



Discussion Paper

**Modernizing the Human Rights
System in Yukon**

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Discussion Paper

Modernizing the Human Rights System in Yukon

Introduction

The Yukon *Human Rights Act* was enacted 23 years ago for the purpose of promoting and protecting human rights in the territory. The Act established the Yukon Human Rights Commission to promote human rights, engage in research and education, and handle human rights complaints. Also established under the Act was a tribunal called the Panel of Adjudicators to conduct hearings and decide on complaints referred to it by the commission. This Discussion Paper refers to the Panel of Adjudicators as “the tribunal.”

In 2008, the Yukon Legislative Assembly set up a special committee to review the decades-old *Human Rights Act* and to recommend changes as necessary to ensure that the Act reflects modern-day realities. The all-party Select Committee on Human Rights consulted with the Yukon public and stakeholders and issued a report in November 2008 calling for numerous changes to the legislative regime governing human rights in Yukon. The committee’s recommendations covered issues both of substance (e.g., scope and coverage of the Act) and of process (e.g., how complaints are handled, roles and responsibilities of agencies). A number of its recommendations were passed in May and brought into effect in December 2009, completing Phase 1 of the government’s human rights modernization project.

Phase 2 of the Yukon human rights modernization project is now underway and involves consideration of the committee’s remaining recommendations. This discussion paper is designed to elicit feedback only on those recommendations relating to the process and structure of human rights promotion and dispute resolution.

Specifically, this discussion paper examines the following themes: roles and responsibilities of human rights agencies, appeal processes, qualifications of decision-makers, funding of human rights agencies, and human rights education in schools. The Select Committee made a number of other recommendations involving, among other things, scope and coverage of the Act. Those recommendations do not form part of this consultation; they will be considered separately, after this process is completed. See Appendix 1, page 20, for a list of relevant committee recommendations.

A report on these process-related consultations will be provided to the Minister of Justice, accompanied by recommendations, by the end of December 2010.

NOTE: Issues related to the scope and coverage of the Act are not being considered in this consultation but will be considered in future.

Background

Since the Universal Declaration of Human Rights was adopted by the United Nations in 1948, the international community has developed a growing body of standards and rules for the protection and promotion of human rights worldwide. These standards and rules have been embodied in a number of international legal instruments to which Canada has acceded.¹ In 1993, the United Nations General Assembly adopted a set of non-binding standards affirming the need for national state institutions with the mandate of promoting and protecting human rights, and identifying key roles and responsibilities that such institutions should fulfill (the Paris Principles).²

Yukon's *Human Rights Act* creates a system of human rights advocacy and complaint resolution based on a model implemented across Canada in the 1960s and 70s. This model includes a publicly-funded, independent Human Rights Commission with a broad mandate and a separate tribunal to hear and decide legitimate human rights complaints that have not been settled. Both of these bodies are accountable to the Yukon Legislature through the tabling of their annual reports.

In Yukon, the tribunal responsible for hearing and deciding human rights complaints is referred to generally as the Panel of Adjudicators. The panel that hears a particular case is called a Board of Adjudication. This paper refers to both as “the tribunal.”

Over the years, stakeholders in Yukon and elsewhere have expressed concerns about the functioning and effectiveness of this model. In response to such criticisms, British Columbia and Ontario have overhauled their human rights systems, while other jurisdictions (including Canada) have made significant changes.

Consultation scope and process

This consultation process was focused on the seven process-related recommendations of the Select Committee on Human Rights (see Appendix 1). The consultation aims to accomplish several things:

- clarify the principles and elements of an effective human rights system;
- create an opportunity for further balanced discussion of issues and options;
- ensure a transparent and open process leading to change; and
- develop meaningful and viable conclusions that will support a revitalization of Yukon's human rights system.

The release of this discussion paper is the first step in this consultation process, and is intended to provide a context and framework for public discussion about Yukon's human rights system in terms of structure, process, roles and responsibilities. As noted, recommendations regarding scope, coverage and other matters will be dealt with separately in the future.

This discussion paper will be mailed out to key stakeholders, and posted on the Department of Justice website for public comment in August and September 2010 to allow all interested individuals to share their thoughts. The department will contact interested stakeholders who represent of a variety of perspectives to participate in consultations during this period. Based on public input and stakeholder consultations, as well as those already conducted by the Select Committee in 2008, the department will produce a report for the Minister by the end of December 2010.

Principles for an effective human rights system in Yukon

The purpose of the human rights system in Yukon is to effectively promote and protect human rights throughout the public and private sector. An effective human rights system will enjoy public legitimacy among Yukoners and will be guided by the following principles:

- **Independence and accountability:** The system should be structured so as to ensure the independence of “watchdog” and decision-making bodies and the accountability of publicly funded bodies.
- **Accessibility and fairness:** The complaint process should provide access to justice for victims of discrimination and should be fair to all parties.
- **Operational efficiency:** The complaint process should ensure that complaints are resolved in an efficient, effective and timely manner.
- **Proportionality:** The overall system should be proportional in size, cost and complexity to the size of the jurisdiction.

The Department of Justice seeks input on if, and if so how, the Yukon human rights system can be redesigned to better fulfill these principles.

Discussion

The Select Committee report raises five distinct themes with respect to the human rights system:

1. functions and structures of the human rights legal system;
2. the appeal process for final decisions of the tribunal;
3. adjudicator qualifications;
4. funding and financial accountability of human rights agencies; and
5. the nature of the human rights educational mandate.

Each of these themes is addressed separately below. Input is invited on each theme, as well as generally on human rights institutions and processes in Yukon, taking into account the principles set out above.

Theme 1 Functions and structures

In four separate recommendations (14, 15, 17 and 19), the Select Committee directed the government to re-examine the roles and responsibilities of the Yukon Human Rights Commission and tribunal (Panel of Adjudication), with a view to creating a more efficient, balanced process of resolving human rights complaints. This discussion paper identifies the various functions that human rights agencies fulfill, and then outlines alternative structures through which those functions can be delivered, in keeping with the principles set out on page 3.

Functions

Human rights agencies in Canada typically fulfill a number of roles, including some or all of the following (See Appendix 2 for more explanation of each function).

1. **Promoter/educator:** This function involves promotion of human rights through research, public education and awareness raising activities. For example, the Yukon Human Rights Commission holds public information sessions, publishes fact sheets, and issues public service announcements on human rights in Yukon.
2. **Public interest watchdog:** This function involves monitoring and reporting on human rights issues, especially systemic issues. For example, the Yukon Human Rights Commission published a report in 2008 on the Human Rights of Women and Girls in Yukon.
3. **Complainant advocate/prosecutor:** This function involves representing complainants or prosecuting individual, non-systemic complaints before the human rights tribunal and/or courts. In Yukon, the Human Rights Commission prosecutes individual cases both before the tribunal and in court.
4. **Public interest advocate:** This function involves initiating complaints, intervening in legislative and adjudicative processes separate from complainants, and/or prosecuting serious/systemic cases before the human rights tribunal or courts. It is distinct from the Complainant Advocate function insofar as it requires advocating from a public-interest perspective rather than representing a particular complainant or group of complainants. The Yukon Human Rights Commission has no explicit power to initiate complaints on its own, but it is treated as a party separate from the complainant in hearings before the tribunal, and can prosecute systemic cases as such.
5. **Assistor/advisor to complainants in human rights disputes:** This function involves providing information and non-legal advice and assistance to complainants (and sometimes respondents) in human rights matters. The Yukon Human Rights Commission provides basic information about legal obligations and processes to both complainants and respondents, and offers additional assistance and advice to complainants in order to ensure that legitimate complaints are identified and pursued.
6. **Complaint screener/gatekeeper:** This function involves (a) initial screening of human rights complaints (e.g., to confirm that the complaint is about a human rights issue and is made within applicable time limits) and (b) a later decision (usually after investigation and/or settlement attempts) as to whether to refer the complaint to a tribunal hearing. In Yukon, initial screening is conducted by Commission staff, while Commissioners decide, in response to requests by Commission staff or either party, whether or not to refer the matter to the tribunal for a hearing.
7. **Mediator:** This function involves helping parties to a complaint achieve settlement so that the matter need not be adjudicated. In Yukon, commission staff perform this function. In jurisdictions without a commission, the tribunal engages in mediation efforts before hearing a case.

8. **Investigator:** This function involves investigating the details of a given complaint for purposes of reporting to a decision-maker. The Yukon Human Rights Commission employs a full time investigator whose reports are considered by Commissioners when deciding whether or not to refer a case to the tribunal.
9. **Adjudicator:** This quasi-judicial function involves hearing from all parties to a complaint and deciding cases arising from complaints. In Yukon, the Panel of Adjudication fulfils this function, holding hearings and deciding cases that are referred to it by the commission. Yukon courts also fulfil an adjudication function, but only on appeal from a tribunal decision or on judicial review from a decision of the commission or tribunal (see below for an explanation of the difference between appeal and judicial review).

Discussion: Functions

Some of these functions may be seen as more important or more central than others to human rights promotion and protection. For example, several regimes in Canada do not empower or expect human rights commissions to engage in extensive investigation of individual complaints. Some commissions do not advocate on behalf of complainants; focusing instead on performing public interest roles. Two jurisdictions (B.C. and Nunavut) have done away with commissions entirely, vesting the tribunal with all complaint resolution functions and government and/or non-governmental organizations (NGOs) with general human rights promotion/protection functions.

The Paris Principles do not recognize complainant advocacy/prosecution as an essential function of human rights institutions; rather, they emphasize

the role of such institutions in publicizing human rights violations, increasing public awareness of human rights, inquiring into and reporting on human rights matters, and advising governments on human rights legislation and other matters. Nor do these international principles recognize a need for human rights commissions to engage in complaint resolution. They explicitly recognize that such functions may be invested in a separate quasi-judicial tribunal or left to the courts.

In any case, these nine functions can be usefully categorized in at least two ways: first, by whether they focus (a) on general promotion of human rights or (b) the resolution of human rights complaints. Functions 1, 2 and 4 fall into the former category; they are public interest functions that focus on broad systemic issues rather than individual complaints, and involve proactive efforts on the part of the human rights body. In contrast, Functions 3 and 5–9 focus on the reactive resolution of complaints that typically involve unique individual circumstances rather than broad, systemic issues of a public interest nature.

Another way to categorize these functions is by whether or not they require impartiality on the part of the body exercising them. Functions 3 and 4 are fundamentally adversarial and require the body exercising them to take sides in disputes. In contrast, impartiality is critical to the effective exercise of functions 6–9. Combining these very different functions in the same body can lead to bias, or at least perceptions of bias, in the context of individual complaint resolution. Functions 3 and 4 can also create difficulties in the effective exercise of Function 1 if the human rights agency has taken an adversarial position against the same parties that it is seeking to educate or enlist in educational/promotional activities.

The following table illustrates these key differences by function:

Function	General HR promotion	Complaint resolution	Impartiality required	(Potentially) adversarial
1. Promoter/educator	•			
2. Public interest watchdog	•			•
3. Complainant advocate/ prosecutor		•		•
4. Public interest advocate	•			•
5. Assistor/advisor to complainants		•		
6. Complaint screener/gatekeeper		•	•	
7. Mediator		•	•	
8. Investigator		•	•	
9. Adjudicator		•	•	

Structures

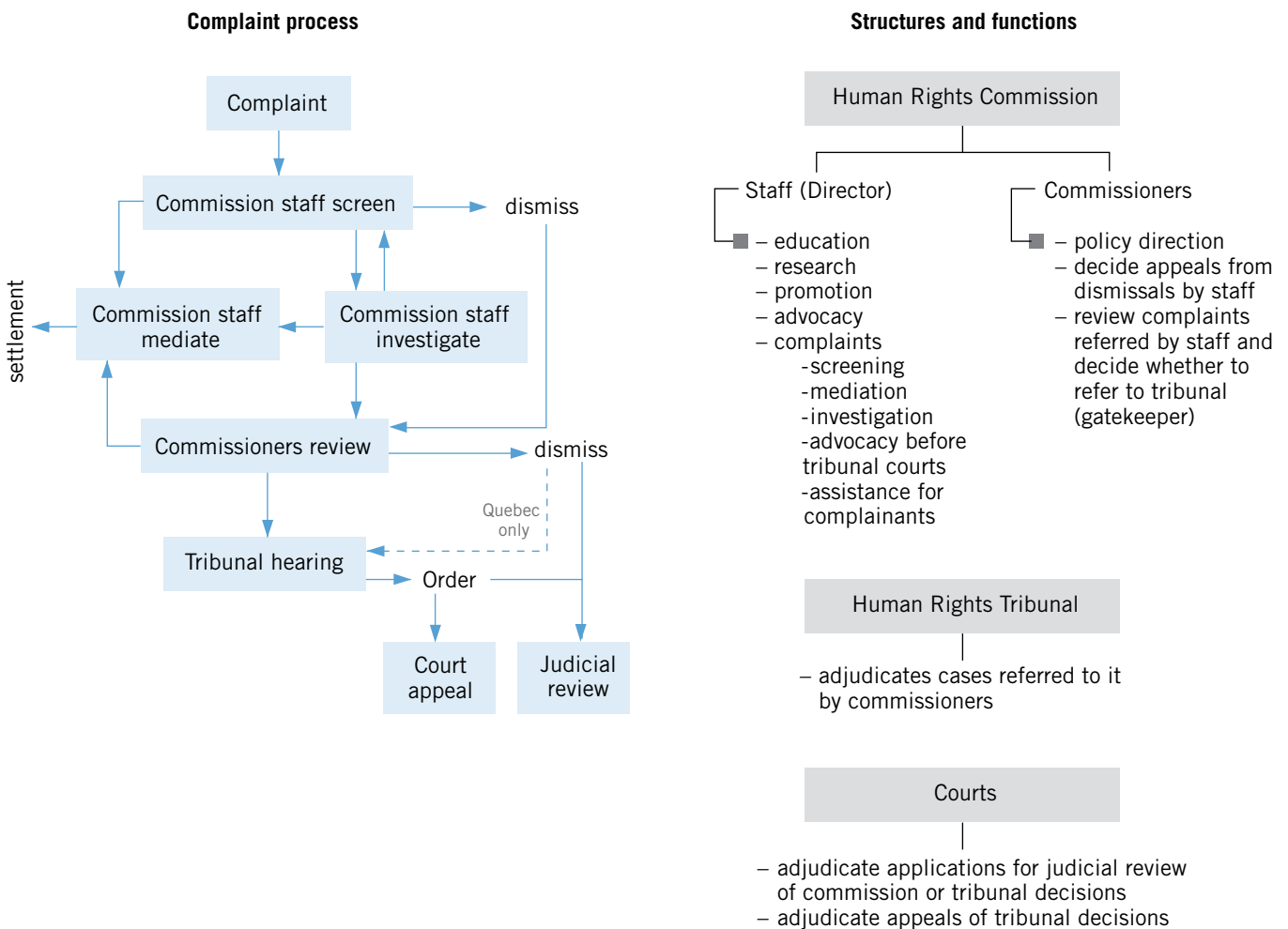
Taking into account these nine different functions of human rights agencies and the interactions among them, there are many ways in which the current Yukon human rights system could be reformed to achieve greater efficiency and balance without compromising accessibility or other principles. Such reforms could involve significant restructuring of the existing regime, as in B.C. or Ontario. Alternatively, they could simply refocus existing institutions so as, for example, to streamline complaint handling and to remove or limit functions that have proven to require a disproportionate level of resources in relation to the value they deliver.

There is a continuum of options for human rights systems, from a simple court-based model to a complex arrangement of independent government-financed bodies with specific human rights mandates and gatekeeper powers. Along this continuum are any number of variations. This paper describes four distinct models of human rights systems, the first three of which currently operate in Canada:

1. the Conventional Model;
2. the Direct Access Model;
3. a Hybrid Model; and
4. the Court-based Model.

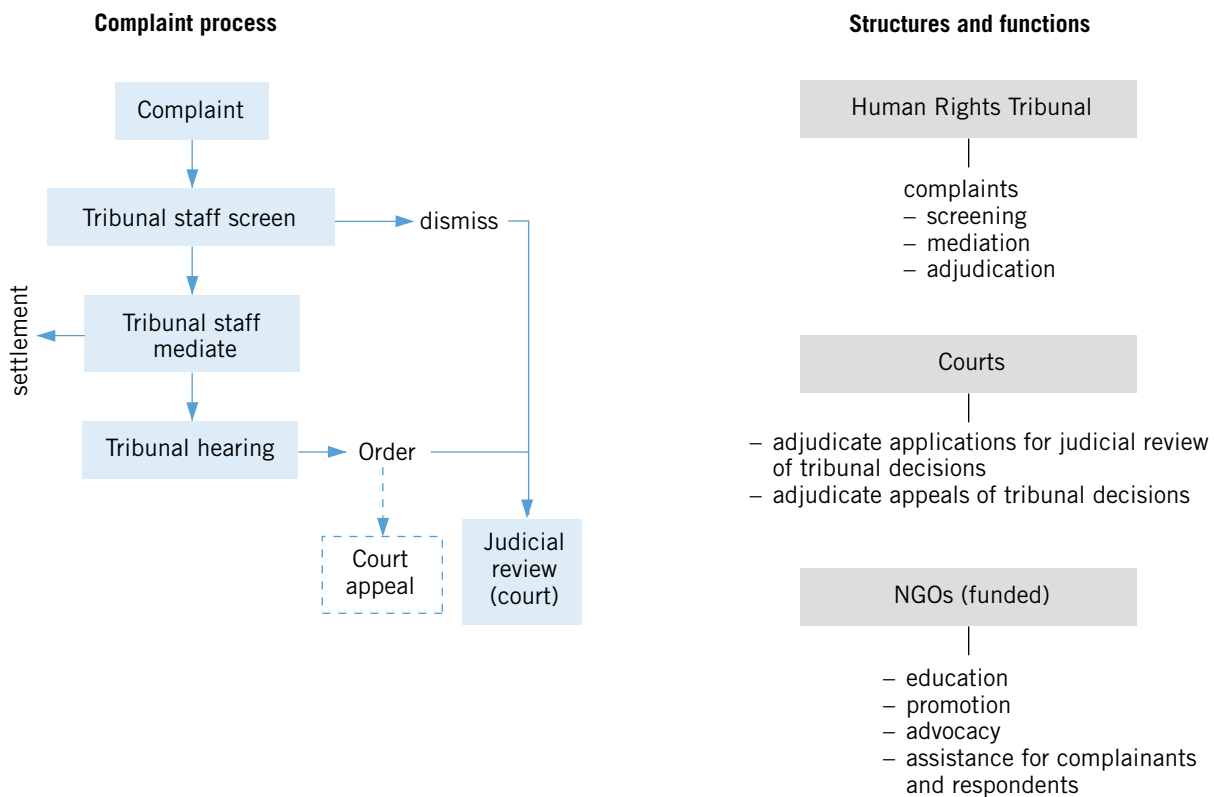
Conventional Model

Under this model, a commission fulfills most or all of the functions described above, other than final adjudication, which is handled by a separate quasi-judicial tribunal that hears and decides complaints referred to it by the commission. This is the model that was implemented across Canada in the 1960s and 70s. It remains in place federally and in many provinces and territories, including the Yukon. There are significant variations of this model by jurisdiction, some of which have recently been adopted with a view to improving operational efficiency and overall effectiveness of the regime.



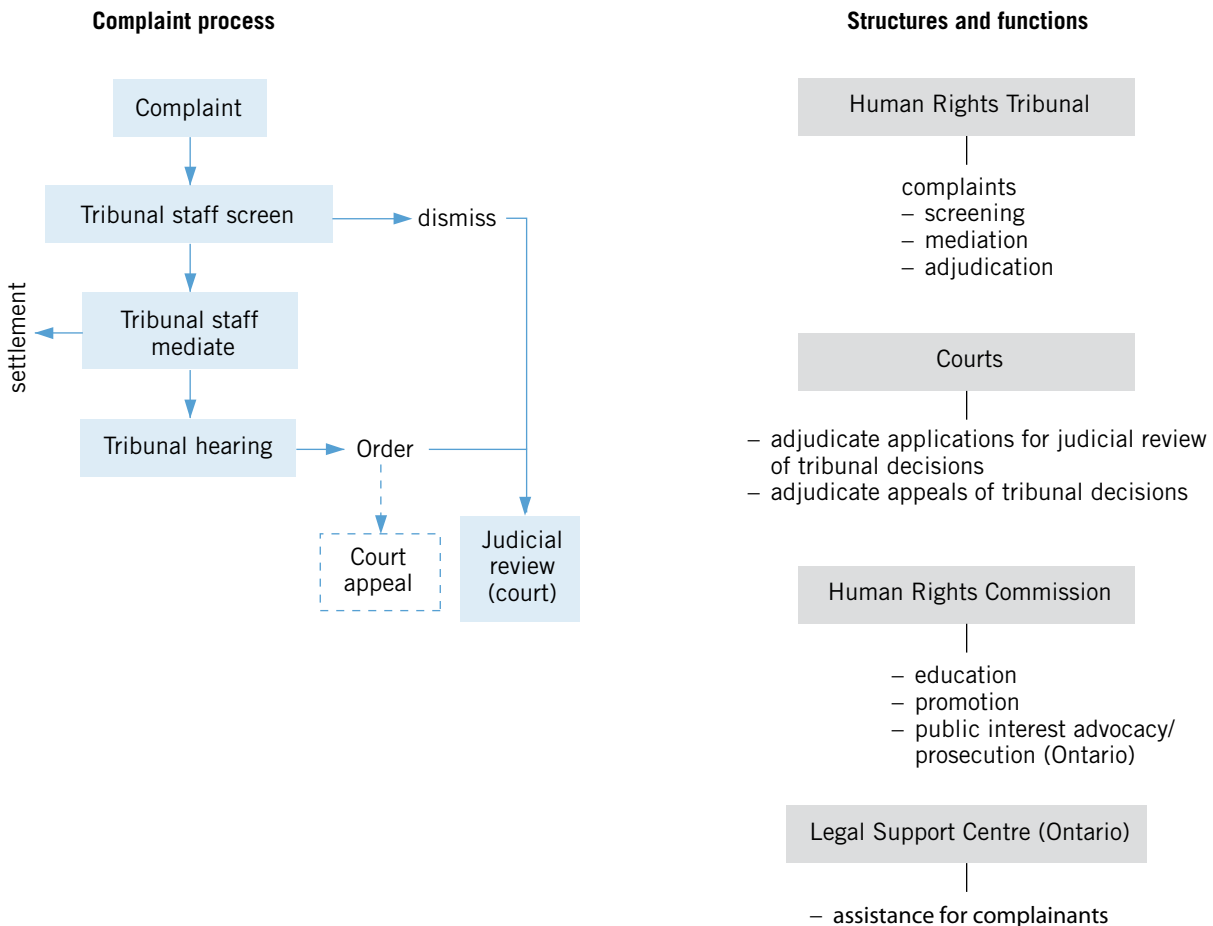
Direct Access Model

Under this model, adopted in 2003 by British Columbia and more recently by Nunavut, a tribunal handles all functions related to complaints (other than the investigatory function, which has been dropped), and the government retains responsibility for human rights promotion, research and education. Although not legislatively required to do so, the B.C. government funds NGOs to engage in human rights research, education and promotion; to act as human rights watchdogs and advocates; and to assist complainants and respondents in human rights disputes. In exceptional cases a specialized legal aid clinic in B.C. offers representation of human rights complainants. There is no human rights commission under this model.



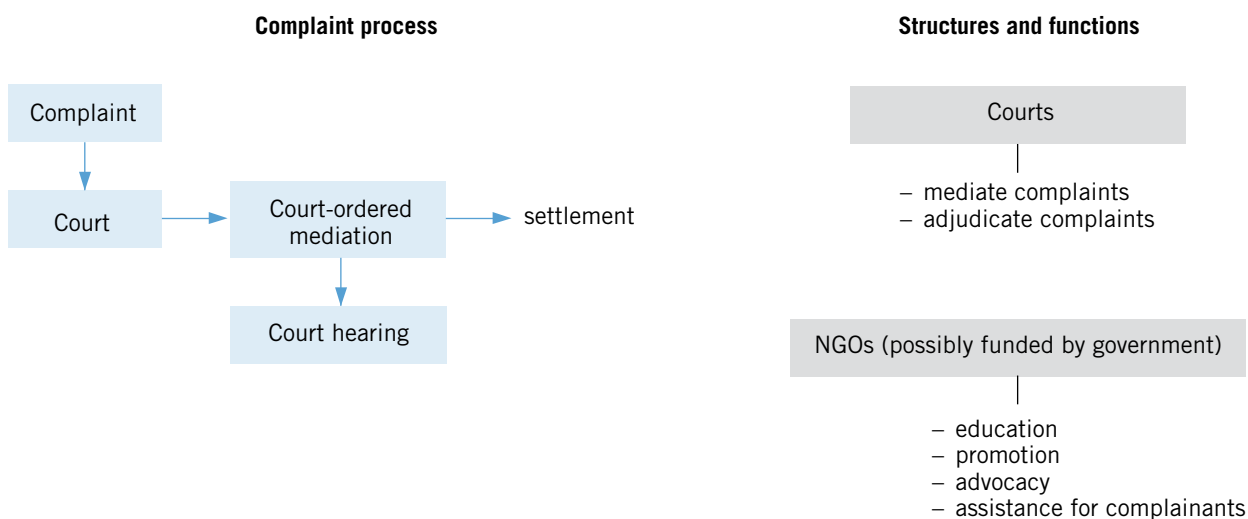
Hybrid Model

There are a wide variety of hybrid models, incorporating aspects of both the conventional and direct access models. Under the hybrid model recently adopted by Ontario, a human rights commission is retained but with a much more limited mandate. Complaints are lodged directly with a quasi-judicial tribunal. As under the Direct Access Model, the tribunal in this model handles all matters related to complaint resolution (other than investigation which no longer occurs). But rather than funding NGOs to assist complainants (as is done in B.C.), Ontario has established a new public body, the Human Rights Legal Support Centre, to fulfil this function. The Ontario Human Rights Commission continues to be responsible for public education and research as well as public interest watchdog and advocacy functions.



Court-based Model

This model is not currently followed in Canada. Under this model there is no special administrative body established to fulfil any of the functions set out above. Rather, complainants use the court system for resolution of complaints. Public education/promotion, research, watchdog, and public interest advocacy functions are fulfilled by NGOs, with or without funding from government. As under the Direct Access Model, legal aid clinics may be funded to assist and represent complainants (and possibly respondents) in human rights disputes.



Discussion: Structures

These four models are not the only ways in which human rights systems can be designed. Variations on any one model can make significant differences to accessibility, fairness, efficiency, and cost, among other relevant considerations. In any case, an assessment of these models and/or variants of them should be guided by the ultimate goal of effectiveness in promoting respect for human rights, and to that end, by the principles set out above. Several points should be considered in such an assessment:

Overall effectiveness

- the effectiveness of educational and promotional activities in raising public awareness of human rights;
- the effectiveness of complaint proceedings in raising public awareness of and respect for human rights; and
- the extent to which Yukon human rights agencies and the complaint process enjoy public legitimacy.

Independence and accountability

- the extent to which human rights agencies are free from government interference; and
- the methods by which Yukon human rights agencies are fiscally transparent and thus accountable to the public.

Accessibility and fairness

- the value, cost and effectiveness of each of the functions currently fulfilled by human rights agencies;
- whether human rights agencies exercise roles that conflict with each other or are otherwise incompatible;
- barriers to access to the complaint resolution system faced by human rights complainants;
- ways in which the current complaint process is, or is seen to be, imbalanced in favour of one party to a dispute; and
- party satisfaction with the complaint-handling process.

Operational efficiency and proportionality

- the time it takes for complaints to be resolved, whether by mediation or adjudication; and
- the overall benefits and costs to all parties of prolonged investigations and adversarial proceedings.

Questions for discussion, Theme 1

1. What concerns, if any, do you have about the current model/process of human rights promotion and complaint handling in Yukon?
2. Who, in your view, should perform the different functions of the human rights system? Feel free to provide reasons.

If you would like to provide responses to Theme 1 questions, please use the [Comments fillable form](#) at the end of the document.

Theme 2 Appeal process for final decisions of the tribunal

The Select Committee recommended clarification of appeal processes for final decisions of the Board of Adjudication, and examination of their effectiveness (Recommendation #21; see Appendix 1). Section 28 of the Yukon *Human Rights Act* provides for appeals of tribunal decisions to the Yukon Supreme Court by any party. Such appeals can be made only on questions of law; factual determinations by the tribunal are considered final and are not subject to appeal.

Only half of Canadian jurisdictions currently allow for appeals from human rights tribunal decisions. Some require that the court first grant permission before the appeal can be heard, allowing courts to screen out appeals that they feel have little merit. Others, like Yukon, limit appeals to legal issues.

In Yukon as elsewhere in Canada, judicial review of administrative decisions (including those of the commission) is always available even though it is

not specified in the Act. A judicial review is similar to an appeal but is available only for certain kinds of actions and findings of the administrative body (e.g., those made in bad faith, without jurisdiction, without regard to the principles of natural justice, or that are unreasonable by any standard). The availability and scope of judicial review may be addressed in a statute, but courts always retain the power to review the actions of an administrative body that go beyond the powers of that body.

There are several options in respect of appeals:

- limiting the right of appeal to complainants and respondents (i.e., not permitting the commission to appeal decisions of the independent tribunal);
- requiring prior written approval from the tribunal chair for commission participation in proceedings before a court (Alberta);
- requiring leave of the court before appeals can be heard (Quebec, Newfoundland & Labrador);
- removing the statutory right of appeal entirely, thus leaving judicial review as the only avenue of recourse once the tribunal has ruled on a complaint (B.C., Canada, Manitoba, New Brunswick, Nunavut, Ontario and P.E.I.);
- legislatively specifying the right to judicial review of final decisions made by the tribunal and/or commission, and the scope of such judicial review; and
- legislatively specifying the role of the commission in appeal and/or judicial review proceedings.

Discussion: Appeal process

An important consideration when evaluating these options in the Yukon context is the appropriate level of respect and weight that should be accorded to decisions of the tribunal by courts. In general, courts treat findings of fact by specialized administrative tribunals with a high level of respect since such tribunals have conducted a thorough review of the facts and are thus better placed than the courts to make findings of fact. Similarly, courts typically do not interfere with decisions of expert tribunals on matters of law within the tribunal's recognized area of expertise. The appropriate level of deference for courts to afford a given tribunal will depend on a number of factors, including the expertise required to decide the kinds of legal issues coming before the tribunal (as

compared to those coming before the courts), and the relevant expertise of individual members of that tribunal (see below for a discussion of adjudicator qualifications).

The level of respect and weight to be given to tribunal decisions can be specified in the legislation, as Ontario has done in s.45.8 of Ontario's *Human Rights Code*, which states:

"...a decision of the Tribunal is final and not subject to appeal and shall not be altered or set aside in an application for judicial review or in any other proceeding unless the decision is patently unreasonable."

This represents a very high level of respect, higher than would normally be given by courts to a human rights tribunal. In this respect, it should be noted that the Ontario Human Rights Tribunal is chaired by a human rights lawyer, that 18 of the 20 vice-chairs are lawyers, and that all 20 have professional experience in the human rights field.

Questions for discussion

1. Is the current appeal process effective?
2. What role should the commission play in appeals and/or judicial review applications?

If you would like to provide responses to Theme 2 questions, please use the [Comments fillable form](#) at the end of the document.

Theme 3 Adjudicator qualifications

The Select Committee recommended further discussion and clarification of the roles, responsibilities and qualifications of members of the Yukon Human Rights Panel of Adjudication (Recommendation #19). As noted above, the qualifications of tribunal members can be relevant both to the level of respect accorded their decisions and to the appropriateness of statutory appeals.

The more expert the tribunal members in human rights and law, the more respect courts tend to give to their decisions. Qualifications of individuals acting in quasi-judicial roles are important, given the implications of their decisions for individuals and communities. In the human rights context, tribunal decisions are of even greater importance, insofar as they guide societal norms on matters involving fundamental values.³

Some jurisdictions set out criteria for tribunal appointments in their human rights legislation. For example, Canada requires that the Chair, Vice-Chair, and at least two of the remaining 13 members be lawyers. Ontario applies three criteria: 1) experience, knowledge or training with respect to human rights law and issues; 2) aptitude for impartial adjudication; and 3) aptitude for applying the alternative adjudicative practices and procedures that may be set out in the tribunal rules. Saskatchewan requires that all members be lawyers and human rights experts. In the Northwest Territories, members must have human rights experience and more than five years experience either practising law or as a judge or tribunal member. Nunavut requires that members “have an interest in and a sensitivity to human rights and to Inuit culture and values that underlie the Inuit way of life.”

Discussion: Adjudicator qualifications

Regardless of whether criteria for appointments to human rights tribunals are established in law or policy, most jurisdictions in Canada recognize that effective decision-making on matters of human rights requires expertise in law and/or human rights, and make appointments accordingly. Human rights tribunals are quasi-judicial in nature; the issues they are required to decide involve matters of law that could, and often are, decided by judges in court proceedings. Unless at least some members have legal or human rights training, it may be difficult for human rights tribunals to render properly informed and well-reasoned decisions. In small jurisdictions without access to a large pool of individuals with legal training, one option is to provide adjudicators with access to independent legal counsel.

Human rights decision-making also requires sensitivity to the particular cultural and social context in which such decisions are being made. An understanding of different cultural perspectives at play in a given dispute may be necessary in order to make an informed and fair decision. According to the Paris Principles, the composition of human rights institutions and the appointment of tribunal members should “ensure the pluralist representation of the social forces (of civilian society). . . .” By ensuring consistent relationships with the diverse groups that make up our society, pluralism is recognized internationally as improving the system and process of human rights protection and promotion.

Questions for discussion

1. What knowledge, awareness and/or expertise do adjudicators of human rights complaints in Yukon require as individuals in order to do their job properly?
2. What knowledge and expertise should be required of the Yukon Panel of Adjudicators as a whole (compared to individual adjudicators) in order to ensure a plurality of perspectives as well as legal soundness of tribunal decisions?
3. What training ought to be available to tribunal members?

If you would like to provide responses to Theme 3 questions, please use the [Comments fillable form](#) at the end of the document.

Theme 4 Funding and financial accountability

The Select Committee recommended that funding of the Yukon Human Rights Commission and Board of Adjudication be removed from the Yukon Government's Department of Justice (Recommendation #16).

Both the Yukon Human Rights Commission and tribunal are currently funded through the Department of Justice. This is the norm in Canada: most human rights commissions and tribunals are funded through the relevant Department of Justice (or Attorney General), as are other administrative bodies dealing with matters of a fundamentally legal nature. In three provinces (Alberta, New Brunswick and Nova Scotia), the human rights commission is funded through a different government department. Only one jurisdiction (NWT) funds its human rights commission directly from the legislature.

Concerns have been raised that funding of the Yukon Human Rights Commission by the Department of Justice compromises the independence of the commission and puts the department in a conflict of interest since it represents the government in human rights cases. Others have noted that there is a clear separation between the role of the department as an administrative authority providing funding to agencies falling within its mandate, and the role of government lawyers representing client departments in litigation involving those agencies. This is the case with respect to a variety of independent agencies and tribunals funded by the Department of Justice whose duties can involve advocating positions contrary to that of the government or making findings against the government. As noted above, this is the predominant approach to funding of human rights agencies in Canada.

Discussion: Funding and accountability

Administrative agencies, including human rights commissions and tribunals, are created by governments for the purpose of implementing government policy. While implementation of that policy requires a certain level of independence from government — for example, in the ability to make decisions free from government interference, to take a position contrary to that of government without fear of budgetary consequences, or for people to criticize government without fear of losing their jobs — such independence does not require removal of normal financial accountability mechanisms.

Independence and accountability are inextricably linked, and both must be effective. With a few exceptions, most independent agencies of government

in Yukon and elsewhere are funded by and financially accountable to the government department whose mandate covers the subject matter of the agency.⁴ Exceptions typically include elections officers, ombudspersons and child advocates, who report directly to the legislature rather than through a government department. While direct financial accountability to the legislature (as opposed to a department) may in theory enhance an agency's independence, it is not considered a necessary precondition for the independence of human rights commissions or tribunals in Canada.

In Yukon, there are two basic mechanisms for publicly funding NGOs: grants and contributions. Grants are required in legislation, are approved by the legislature and are generally provided in lump sums. Contribution agreements form a contractual obligation on the part of the non-profit organization (potentially including performance and reporting requirements) and may be paid in instalments.

What is required for institutional independence is a budgeting process that gives due consideration to the agency's needs for staff, facilities and financial resources in the exercise of its functions. In this respect, the Yukon Human Rights Commission's annual funding for 2009/10 was \$536,000 and the projected funding for 2010/11 is \$549,000. It is funded through a contribution agreement which is included in the estimates approved by the Legislative Assembly.

The expenses for the Human Rights Panel of Adjudication are paid directly by the Department of Justice in accordance with a budget approved by the Legislative Assembly. There are no grants or contribution agreements and the budget is increased as required based on number of hearings, required training, etc. The budget for the Human Rights Panel of Adjudication was \$83,000 in 2009–10 and is projected to be \$135,000 in 2010–11.

Questions for discussion

1. Do the existing processes by which the Yukon Human Rights Commission and tribunal are funded strike an appropriate balance between independence and accountability?
2. Should the funding for the tribunal (Panel of Adjudication) be continued on the current basis (i.e., an amount set through the regular budgeting process, supplemented as required based on hearings, etc.), or should it be changed?
3. Are there other means for ensuring accountability that should be considered?

If you would like to provide responses to Theme 4 questions, please use the [Comments fillable form](#) at the end of the document.

Theme 5 Education mandate

The Select Committee recommended that there be increased education on human rights and responsibilities in the school system and that this be enshrined in the Act (Recommendation #13).

No jurisdiction in Canada includes in its human rights legislation a requirement for mandatory human rights education in schools. One jurisdiction in fact does the opposite: having been forced to include sexual orientation as a prohibited ground of discrimination in its *Human Rights Act*, Alberta recently introduced a new provision permitting parents to withdraw their children from school instruction on subject matter that deals primarily with religion, human sexuality or sexual orientation.

Section 4 of the *Education Act* establishes, as one of the goals of the Yukon education system, “to promote the recognition of equality among Yukon peoples consistent with the Canadian Charter of Rights and Freedoms and the *Human Rights Act*.”

Currently, formal education on human rights is provided as part of the mandatory Yukon curriculum⁵ in Grade 6 (Social Studies students learn to assess equality and fairness in Canada with reference to the Canadian Charter of Rights and Freedoms). Grade 8 students are taught about the importance of respect for diversity and an inclusive social environment as part of Health and Career Education. Throughout levels K–10, teachers also assess students based on social responsibility performance standards, one of which is “valuing diversity and defending human rights.” Human rights as a subject is also taught in Grades 11 and 12 courses on civics, social justice, and law.

Discussion: Education mandate

Further integration of human rights education in the Yukon K–12 curriculum could be accomplished without legislative mandate. Indeed, curriculum content is normally treated as a matter of policy and is not mandated through provisions of the *Education*

Act or any other statute. If human rights education in schools is mandated by way of the *Human Rights Act* or the *Education Act*, questions may be raised as to why other important elements of school education are not similarly mandated in legislation.

Questions for discussion

1. Is there a need for more human rights education in Yukon schools?
2. If so, how can this best be accomplished? Is it necessary and/or appropriate to mandate such curriculum changes by way of legislation?
3. If mandating by way of legislation, which statute is the more appropriate vehicle: the *Education Act* or the *Human Rights Act*?

If you would like to provide responses to Theme 5 questions, please use the [Comments fillable form](#) at the end of the document.

Conclusion and next steps

Please provide any additional comments with respect to the effectiveness of the current Yukon human rights system and/or alternative approaches.

The Department of Justice will be consulting with interested organizations and individuals in August and September 2010. All input will be considered, analysed and incorporated into a report to the Minister, due by the end of December 2010.

Outstanding Select Committee recommendations, including those involving scope and coverage of the Act, will be considered at a later date.

If you would like to provide a response to anything in this Discussion Paper, please use the [Comments fillable form](#) at the end of the document.

Appendix 1. Recommendations of the Select Committee

The Select Committee on Human Rights made 25 recommendations requiring legislative amendment and recommended a phased approach. Phase 1 is complete. The remaining recommendations are divided into categories, beginning with those related to structure, roles and responsibilities, and process.

Recommendations re structure, roles and responsibilities, and process (first part of phase 2)	
13	THAT there be increased education in the school system on human rights and responsibilities, and that this be enshrined in the <i>Human Rights Act</i>
14	THAT the human rights process change from the current configuration to a hybrid model that would reflect parts of a direct access model, with the intent of building efficiencies into the process
15	THAT there should be greater guidance on the role of the Yukon Human Rights Commission in the adjudication process to maintain balance
16	THAT the funding of the Yukon Human Rights Commission, and of the Yukon Human Rights Panel of Adjudication, be removed from the Department of Justice
17	THAT process issues be addressed and evaluated for both the Yukon Human Rights Commission, and the Yukon Human Rights Panel of Adjudication
19	THAT there be further discussion of the roles, responsibilities, and qualifications of the members of the Yukon Human Rights Panel of Adjudication, and that these roles, responsibilities, and qualifications be clarified
21	THAT further clarity be sought on Section 28 (“Appeals”) of the Act, with regard to the effectiveness of the provisions concerning appeals of final decisions of the Board of Adjudication
Recommendations on scope and coverage issues (next part of phase 2)	
6	THAT Section 7 (“Prohibited grounds [for discrimination]”) of the <i>Human Rights Act</i> be reviewed with a view to using more contemporary language
7	THAT Section 9 (“Prohibited discrimination”) of the Act be amended to add protection for volunteers
11	THAT the Preamble to the Act provide greater guidance to the rest of the legislation
12	THAT the Act more strongly promote human rights and responsibilities, awareness, and education
24	THAT Section 8 (“Duty to provide for special needs”) of the Act be revised and modernized around the duty to accommodate, specifically, “duty to provide for special needs” be changed to “duty to accommodate”
23	THAT further clarity be sought with respect to the application of human rights laws to self governing Yukon First Nations, including clarification of the application of section 13.1 of the Yukon First Nations Self Government Agreements, and clarification of the application of the recently amended Canadian <i>Human Rights Act</i>

General recommendations to apply to all phases	
8	THAT if draft human rights legislation is brought forward by the Yukon Government, there be the opportunity for the public and for stakeholder groups to have the opportunity to comment on the proposed legislation
10	THAT strong consideration be given to a plain-language approach when revising the Act
25	THAT after the <i>Human Rights Act</i> is reviewed and amended, the regulations be reviewed for compliance as well
Phase 1 recommendations - complete	
1	THAT the <i>Human Rights Act</i> be amended under Section 20 (“Complaints”) so that the threshold for filing a complaint under the Act is raised from its current level – i.e., that a complainant “believes” that they have been harassed or discriminated against – to the requirement that there be “reasonable grounds” for such a belief
2	THAT the <i>Human Rights Act</i> be amended under Section 20 to expand the circumstances under which the Commission shall not investigate a complaint by adding after 20 (1)(c): (a) the commission decides to refer the complaint to the Board of Adjudication or to mediation; (b) the complaint has either been abandoned by the complainant or the complainant fails to cooperate with the investigation; or (c) the complainant has declined what the Director considers a fair and reasonable settlement offer; or (d) the substance of the complaint has been or could be dealt with in another proceeding or review procedure or under another Act
3	THAT the <i>Human Rights Act</i> be amended under Section 20 to extend the allowable time limit for filing a complaint under the Act from the current period of 6 months, to a period of 18 months of the alleged contravention
4	THAT the <i>Human Rights Act</i> be amended under Section 20 such that if a continuing contravention is alleged, the complaint must be filed within 18 months of the last alleged instance of discrimination
5	THAT the <i>Human Rights Act</i> be amended under Section 20 such that the Yukon Human Rights Commission may accept a complaint filed after the expiration of the time limit, 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
9	THAT the language used throughout the Act, and in the definitions section of the Act in particular, needs to be clarified and updated to reflect more modernized language, e.g. (a) change the name of the <i>Human Rights Act</i> to the Yukon Human Rights and Freedoms Act (note: this was not done as part of Phase 1) (b) remove the term “mental retardation” from the Act (c) remove the definition of sexual orientation from Section 37 (“Interpretation”) (d) clearly define the Board of Adjudication and the Panel of Adjudication (e) change “seeing eye dog” to “guide dog”
18	THAT the reporting accountability of the Yukon Human Rights Panel of Adjudication be clarified, and that the Panel submit a report of its activities and cases to the Legislative Assembly annually
20	THAT Section 22 (“Panel of adjudicators”) of the Act dealing with the size of the panel of adjudication and the number of adjudicators that are seized to a board of adjudication be clarified, and that the total number of adjudicators appointed to any on time be clarified

Appendix 2. Functions of human rights agencies

1. **Promoter/educator:** This function involves promotion of human rights through research, public education and awareness raising activities. All jurisdictions in Canada other than British Columbia and Nunavut have a Human Rights Commission tasked with these duties; in B.C. and Nunavut, these functions are performed by government and/or non-governmental organizations. Some jurisdictions also empower their human rights commissions to advise government on human rights matters, to review legislation for consistency with human rights laws and principles, and/or to review and approve affirmative action programs.
2. **Public interest watchdog:** This function involves monitoring and reporting on human rights issues, especially systemic issues. Although it can be seen as part of the promotion function, it is sometimes treated as a separate, explicit duty or power of Commissions. For example, the Ontario Human Rights Commission is legislatively required to report to the people of Ontario on the state of human rights in Ontario. In other jurisdictions, such as Yukon, where this function is not explicit, it may be seen as implicit in the promotion/education function.
3. **Complainant advocate/prosecutor:** This function involves providing legal advice and assistance to complainants and representing complainants or prosecuting individual complaints before the human rights tribunal and/or courts. Traditionally, this has been a major function of human rights commissions in Canada, and remains a key function of several commissions including Yukon's. As part of their regime overhauls, however, both Canada and Ontario removed this function from their commissions, who now advocate only from a public interest perspective and who appear only rarely at tribunal hearings.
4. **Public interest advocate:** This function involves initiating complaints, intervening in legislative and adjudicatory processes separate from complainants, and/or prosecuting serious/systemic cases before the human rights tribunal or courts. It is distinct from the Complainant Advocate function insofar as it requires advocating from a public interest perspective rather than representing a particular complainant or group of complainants.

Where they exist, human rights commissions are usually made parties to tribunal hearings separate from complainants and are in that sense “public interest” advocates. However, in some jurisdictions (including Yukon), they have carriage of the case before the tribunal and are therefore treated for the purpose of this analysis as a “Complainant Advocate/Prosecutor.” Some commissions (Canada, Manitoba, NWT, Ontario, and Saskatchewan) are specifically empowered to initiate complaints on their own without an individual complainant, which is clearly a public interest advocacy function.

5. **Assistor/advisor to complainants in human rights disputes:** This function involves providing information and non-legal advice and assistance to complainants (and sometimes respondents) in human rights matters. Although not usually specified in legislative mandates, it is a function commonly exercised by human rights commissions in Canada, except in B.C. and Nunavut where the tribunal provides such assistance; and in Ontario, where a separate body — the Human Rights Legal Support Centre — does so. Commissions in Quebec and Newfoundland and Labrador are statutorily required to assist complainants.
6. **Complaint screener/gatekeeper:** This function involves a) initial screening and decision-making with respect to human rights complaints; i.e., dismissing or deferring complaints (usually based on specified criteria), and b) referring complaints that are not dismissed or settled to the tribunal for adjudication. Screening and gatekeeping functions are exercised by tribunal staff in B.C., Ontario and Nunavut, and by commissions in all other Canadian jurisdictions including Yukon.

Commission approaches to initial complaints screening span a wide range: from simple screening based on clear criteria requiring little or no judgement, to determinations based on the perceived merit of the complaint. In some jurisdictions, commissions (or tribunals where commissions do not exist) are statutorily required to dismiss complaints that do not meet certain criteria, while in other jurisdictions (e.g., Yukon), the commission is simply empowered to dismiss complaints.

In B.C., Ontario, Quebec and Nunavut, complainants have direct access to the tribunal without the need for prior approval by the commission (if a commission exists). In Quebec, direct access is available only after the commission has dismissed the complaint. In other jurisdictions, commission approval is required before an individual can access the tribunal. Moreover, most jurisdictions do not permit complainants to access the tribunal on their own; instead, they require that all complaints referred to the tribunal/adjudicator be prosecuted by the commission.


7. **Mediator:** This function involves helping parties to a complaint achieve settlement so that the matter need not be adjudicated. It is a function that is universally exercised by commissions and/or tribunals in all Canadian jurisdictions. The purpose of mediation is to settle disputes without the need to engage in an adversarial process. Depending on the jurisdiction, mediation functions are conducted by commission or tribunal staff, by outside experts on contract to the commission, and/or by adjudicators themselves.
8. **Investigator:** This function involves investigating the details of a given complaint for purposes of reporting to a decision-maker. It is a key function of commissions under the conventional Canadian model, but has been dropped in the newer models of complaints resolution recently adopted in B.C., Ontario and Nunavut. In most jurisdictions, the investigatory function is discretionary: the commission is empowered to investigate if it sees fit to do so, but is not required to investigate all complaints that pass initial screening. In Yukon, the commission is required to investigate all complaints unless a specified exception (including direct referral to the Panel of Adjudicators) applies.
9. **Adjudicator:** This quasi-judicial function involves hearing from all parties to a complaint and deciding cases arising from complaints. It is exercised in all Canadian jurisdictions by a government-appointed, independent administrative tribunal or panel of adjudicators. However, in a number of jurisdictions, similar adjudicatory functions are exercised in the first instance by human rights commissions, before complaints are referred to the tribunal or adjudicator. Moreover, as mentioned above under “Complaint Screener/Gatekeeper,” some commissions empower their staff to screen complaints on the merits (without a hearing), before referring to commissioners for a determination as to whether or not to refer to the tribunal/adjudicator. In other words, complaints may be effectively adjudicated by the commission once or twice before they reach the tribunal, depending on the system.

In half of Canadian jurisdictions, the tribunal’s decision is final and not subject to appeal. Remaining jurisdictions, including Yukon, provide for another round of adjudication by way of appeal to the courts. However, in Quebec and Newfoundland and Labrador, permission of the court is required before such appeals will be heard. In some jurisdictions including Yukon, courts can only hear appeals on matters of law (not factual disputes).

In all Canadian jurisdictions, judicial review of administrative tribunal decisions is generally available regardless of what the statute says. Judicial review is not the same as an appeal; it is limited to matters of law and jurisdiction. Courts typically will not interfere with a tribunal’s decision on judicial review unless the process leading to the decision was unfair or the decision itself falls outside the bounds of what would be considered reasonable.

Endnotes

1. These include: *International Covenant on Civil and Political Rights*, 19 December, 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46; *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 U.N.T.S. 195, Can. T.S. 1970 No.28; *Convention on the Rights of the Child*, 20 November 1989, GA Res. 44/25, Can. T.S. 1992 No. 3; *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 U.N.T.S. 13, Can. T.S. 1982 No. 31; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, GA Res. 39/46, Can. T.S. 1987 No. 36.
2. See www2.ohchr.org/english/law/parisprinciples.htm.
3. In recognition of its relative importance, human rights legislation typically takes precedence over other legislation. See s.39 of the Yukon *Human Rights Act*.
4. For example, the Ontario Ministry of the Attorney-General oversees and funds the Ontario Human Rights Commission, the Human Rights Tribunal of Ontario and the Human Rights Legal Support Centre in addition to the Criminal Injuries Compensation Board, the Office for Victims of Crime, the Assessment Review Board, the Ontario Municipal Board and the Law Commission of Ontario. The ministry also funds Legal Aid Ontario and administers the Special Investigations Unit and the Independent Police Review Office.
5. Yukon uses the British Columbia school curriculum.



In 2008, the Yukon Legislative Assembly set up a special committee to review the decades-old *Human Rights Act* and to recommend any changes necessary to ensure that the Act reflected modern-day realities. The committee consulted with the Yukon public and stakeholders and issued recommendations for numerous changes. A number of these recommendations were passed by the legislature in May 2009 and brought into effect in December 2009. This completed Phase 1.

Phase 2 is now underway and involves consideration of the committee's remaining recommendations. This Discussion Paper is designed to elicit feedback on the recommendations dealing with processes and structures of the human rights system in Yukon. Recommendations related to scope and coverage will be dealt with at a later date. This Discussion Paper will be mailed out to key stakeholders and posted on the Department of Justice website for public comment in August and September.

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If you would like to provide responses to any Questions in this Discussion Paper, please use the [Comments fillable form](#).