Income Security Advocacy Centre/
Centre d'action pour la sécurité du revenu

Submission to the Standing Committee on Justice Policy
Legislative Hearings on Bill 107
An Act to Amend the Ontario Human Rights Code
November 2006

Introduction to ISAC's position

The Income Security Advocacy Centre is a specialty legal clinic funded through Legal Aid Ontario. ISAC has a province-wide mandate to engage in law reform work on income security issues using community organizing, policy development and test case litigation. ISAC is an independent community based organization that is directed by a community board drawn from low-income people and social activists from across Ontario. It is part of Ontario's network of general service and specialty legal clinics that represent low-income communities.

Much of our work is carried out on behalf of Ontarians who are members of groups that are identified by a prohibited ground of discrimination under the *Human Rights Code,* including disability, race, place of origin, receipt of social assistance, sexual orientation, marital/family status, creed and citizenship - Ontarians who frequently experience discriminatory treatment.

Although ISAC legal staff have had extensive experience with the complaint and enforcement process under the Ontario Human Rights Code, ISAC has, in the 5 years since it opened its doors, made little use of that process. Why is that? It is not because low-income Ontarians lack issues that could and should be brought to the Ontario Human Rights Commission. The clients of the clinic system are among the most disadvantaged and vulnerable Ontarians. Rather, our experience over many years of working in and with the human right system in Ontario has taught us that the current complaints process holds out little hope of satisfaction

for our clients. Instead, we have had to look for other avenues – including time and resource consuming Charter challenges in Ontario's Superior Court.

We support the initiative of the Ontario government in introducing Bill 107. There is broad consensus that the current enforcement process is not working and must be reformed. Two large public consultations, the 1992 *Cornish Task Force* in Ontario and the 2000 *LaForest Report*, federally, have thoroughly examined the Ontario-type of enforcement model and come to similar conclusions about the kind of reforms that are needed to address the dysfunction found in both settings.

Specifically, both of those consultations recommended eliminating the gatekeeper function of the Human Rights Commission and giving human rights complainants the right to go directly to a Human Rights Tribunal, a change that has been urged by both the *UN Committee on Economic, Social and Political Rights* in 1998 and 2006 and the *UN Human Rights Committee* in 1999. Both of the consultations recommended replacing the Commission's mandatory complaint investigation process with a combination of legal supports for complainants and activist powers for an expanded Tribunal. Both of the consultations saw the need to clarify and refocus the role of the Human Rights Commission so that it could become a clear advocate for human rights and be relieved of the burdensome and conflicting roles imposed by the neutral complaint investigation and gatekeeping mandate.

Bill 107 draws on the work of both of those consultations and incorporates their most fundamental recommendations. The reforms included in Bill 107, combined with the AG's commitment to provide publicly funded legal services, will create a significant new opportunity for low-income Ontarians and legal clinics such as ISAC to use the human rights enforcement system to promote equality. We hope it will also allow the Commission to increase its public policy and advocacy work, including using the use of its investigation capacity to support needed systemic research and litigation. We particularly hope that the reforms will give the Commission a greater opportunity to deal with core issues for our constituencies, such as social and economic rights and the enforcement of international human rights through domestic processes. However, in order to ensure that these opportunities become reality, we also believe that a number of amendments to strengthen Bill 107 should be incorporated by the Justice Policy Committee.

Bill 107 and the AG's announcements create three separate components that will constitute Ontario's new human rights enforcement regime:

- The Ontario Human Rights Commission
- The Ontario Human Rights Tribunal
- The Human Rights Legal Support Centre

ISAC has recommendations with respect to each of these three components.

Ontario Human Rights Commission

Under Bill 107, the Ontario Human Rights Commission is intended to have a focused and pro-human rights mandate. Based on the comments of the Attorney General in tabling Bill 107, we understand that it is intended that the Commission be an advocate for human rights:

- in public education and policy development;
- in bringing its own applications to the Human Rights Tribunal of Ontario; and
- by intervening in human rights applications brought by individuals or groups where the Commission identifies an opportunity to contribute to the Tribunal's understanding of a public interest aspect of an application.

The aspects of the Commission's current mandate that are neutral and in conflict with its advocacy role will be removed by Bill 107. This includes the Commission's current roles as investigator, mediator and gatekeeper to a hearing.

We strongly support this change. The Commission's conflicting roles are, in our view, at the heart of the difficulties that have plagued the Commission for the past two decades. We believe that the inability of the Commission's dedicated staff, led by a series of talented Chief Commissioners, to significantly improve the Commission's effectiveness demonstrates the extent to which the Commission's problems are essentially structural.

While supporting this general direction, we feel that there are powers, such as special investigation powers, that are central to the Commission's role as a public advocate for human rights that must be retained. In addition, there are opportunities under Bill 107 to enhance the functioning of the Human Rights Commission by increasing its independence from the government of the day.

a) Commission's reporting relationship:

Currently the Commission reports to the AG. Many advocates and the *Cornish Task Force* called for the Commission to report directly to the Legislature, as is the case with the Ontario Ombudsman and the Information and Privacy Commissioner.

- **Bill 107 should provide that the Commission report directly to the Legislature**

b) Commission's structure

Number of Commissioners

Currently the *Code* provides that the Commission must have at least 7 Commissioners. Bill 107 provides for the appointment of Commissioners, in addition to the Chief Commissioner, but does not provide for any minimum number of appointments. We feel that a clear commitment to a minimum number of Commissioners is necessary to the effective use of Commissioners.

- **Bill 107 should specify a minimum number of Commissioners**

Qualifications for Commissioners

Neither Bill 107 nor the current legislation specifies any particular qualifications for Commissioners. The federal *Human Rights Act* incorporates qualifications for Tribunal members, but not for Commissioners. Many advocates feel that qualifications for Commissioners should be included in Bill 107.

- **Bill 107 should require that persons appointed as Commissioners must have had *"active involvement in and a demonstrated commitment to the promotion of human rights".***

Anti-Racism and Disability Rights Secretariats (ss. 30 & 31)

Bill 107 requires the creation of these two new secretariats. Members of the Secretariat are to be appointed by the Minister on the advice of the Chief Commissioner. Under the direction of the Chief Commissioner, the secretariats will:

- "Undertake, direct and encourage research into discriminatory practices" related to racism or disability and "make recommendations designed to prevent and eliminate such … practices".
- Facilitate the development and provision of programs of public information and education
- Undertake other tasks as directed by the Chief Commissioner

These provisions have met with criticism from some of the groups that they are designed to benefit.

On the one hand, there are historic reasons that can be advanced for the special treatment of these two areas. The inability of the Commission to make significant progress in relation to complaints of racism has long been a concern inside and outside the Commission and has led at various times to the creation of internal

anti-racism units. Discrimination on the basis of disability continues to be the biggest single area of complaint under the *Code*.

On the other hand some advocacy groups are concerned that the secretariat structure is mere tokenism or that the secretariat structure will set up a hierarchy of rights that is problematic. There are compelling concerns that the Secretariats will "strand" anti-racism and disability rights work in under-resourced and ineffective parts of the Commission, rather than making the intersection between race or disability and other C*ode* grounds central to the Commission's work.

- **Based on what we have heard from disability groups and groups representing racialized groups, we recommend that the Secretariat sections be removed and the mandate of the Secretariats folded into the overall mandate of the Commission.**

c) Role of the Commission

The Commission's investigation power

Under section 33(3) of the current legislation, the Commission, once it receives a complaint, has broad powers to enter premises and examine or remove documents or other relevant materials. If access to materials is denied the Commission can apply to the Tribunal for an order or apply to a justice of the peace for a warrant.

Under Bill 107, the Commission does not retain this power. The change appears to be related to the removal of the Commission's obligation to investigate every complaint in order to determine whether the complaints should go forward to the Tribunal. Most advocates believe that the Commission needs to retain investigation powers to give it the tools necessary to investigate systemic discrimination and initiate complaints to the Tribunal.

- **Bill 107 should be amended to provide that, where the Commission initiates a review under s.29(e) into possible instances of discriminatory practices, it should retain the investigation powers that it has under s. 33 of the current legislation.**

- **Where the Commission intervenes in an application, the Commission should retain the powers it has under s.33 to investigate the circumstances surrounding the claimant's application.**

The Commission's right to initiate its own applications

Section 36 of Bill 107 creates a separate set of requirements for an application initiated by the Commission. There are two concerns with the language of this section.

The first concern is with language that could be interpreted as setting a number of restrictions or pre-conditions on the Commission's right to file an application. The second is the restriction of the remedies that can be sought by the Commission to only those remedies designed to promote future compliance.

On the first concern, the new section 36(1) limits Commission applications to circumstances in which the Commission is *of the opinion that*

- there are "infringements of rights ... that are of a systemic nature", and
- the Commission has not been able to adequately address the issues using its other powers, and
- an order under section 43 could address the systemic issues.

There is some danger that this language could expose the Commission to costly and unwieldy challenges by respondents who want to argue that Commission applications are not "systemic" or could be adequately addressed in other ways or that section 43 remedies would not address the problem. Although it is can also be argued that the Commission is adequately protected by the use of the words " if the Commission is of the opinion that…" the named circumstances exist, most advocates would like to see the possible sources of challenge eliminated.

On the second concern, the limitation on remedies available in Commission initiated complaints is problematic. In bringing forward a complaint, the Commission may well want to seek compensatory remedies on behalf of affected persons. There is no principled reason why this should not be available. This is a remedy used very effectively by the EEOC in the US, for example.

- **Section 36 (1) should be amended to provide simply that the Commission may bring an application to the Tribunal if the Commission is of the opinion that the application would be in the public interest.**

- **Section 36(1) should also be amended by also adding orders under 42 to the orders that could be sought by the Commission.**

The Commission's right to intervene in other applications before the Tribunal

Bill 107 does not give the Commission an automatic right to intervene in applications before the Tribunal. Instead the Commission would have the right,

like any other person or group, to make an application under the intervention rules established by the Tribunal. Many advocates feel that the Commission should have the right to intervene in any matter before the Tribunal, if it feels that it would be in the public interest to do so. To ensure that a Commission intervention does not create unfairness for the parties, it would also be reasonable to provide that the Tribunal could control the nature of the Commission's intervention.

- **A paragraph should be added to section 29 specifying that the Commission can intervene in applications before the Tribunal, subject to such terms and conditions as might be set by the Tribunal. The Tribunal's rules should set out the circumstances to be considered by the Tribunal in respect of a Commission intervention, including the consent of the applicant.**

- **The Tribunal should be required to serve a copy of each application filed on the Commission, in order to ensure that the Commission has the opportunity to monitor the substance of complaints being filed and the opportunity to identify applications in which it should consider intervening.**

Human Rights Legal Support Centre

Bill 107 has only limited permissive language in respect of what the Attorney General has referred to as the "third pillar" of the new human rights enforcement system.

The Attorney General advised the Legislature on June 8, 2006, that he would be introducing amendments to flesh out the mandate of the new Human Rights Legal Support Centre that will be established to provide legal services to claimants before the Tribunal. Attorney General Bryant has stated that:

- the new centre will provide: "information, support, advice and legal representation to those seeking a remedy before the Tribunal", and

- "regardless of levels of income, abilities, disabilities or personal circumstances, all Ontarians would be entitled to share in receiving equal and effective protection for human rights, and all will receive full representation".

There is broad consensus that providing accessible, publicly-funded legal support for claimants is a vital component of ensuring that the new system is fair and effective. With legal support, claimants will also be assisted in obtaining the

evidence needed to support their claim. This will be particularly important in cases in which the Commission does not intervene. The claimant's legal representative will be able to use the Tribunal's processes and rules to obtain the evidence needed to support the application.

It is essential that the specific commitment to provide legal services be enshrined in Bill 107. It is also crucial that the legal services component of the new system receive an appropriate level of funding to allow it to provide an excellent and accessible service to all Ontarians who want to file a human rights application and who apply for legal assistance. Because it is difficult at the outset to assess the level of demand for this new service, a mechanism is needed to ensure that the necessary funding is assessed within a reasonable period after the Legal Support Centre is established.

- **Section 46.1 should be amended to provide that the Minister *shall* establish a system for providing high quality legal support services to any person who is or may be a claimant. The provision should specify that the support should include: information, advice, legal assistance and representation.**

- **In order to ensure that the Centre receives appropriate financial resources, Bill 107 should provide for an independent audit of the Legal Support Centre, including the adequacy of its funding, within two years of proclamation.**

Human Rights Tribunal of Ontario

Under the current legislation, human rights hearings have often become protracted proceedings that are delayed by procedural motions and by unnecessary evidence. Legal clinics with experience before the Tribunal report that it is often respondents who are able to extend the hearings, placing a disproportionate burden on our financially disadvantaged claimants.

Under Bill 107, the Human Rights Tribunal would gain enhanced powers to control its own processes and to establish rules that ensure that claimants, as well as respondents, are afforded a timely resolution of the application. The Tribunal would gain the similar powers to establish varied case resolution models as are currently held by the Ontario Labour Relations Board.

Bill 107 eliminates appeals from the decisions of the Tribunal and imposes a privative clause that will protect Tribunal decisions from being reversed unless they are found by Divisional Court to be "patently unreasonable". At first blush the loss of appeal rights may cause some concern, but the practical reality is that it is

normally respondents who have the resources to appeal decisions. The addition of the privative clause recognizes the new Tribunal as an expert decision-making body and underscores the importance of an amendment requiring Tribunal members to have expertise and experience in human rights and be selected through a competitive process.

a) Tribunal members

Bill 107 does not specify any particular qualification for persons appointed as members of the Tribunal. As with Commissioners, there is a concern that the Tribunal members bring relevant expertise to their position. Section 481(2) of the *Canadian Human Rights Act* states that Tribunal members "must have experience, expertise and interest in, and sensitivity to, human rights".

A group called the Administrative Justice Working Group has developed a general position paper on appointment of members for any tribunal in Ontario. Among other things the Working group recommends that tribunal members be recruited in a public, competitive process.

- **Bill 107 should be amended to provide that s.32 of the Code require that persons appointed to the Tribunal have experience, expertise and interest in, and sensitivity to, human rights.**

- **Bill 107 should provide that the appointment process for Tribunal members be an open and competitive process.**

b) Making Applications to the Tribunal

Who can apply

Bill 107 provides that persons who believe their rights are infringed can make an application to the Tribunal, but the Bill does not make provision for applications by third parties such as public interest groups. Groups like ISAC may want to bring an application on behalf of vulnerable individuals who are unable to bring their own complaint or may want to complain about a discriminatory policy or practice without having to find an applicant who has been adversely affected by the policy.

- **Section 35 (1) should be amended to give third parties with an interest in the subject matter of the application the right to make applications to the Tribunal alleging a right under the Code has been infringed. Where an application by a third party alleges the rights of another individual have been infringed, the consent of that party must be obtained.**

Tribunal approved application forms

Bill 107 provides that applications to the Tribunal "shall be in a form approved by the Tribunal". Although it is unlikely that the Tribunal would use this language to dismiss applications because an unapproved form was used, it would still be desirable to have a saving provision in the Code that would protect applicants if there is some formal defect.

- **Language should be added to section 35 to ensure that no application will be dismissed solely on the basis of any failure to use the proper form.**

Limitation period for making applications

Bill 107 continues the 6 month limitation period for filing applications and the authority of the Tribunal to accept late-filed applications under certain circumstances. The general limitation period for bring most types of civil legal claims is 2 years and there is no principled reason why it should be shorter for matters involving human rights. Many advocates feel that the Bill 107 should bring the *Code's* limitation period in line with other legal rights.

- **The time period for bringing complaints under the Code should be changed from 6 months to 2 years**.

c) The Tribunal hearing process

Tribunal Mandate

Bill 107 provides in section 37(2) that the Tribunal "shall adopt the most expeditious method of disposing of an application on the merits". This provision appears to be responsive to the concerns about hearing that are unduly delayed by the conduct of parties – typically respondents. Advocates who have practiced before the Tribunal see this as a crucial issue, but legal clinics are mindful of their experience in representing low-income clients before Ontario tribunals that have placed a premium on efficiency at the expense of procedural fairness and accessibility, particularly for vulnerable parties. Bill 107 must not allow the goal of efficiency is achieved at the expense of ensuring that the true merits of the application get considered.

- **The language of 37(2) should be replaced with language like: "The Tribunal shall determine an application in an expeditious manner, consistent with the principles of procedural fairness, and on the basis of the true merits of the application."**

Early dismissal of applications

Bill 107 (s.41) gives the Tribunal the power to "dismiss a proceeding, in whole or in part, without a hearing". This provision has caused concern in some parts of the advocacy community, but as Mary Cornish and Fay Faraday point out in their review of Bill 107 [1] this is the kind of power that is granted to tribunals generally by s.4 of the *Statutory Powers Procedure Act*.

Every Tribunal needs to have the power to dismiss applications at an early stage where it can be determined that the applications are not properly before the tribunal, or that they have no hope of success, or that the matter has already been dealt with in another proceeding.

What is normally meant by this kind of provision is that the complaint can be dismissed in certain circumstances without a *full hearing on the merits.* In addition it would normally be expected that dismissal without a full hearing would only take place with notice to the applicant, an opportunity to respond to the potential dismissal and with receipt of reasons for the dismissal.

- **Section 41(1) should be amended by substituting "full hearing on the merits" for the word "hearing" and should be further amended to specifically set out additional protections such as notice to the applicant, an opportunity to make oral submissions to the decision-maker and receipt of written reasons should a decision to dismiss be made.**

- **Section 41(2), which could be used to limit the SPPA protections in an early dismissal process, should be removed.**

- **The words "and the appropriate remedy has been granted" be added to the end of section 41(1)(g).**

Tribunal consideration of Commission documents

Bill 107 provides that the Tribunal may consider any document published by the Commission. Advocates would like to see this as a mandatory requirement.

- **Section 44 should be amended to read "...the Tribunal *shall* consider any document published by the Commission…"**

[1] Responding to Bill 107 – Some Issues to Consider, Cavalluzzo Hayes Shilton McIntyre & Cornish available at http://www.cavalluzzo.com/

Tribunal power to charge fees

Section 45.2 gives the Tribunal a new power to charge fees for expenses incurred. Bill 107 does not specify what kind of fees are contemplated. There may be circumstances where it would be appropriate for the Tribunal to charge a respondent in respect of investigation costs incurred by the Tribunal because of non-disclosure on the part of the respondent. However, application fees and photocopying charges would have an unfair impact on low-income clients. The Ministry of Municipal Affairs and Housing has recently recognized this in respect of fees at the Ontario Rental Housing Tribunal and has announced, in response to the urging of clinics, that fees would be reduced.

- **The section 45.2 power to charge fees for expenses incurred by the Tribunal should be removed.**

Conclusion

Bill 107 represents an important opportunity for Ontario to again demonstrate leadership in human rights enforcement. Enforcement in this province has too long languished under the burden of an ineffective model. This government is to be applauded for taking on this challenge.

Of course, adequacy of funding will also determine the success of this reform. It is crucial that all three components of this reform are given the resources that are needed to operate effectively. We urge the Legislature to move quickly towards passage of a strengthened Bill 107 and we urge the government to ensure that that adequate funding and strategic supports are put in place to ensure the success of these reforms.