

**Submission of the Advocacy Centre for the Elderly
Concerning the
Ontario Human Rights Review 2011-12**

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ADVOCACY CENTRE FOR THE ELDERLY

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INTRODUCTION TO THE ADVOCACY CENTRE FOR THE ELDERLY

The Advocacy Centre for the Elderly (ACE) is a specialty community legal clinic funded by Legal Aid Ontario that was established to provide a range of legal services to low income seniors in Ontario. The legal services include individual and group client advice and representation, public legal education, community development, and law reform activities. ACE has been operating since 1984 in Toronto, and is the first and oldest legal clinic in Canada with expertise in legal issues of the older population.

ACE receives, on average, over 2,500 client intake inquiries a year. These calls are primarily from the Greater Toronto Area but approximately twenty per cent (20%) are from outside this region. The individual client services are in areas of law that have a particular impact on older adults. These include, but are not limited to: capacity, substitute decision-making and health care consent; end-of-life care; supportive housing and retirement home tenancies; long-term care homes; patients' rights in hospitals; and elder abuse. ACE lawyers are in high demand as speakers on seniors' issues. Numerous presentations on these issues have been made by ACE at the local, provincial, national and international levels.

Given ACE's experience over the years of working on legal and policy issues that impact older adults in Ontario and across Canada, we trust that our submissions to the Chair of the Ontario Human Rights Review 2011-12 and to the Attorney General of Ontario concerning the review of the human rights system will be of assistance.

We have reviewed the *Consultation Paper* released by the Chair of the Ontario Human Rights Review 2011-12 concerning the changes to Ontario's human rights system since June 30, 2008.

Our submission consists of five parts:

1. Ageism – we will provide some general comments concerning ageism, making reference to the Law Commission of Ontario's recently released Interim Report concerning the Law as it Affects Older Adult
2. Comments concerning the Human Rights Tribunal of Ontario
3. Comments concerning the Human Rights Legal Support Centre
4. Comments concerning the Ontario Human Rights Commission
5. Recommendations for improving the human rights system to meet the needs of older adults

Where possible we have provided a response to the questions proposed in the *Consultation Paper*.

AGEISM

The Law Commission of Ontario provides the following definition in their recent report concerning the law as it affects older adults:

. . . . ageism is a systematic way of thinking about aging and older persons that sees aging as a negative process and older adults as separate and different from other members of society, attributing to them a set of negative characteristics. Ageism includes the tendency to structure laws and social institutions in a way that assumes that everyone is young. Ageism may be manifested in negative treatment of and discrimination against older persons, social exclusion of older adults and the tendency to ignore their existence, and paternalistic approaches that control older adults and remove autonomy under the guise of protecting their best interests.¹

While the provisions of the *Human Rights Code* (“Code”) clearly state that individuals have the right to be free from discrimination based on age in the context of services, employment and housing, more is required to overcome the ageism that pervades legal systems including the human rights system. In terms of some of the challenges for older adults with respect to access to justice, the Law Commission of Ontario identifies the following concerns:

Although concerns regarding access to law are not limited to older adults, fixed incomes and withdrawal from the workforce, lower than average literacy and educational levels, the onset of health and activity limitations as age advances, and limitations in life expectancy all may limit access for older adults. Some significant portions of the older adult population also have their experiences shaped by cognitive disabilities, living environments that reduce their autonomy and community inclusion, and the consequences of physical, financial or other forms of dependency.²

The statistics from the Human Rights Tribunal of Ontario’s (HRTO) for fiscal year 2010-2011 show that 77% of all applications made during that period were in the social area of employment. Only 15% of applications made to the HRTO were based on the ground of age. Some of the applications made by older adults to the HRTO could very well have been under different grounds (i.e. disability). ACE submits, however, the low percentage of age discrimination applications being filed at the HRTO is more likely due to the fact that older adults are either not aware of their *Code* rights or do not see the benefit in filing at the HRTO even where they identify that their rights have been

¹ Law Commission of Ontario, *The Law as it Affects Older Adults: Developing an Anti-Ageist Approach, Interim Report*, June 2011, online: < <http://www.lco-cdo.org/older-adults-interim-report.pdf> > at 3. [*Interim Report*]

² *Interim Report* at 6.

infringed.

In cases where older adults have experienced discrimination based on age or another *Code* ground, it is our submission that older adults are not accessing the human rights system to enforce their rights for the following reasons: fear of reprisal (where the infringement occurs in the social area of housing or services); time it takes to pursue a claim; access to legal representation at the HRTO, to name a few. Further, it has only been since the recent changes in access to the HRTO that most older adults would have seen the system as being able to meet their needs. Previously, the process took many years which was unhelpful to older adults who needed their issues resolved quickly and did not have time to wait for systemic change.

a) Is the new human rights system accessible and easy to use? What would you describe as the advantages and disadvantages of the system?

According to the Law Commission of Ontario, in its recent Interim Report entitled *The Law as it Affects Older Adults: Developing an Anti-Ageist Approach*:

A key concern in the law as it affects older adults is the “implementation gap”, wherein laws which on their face are neutral or positive with respect to older adults are in practice unproductive or negative in their effects, due to inadequate implementation and poor enforcement. One important aspect of the implementation gap is access to the law for older adults, meaning the existence (or lack thereof) of effective mechanisms for accessing and enforcing existing laws.³

It is our submission that the implementation of the changes in the *Code* has resulted in a gap being created. The new human rights system has not been made accessible to older adults with these changes and they are not relying on it.

Seniors contact ACE seeking assistance and advice on issues such as: forced discharge from hospital to home; their rights while living in a long-term care home and/or retirement home; health care consent; capacity to make treatment or health care decisions; elder abuse. These are but some of the examples of the many types of inquiries we receive from seniors living across Ontario. Many of the older adults who contact our office seeking legal advice or representation are unaware of their rights under the *Code*.

ACE submits that the new human rights system is accessible to those seniors who are still employed, who are educated, speak fluent English, and have access to resources

³ *Interim Report* at 5-6.

(financial or otherwise). These are not, however, the clients who contact ACE for advice nor are they clients most in need of assistance in navigating the new human rights system. It is our submission that the new human rights system poses a challenge for any unrepresented applicant who is marginalized and disadvantaged, but is especially challenging for older adults.

We submit that this is especially true for those older adults who live in congregate settings such as retirement homes or long-term care homes who would not find the new human rights system easy to use and/or accessible. Because of the lack of alternative living arrangements, these older adults must continue to reside in these places even after filing a human rights application. They have no choice with respect to where they can live and simply cannot decide to move somewhere else on short notice. The fear of threats and reprisal is extremely high in this population, and for good reason, as they are heavily reliant upon the care that is provided to them and, as such, are one of the most vulnerable groups in society.

b) Are you able to get information about the human rights system? Where do you go to get that information? Is the information helpful and accessible?

ACE has noticed that much of the information about the new human rights system is available on the Internet. While many seniors are technologically savvy, ACE submits that a large proportion still rely on print materials. Certainly, this is the case for many seniors living in congregate settings such as retirement homes and long-term care homes. Many of the residents of retirement homes and long-term care homes do not readily have access to a telephone (if at all) let alone a computer with an Internet connection. In addition, ACE has dealt with numerous cases of long-term care home residents having their mail routinely opened and read by staff. This creates a further barrier for older adults who are concerned about reprisal if their allegations of discrimination are concerning the staff or the long-term care home where they reside.

It is our experience that older adults living in Ontario are not familiar with the new human rights system. Many seniors who contact our office are not aware of their rights under the *Code* nor are they aware of how to enforce their rights through the process available at the HRTO. For many seniors and their families, their legal issues are often layered and complex. As a result, it may be more difficult to clearly identify *Code* related issues.

One example of this pertains to the use of motorized wheelchairs in long-term care homes. ACE often receives telephone calls from seniors living in long-term care homes who have been advised by the staff at the home that they are not allowed to use their motorized wheelchairs inside, claiming that it is a safety concern or that it will impact the “environment in the home” and upset those residents who do not require mobility

devices. In many cases, staff from the home have physically taken the chairs from the resident and locked them up due to the homes “policies” or “rules”.

For the most part, seniors who contact ACE for advice on this particular issue do not necessarily see the motorized wheelchair as an accommodation that they require for their disability (even when it is clearly recommended by their physician). Nor do long-term care home operators understand their obligations to accommodate residents to the point of undue hardship. For the most part, even when advice is provided to seniors concerning their rights under the *Code* and the process at the HRTO, many are reluctant to pursue an application for fear of reprisal from the long-term care home staff.

ACE submits that even though it is the senior’s choice as to whether he or she wishes to pursue an application at the HRTO, it remains important that seniors are given the information about the human rights system, the HRTO and how to get assistance should they wish to. It is our opinion that this information is not reaching seniors living across Ontario and especially those who are living in congregate settings or in rural and remote communities. ACE submits that many seniors are not getting important information about the human rights system and about their rights under the *Code*. ACE recommends that more outreach needs to be done in order to reach seniors and that this outreach cannot be accomplished solely through electronic means.

HUMAN RIGHTS TRIBUNAL OF ONTARIO (HRTO)

General Comments concerning the HRTO

The *Consultation Paper* released by the Chair of the Ontario Rights Review 2011-12 states:

Since June 30, 2008, when the Human Rights Code Amendment Act, 2006, came into effect, all claims of discrimination and harassment under the Ontario Human Rights Code are dealt with through applications filed directly with the Human Rights Tribunal of Ontario (HRTO).

The HRTO is an independent administrative tribunal. According to its website, the Tribunal’s primary role is to “provide an expeditious and accessible process to assist parties to resolve applications through mediation, and to decide those applications where the parties are unable to reach a resolution through settlement.”

ACE submits that the change in the human rights system brought about by the *Human Rights Code Amendment Act, 2006*, has not necessarily been of any benefit to seniors living in Ontario. From the calls we receive from older adults, many of them are not aware of their rights under the *Code* nor are they aware of the HRTO and what it does.

More concerning is the fact that service providers across a broad range of sectors that work regularly with older adults appear oblivious to their obligations under the *Code*. In many ways, this is a manifestation of the ageism that pervades the legal system in general and the human rights system is, unfortunately, not immune to this.

Further, the backlog currently at the HRTO with respect to open applications and the time it takes for an application to reach the mediation and/or hearing stage would be prohibitive for many older adults. ACE submits that while the new human rights system has expedited the process to a degree, the time it takes for an application to reach the mediation stage or potentially a hearing is still overly lengthy. For those seniors who may be struggling with health issues and faced with concerns with respect to long-term care home placement, it is not likely that they will pursue an application at the HRTO when their *Code* rights have been infringed. Further, time may not be on their side as their health may be such that they will not live long enough to see the resolution of their matter as it proceeds through the new human rights system.

- a) **The Tribunal currently does not charge a filing fee to applicants or respondents. In future, would you be prepared to pay a filing fee to participate in the Tribunal's processes?**
- b) **The Tribunal currently does not award legal costs to the successful party. In future, if the Tribunal made an unsuccessful party pay (or partially pay) the successful party's legal costs, would you consider that fair?**

ACE submits that the charging of a filing fee to applicants and the awarding of legal costs to the successful party to be paid by an unsuccessful party would be prohibitive for many seniors. Many of the seniors who contact ACE seeking assistance are on fixed incomes through various Federal Government income support programs. The requirement that they would have to pay a filing fee prior to filing an application or the potential that they would be required to pay costs should they be unsuccessful at the Tribunal would be extremely concerning to them and just add to the many reasons why they would choose not to pursue an application at the HRTO.

ACE submits that the implementation of a filing fee and any move to have legal costs awarded following a hearing at the HRTO would have a detrimental affect on all potential applicants, but particularly for those who are most vulnerable and have the least access to resources.

HUMAN RIGHTS LEGAL SUPPORT CENTRE (HRLSC)

ACE submits that the HRLSC could do more in terms of outreaching and providing support, advice, legal representation and assistance to seniors. While the HRLSC does not charge a fee for its legal services, the manner in which it provides legal services

across the province poses a challenge for seniors who are trying to access their services. Specifically, the HRLSC has a telephone helpline that provides legal information and advice to members of the public but for reasons we have mentioned above, this is not necessarily the best method of service delivery for older adults.

ACE submits, however, that while obtaining advice and assistance through the telephone is cost-effective it does not necessarily work for seniors – especially those who have disabilities that may impact their cognitive abilities or hearing. In these instances, ACE submits that having staff arrange to meet the senior at his or her home to have an in-person interview is imperative. In ACE's experience, visiting the senior in their home – whether it be in the community, a long-term care home or a retirement home – in order to provide appropriate legal advice and representation is the only way to ensure access to justice.

We would like to reiterate that many seniors living in long-term care homes and retirement homes do not have access to a telephone, let alone a telephone where they can speak in privacy. Therefore, these residents would not be able to easily access the HRLSC's services. Given that the HRLSC is working on the premise of providing legal advice, representation and assistance to the public, including older adults, who reach the HRLSC's telephone helpline, ACE is concerned that the HRLSC is not reaching those potential applicants who are the most vulnerable and may require the most assistance.

Further, there are some residents in long-term care or retirement homes who reside in "locked" wards, where they not only have access to a telephone, but may have no means of communicating with the outside world without the assistance of a third party. While the legality of such detention is highly questionable, the inability of these persons to access any legal rights is clear unless appropriate methods are put into place.

ACE submits that seniors would be dissuaded from pursuing an application at the HRTO even if they manage to contact the HRLSC if they are advised that the HRLSC's services are "unbundled" or that they will only have legal representation up to a certain stage in the process. Seniors often express concerns about reprisal in terms of loss of housing or loss of healthcare supports. Many seniors would not agree to pursue litigation at the HRTO to enforce their *Code* rights without assurance that they would receive full representation from the HRLSC. The "unbundled" approach to legal services is another reason why older adults would not use the human rights system to enforce their rights.

ONTARIO HUMAN RIGHTS COMMISSION

Prior to changes to human rights system – the Ontario Human Rights Commission ("Commission") had a more significant role with respect to complaints. The Commission

had considerable powers in terms of investigation which it no longer has in the context of individual applications. While there are rules in place now in terms of disclosure, the mechanisms available under the new system by no means replace the extensive powers of investigation previously exercised by the Commission.

It now falls upon applicants to gather evidence to support their own applications at the HRTO. The burden of collecting evidence falls on potential applicants. In ACE's experience, it is rare for potential litigants to have the forethought to preserve or collect evidence in advance of filing an application. For seniors who are vulnerable, the task of gathering evidence is likely insurmountable especially where potential allegations of *Code* violations are being made against health care providers. Many seniors contact ACE and experience frustration when health care providers refuse to provide them with information relating to their own health situation. In these situations, there is a clear power imbalance between the older adult and the health care provider at the outset. ACE submits without the Commission playing the significant role that it previously did, seniors are at a disadvantage under the new human rights system.

Further, ACE submits that the Commission has a greater role to play with respect to promoting awareness of human rights and preventing and eliminating discrimination amongst seniors and those sectors that provide services to seniors.

RECOMMENDATIONS:

1. More outreach by the HRLSC, HRTO and the Commission to older adults, particularly to those who live in congregate settings, to raise awareness of their rights under the *Code* and how to get help in enforcing these rights.
2. ACE recommends that there should be no fee required for filing an application at the HRTO as this would pose not only a financial hardship but be prohibitive for seniors living on a fixed income.
3. ACE recommends that the HRTO should not be allowed to order legal costs as against an unsuccessful party following a hearing.
4. ACE recommends that in cases where the applicants are particularly vulnerable, the HRLSC provide full representation throughout the process at the HRTO instead of on providing "unbundled" services.
5. ACE submits that the HRLSC explore different models of service provisions especially when assisting and representing clients who are seniors.
6. ACE recommends that the Commission undertake public consultations concerning age discrimination in all social areas, but particularly with respect how it impacts seniors who are living in congregate settings, given that the population of seniors continues to increase.
7. ACE recommends that the Commission undertake an education campaign targeting those sectors that provide services to seniors (i.e. long-term care

homes, retirement homes, home care, homemaking services) so that service providers can learn about their legal obligations under the *Code*.