides to refer the complaint to the Board of Adjudication or to mediation;*
 - (e) the complaint has either been abandoned by the complainant or the complainant fails to cooperate with the investigation; or*
 - (f) the complainant has declined what the Director considers a fair and reasonable settlement offer; or*
 - (g) the substance of the complaint has been or could be dealt with in another proceeding or review procedure or under another Act.*
- (3) A complaint must be made within two years of the alleged contravention.*
- (4) If a continuing contravention is alleged, the complaint must be filed within two years of the last alleged instance of discrimination.*
- (5) The commission may accept a complaint filed after the expiration of the time limit referred to in subsection (2) or (3) if the commission determines that*
- (a) the delay in filing the complaint was incurred in good faith; and*
 - (b) no substantial prejudice will result to any person because of the delay.*

- (6) The commission may initiate a complaint in circumstances where no person or group complains of a contravention and where public interest requires that the commission investigates whether or not there has been a contravention of the Act.
- (7) Subsection 4 does not apply when the commission initiates a complaint.

Issue – Commission’s Disposition Powers

Current Section of the Act – Section 21

Recommended Change – Add the following underlined words to renumbered subsection 21(1) (a) and (c):

21(1) After investigation, the commission shall

(a) Dismiss the complaint in whole or in part; or

(c) Ask a board of adjudication to decide the complaint in whole or in part.

Why? The Commission screens the complaint and any referral to the Board of Adjudication should not contain matters for which there is not a reasonable basis in the evidence to proceed. Other jurisdictions (Northwest Territories) have this power.

Issue – Review of Commission’s Final Decisions

Current Section of the Act – Section 21

Recommended Change – Add new subsection 21(2) and add the following underlined words:

Any party to a complaint may take a final decision of the commission on review to Supreme Court of Yukon by filing a petition with the court within 30 days after the decision of the commission is made.

Why? The parties to a complaint will be aware of their rights to have decisions of the Commission reviewed by court. The absence of such a provision in the current *Act* causes uncertainty whether the decisions of the Commission may be challenged, reviewed, quashed or called in question at a higher level.

The proposed amendment will also prevent parties from going to court on any interim decision of the Commission. Only final decisions of the Commission may be reviewed by court.

This proposed amendment will also address the concerns with respect to “oversight” that came to the fore during the public meetings. Currently the court may order remedies after review that would be binding on the Commission and the parties.

Issue – Improving Remedies

Current Section of the *Act* - Section 24

Recommended Change – Replace section 24(e) and add new 24(g) as underlined:

(e) pay exemplary damages if the contravention was done maliciously or pursuant to (new) section 9(2) [**9(2) is the proposed improved retaliation provision – see page 24*]

(g) pay interest on any amount awarded pursuant to subsections (c), (d) and (e).

Add the following to section 24:

(3) If the board makes an order for damages for injury to dignity, feelings, or self-respect under subsection (1) (d) the Board shall award damages not less than \$5,000.

(4) If the board makes an order under subsection (1) (a) or (1) (b) or both the Board shall monitor the implementation of the order(s).

Why? The first proposed amendment to section 24 is necessary because of the proposed change of a new section 9(2) to make retaliation discrimination under the *Act*. (See the “retaliation issue” section later in this document.)

The second proposed amendment to section 24 is in line with similar provisions in the Acts of other jurisdictions.

The third proposed amendment to section 24 is to bring remedies the board may order in line with awards in other jurisdictions and also to ensure there is strong deterrence for those who discriminate.

Issue – Costs

Current Section of the *Act* - Section 25

Recommended Change - Repeal section 25 and substitute it with the following:

If the board of adjudication finds that the proceedings have been frivolously or vexatiously prolonged by a party the board may order that party to pay part or all of the costs of the other parties.

Why? This change would provide an incentive to all parties to conduct their cases efficiently. The current provision is not consistent, because any party except the Commission may prolong the proceedings frivolously or vexatiously without incurring any costs as a result.

Issue - Retaliation

Current Section of the *Act* - Section 30

Recommended Change - Delete section 30 and substitute it with the following:

It is an offence for any person to retaliate or threaten to retaliate against any member or staff person of the commission on the ground that they have done or proposes to do anything the *Act* permits or obliges them to do.

Add the following subsections to section 9:

9(2) It is discrimination to retaliate or threaten retaliation against the person or group who filed the complaint or a witness in the complaint or the investigation of the complaint.

Why? The current section 30 provides broad protection that includes protection for anybody administering the *Act*. Any retaliation directed against a complainant or witness in a complaint will be a discriminatory act to be dealt with by the commission during investigation and by the board during the hearing. If the Board makes a finding that retaliation took place, then the Board may order the party who retaliated to pay exemplary damages. (See proposed amendment to remedies.)

Issue – Investigation Powers and Timelines

Current Section of the *Act* - Section 34

Recommended Change - Add the following new subsections to section 34

- (1) For the purpose of section 19 the Director or person designated by the Director may:
 - (a) require any person to produce any information or records that may be reasonably necessary to deal with a complaint within a specified time;
 - (b) enter at all reasonable times the premises to which a complaint refers;
 - (c) require any person to answer all questions concerning any matter relevant to a complaint within a specified time.

- (2) Where the production of information or records, entry of a premises or answer to questions is refused, the Director may bring an application in the Supreme Court of the Yukon to compel such production, entry or answer.

Change the current section 34(1) to subsection (3) and add the underlined words:

- (3) If a judge of the Supreme Court is satisfied that a request for the production of information or record, entry to a premises or answer to questions has been refused and there are reasonable grounds to believe that the production of information or record, entry to a premises or answer to questions is relevant to the investigation of the complaint, the judge may order the person in control of the information or record, premises or answer to comply with the commission's request.

Amend the current subsection (2) to be subsection (4) without any change.

Why? This amendment addresses the current gap in the *Act* with respect to the Commission's investigative powers. The following jurisdictions have similar provisions: Newfoundland & Labrador (section 22); Nova Scotia (sections 30 & 31); P.E.I. (sections 22 to 24); Canada (section 43); Saskatchewan (section 28); Manitoba (section 27) and NWT (sections 36 to 39). The current *Act* does not contain any provision for powers the Commission may exercise in investigating complaints. This will improve the efficiency and effectiveness of investigations.

Significant delays are caused by parties not providing relevant documents or not complying with time lines set by the Commission. Statutorily setting time lines for completion of investigation reports and decisions by the Commissioners could improve the speed with which complaints are dealt with, but only if the resources were available to meet those timelines and still do thorough investigations.

Issue – Jurisdiction over human rights with respect to self-governing First Nations

Jurisdiction over human rights is divided between Canada and the provinces and territories. Because the Canadian Constitution gives jurisdiction to Canada over "Indians and Lands Reserved for Indians", the Yukon Human Rights Commission refers complaints against Indian Act bands to the federal Commission, located in Ottawa. Often when people hear that YHRC cannot take their complaint, they decide not to go any further. YHRC does take complaints by First Nation people against Yukon government employers and service providers and against other Yukon businesses and employers.

Some self-governing First Nations have told YHRC that they have “exclusive” power over human rights for their employees and citizens because of the language of Chapter 13 in the SGA’s here in the Yukon. When YHRC explains this to First Nation citizens who call us asking for help, some are unhappy that their complaint cannot be dealt with by the Yukon Commission or perhaps even the federal Commission. Sometimes they say that leaves them nowhere to turn.

It may be possible to change the *Human Rights Act*, so it has an option similar to the one in the *Ombudsman Act* which says that a First Nation may choose to have the Ombudsman help by taking and investigating complaints and helping to solve them.

Recommended action: Further dialogue with First Nations needs to take place to discuss whether or not a provision allowing the Yukon Commission to deal with human rights matters with respect to self-governing First Nations would be helpful.

CONCLUSION

There is need for a full review of the Yukon *Human Rights Act* based on the information we heard at the public meetings, and the research and recent surveys with women, girls and youth that were undertaken by the Commission. The Commission members and staff believe that the current Bill 102 before the Legislature is too narrow and needs to include many of the recommendations outlined in our submission. Several recommendations are well supported by the public. These recommendations would update the current legislation and could go forward as immediate amendments to the *Act*.

There are issues that we have highlighted that require further dialogue and research. It is recommended that a process for educating and engaging the public in meaningful dialogue be done in collaboration with the Yukon Human Rights Commission. The Commission members and staff have considerable experience in working with the existing *Act* and are committed to developing legislation and regulations that would not only enhance protection, but also prevent discrimination, promote responsibility and accountability, and improve the overall efficiency and effectiveness of the Yukon Human Rights Commission.

We thank the members of the Select Committee on Human Rights for the opportunity to provide our recommendations and look forward to further discussion on the issues raised.
