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[NORTHWEST TERRITORIES HUMAN RIGHTS ACT COMPREHENSIVE REVIEW]

A review and analysis of human rights promotion and protection in the Northwest Territories.

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Northwest Territories *Human Rights Act*

Comprehensive Review

April 2015

Executive Summary

The Northwest Territories *Human Rights Act* was proclaimed in 2004. To mark the legislation's 10 year milestone, the NWT Human Rights Commission has undertaken a review of the *Act* and its supporting programs.

The stated objective of this comprehensive review is "to examine, inspect and report on the implementation of the NWT *Human Rights Act* since its adoption and identify and recommend such changes in the legislation and current processes that appear to be necessary in light of the review." Although it is necessary to look at the past and the present, the purpose of the review is to find opportunities to strengthen and improve human rights in the Northwest Territories. The Comprehensive Review Team facilitated a review *process* involving internal and community stakeholders. The findings and recommendations of this report are informed by the knowledge and insights gained through that engagement process. The process itself formed a key part of the comprehensive review. It encouraged and supported system and community stakeholders to participate together in a process of appreciative inquiry and collaborative visioning. Through this process stakeholders played an active role in the comprehensive review of the human rights system.

This document describes the purpose and approach of the comprehensive review, including details about the methodology used to gather information, data and insight into the experience and aspirations of those living in the Northwest Territories. The comprehensive review team undertook a detailed review and analysis of the original purposes and intentions of human rights promotion and protection in the Northwest Territories as envisioned by the *Human Rights Act*.

The Comprehensive Review Team assessed progress in achieving the original purpose, promise and potential of the *Human Rights Act*, namely: Comprehensiveness, Fair Consideration of Complaints, Accessibility, and Addressing Individual and Systemic Discrimination to Promote Social Change in the 10 years since it was passed.

The Comprehensive Review Team details its findings with respect to each of the central objectives of the *Act* and provides specific and major recommendations that members of the Comprehensive Review Team have identified as necessary to address challenges in the current operation and application of the *Act* and realize opportunities for enhanced promotion and

protection for human rights in the Northwest Territories. The specific and major recommendations offered in this report are best understood as an integrated whole. The review team has separated out specific recommendations related to particular issues identified under each of the objectives/themes. The review team has identified some specific recommendations requiring attention even if the major reform recommendations contained in the report are not adopted. However, in the view of the comprehensive review team these specific recommendations are best addressed in tandem with the major recommendations for reform contained in Part IV.

This report reveals and addresses a number of core issues that are critical to the future development of human rights in the Northwest Territories. Most of the specific and major recommendations attend to four major themes: unifying and simplifying the organizational structure with a specific emphasis on better aligning the work of the Director of Human Rights and the Commission; increasing access to human rights promotion and protection through stronger relationships with individuals and communities across the Northwest Territories; integrating a restorative approach into all aspects of human rights work to better reflect the aspirations of the *Human Rights Act*; and placing more emphasis on identifying and addressing systemic discrimination.

Detailed discussion of the necessary legislative and operational changes required to affect such reforms is provided in Part IV of this report. Major recommendations include:

- Change the institutional relationship between the Director of Human Rights and the Commission by bringing them under a single banner "The Human Rights Commission" and single authority and reporting structure. It would require a shift in responsibility for individual complaints from the DHR to the Commission, with the DHR fulfilling certain administrative functions on the Commission's behalf.

- Adoption of a restorative approach throughout the system with particular attention to the dispute resolution at the earliest stages of a complaint.

- Establish and fund community based human rights facilitators to work on behalf of the DHR to handle intake, investigation, facilitate conferences and undertake promotion, education and outreach work for human rights within communities. Fund the existing community justice coordinators (currently within Department of Justice) to do this work. Start initial pilot in approximately 5 sites (one regional centre and four communities) for at least one year. Pilot should begins when DHR office implements a restorative approach to facilitated joint learning and development of model.

- In conjunction with the pilot or after, approach the Canadian Human Rights Commission to collaborate on approach as test case for working with communities in the NWT.

A list of the other specific recommendations in response to the findings discussed within the report is provided in section 7 of Part IV of the report.

Through this comprehensive review and anticipated follow-up, the Northwest Territories has an opportunity to continue in its leading role in the area of human rights, and lead the rest of Canada on such critical issues as access to justice, and reconciliation with Aboriginal self-government through an approach particularly adapted for the unique realities of the Northwest Territories.

PART I: Introduction

Human rights in the Northwest Territories, like elsewhere in Canada, is multi-faceted. At home, at work, in restaurants and stores, and everywhere people interact, human rights are relevant. Most of the time people experience each other in positive ways. Most of the time differences are accepted, and sometimes they're celebrated.

Despite the abundance of good-will and positive intention, most modern societies value human rights too highly to simply hope for equity and inclusion. Following the horrors and atrocities of World War II, Canadians began seeing human rights more than ever as a matter of public interest. The post-war period saw a developing understanding that harms inflicted on individuals created and reflected broader societal problems, harms and injustices. This compelled a rigorous examination of how society could avoid and address the serious harms that arise from the unjust treatment of individuals.

In the north, things are person-dependent

Community Activist

Human rights laws have been developed that seek to encourage, incentivize and compel individuals and organizations to respect others and protect the dignity and rights of all. With its passing in 2004 the Northwest Territories, *Human Rights Act* became Canada's most comprehensive human rights legislation, containing the broadest statement of purpose and the widest protections for individuals. This statute reflects an effort by legislators to incorporate lessons and developments in human rights law, policy and practice within Canada. The NWT *Human Rights Act* represents the aspirations and promise of human rights in Canada, and has become one of the leading exemplars in terms of comprehensiveness.

At the ten year mark of its *Human Rights Act*, the Northwest Territories once again demonstrated leadership and commitment to equality by launching a comprehensive review of the *Act* and its supporting programs. Seizing this opportunity to reflect on the aspirations of ten years ago, and to renew the quest for a strong human rights-respecting society this review comes at a time of significant change within the human rights context in Canada. Provinces and Territories across this nation are grappling with the best approach to take in light of the work that remains to be done. Some, like Nova Scotia, have taken a restorative approach to human rights promotion and protection. Others, such as Ontario and British Columbia, have opted to streamline efforts and focus on efficient processing and adjudication of individual complaints perhaps at the expense of the broader societal change mandate by adopting a direct-access model of dispute resolution.

The stated objective of the comprehensive review was to "examine, inspect and report on the implementation of the NWT *Human Rights Act* since its adoption and identify and recommend such changes in the legislation and the current processes that appear to be necessary in light of the review". Although it is necessary to assess the past and present experience with the

system, the purpose of the review is to find opportunities for strengthening and improving human rights protection in the NWT in the future rather than seeking to find fault with the existing system.

Officials from the human rights system, including the Director of Human Rights and staff, the Commission and the Adjudication Panel, collaborated to define and launch this *Human Rights Act* comprehensive review. This reflects a shared desire among the parties to clearly understand the current situation, and use this knowledge to improve human rights in the NWT. The review aims to support these officials in their efforts by providing expert resources, information, insight and recommended direction for their work. Early and ongoing consultations with officials from the human rights system helped further define and inform the scope of the review.

A. TERMINOLOGY

The *Human Rights Act* creates three distinct parties to serve the purposes of the *Act*: The Human Rights Commission, the Director of Human Rights and the Adjudication Panel. The *Act* is silent with respect to a name or terminology to describe the collective of the three parties. This absence of terminology confounds officials and citizens alike when they seek to reference the three entities. For the purpose of this report, the term human rights system ("HRS") will be used to indicate the collective, while the individual components will retain their legislated titles: the Human Rights Commission ("the Commission" or "HRC"), the Director of Human Rights ("DHR") and the Adjudication Panel ("AP"). The consultants engaged to undertake this review are referenced as the Comprehensive Review Team ("CRT").

B. COMPREHENSIVE REVIEW PROCESS

Purpose and Approach of Review Process

A three-member review team was selected for this work. Team members are Gerald Hashey, Jennifer Llewellyn and Grant Sinclair. Their collective experience includes research and teaching in such areas as constitutional and human rights law, building and managing effective human rights processes, developing and implementing legislation, and adjudicating human rights cases.

The Comprehensive Review Team did not take a traditional approach to this review and evaluation of the human rights system in the NWT nor provide an assessment of its effectiveness simply through a traditional report following an information gathering assessment process. The CRT facilitated a review *process* that enabled stakeholders within and outside the human rights system to actively engage with one another in a collaborative review process. The review process reflected the significance of building capacity within and beyond

the system to consider the strengths and weakness of the human rights system over the past 10 years. It also provided an opportunity to create a shared vision of the future of the human rights system in the NWT.

Every human rights system, program or process relies upon and seeks to organize and structure how people interact with each other. Understanding the strengths, challenges and opportunities of any system relies on gaining insight into the people who populate and interact within it and who the system is meant to serve. The review's methodology relied heavily on the expertise and lived experiences of citizens to understand the needs and nature of human rights in the Northwest Territories. This included those trusted with the responsibility of human rights service, and partners in promoting/securing social justice and community well-being who contribute to the work of seeking, protecting and maintaining a human rights-respecting culture and the healthy social relationships it nurtures.

People are starting to work together to solve complex issues.

NGO Executive

As such, the investment in this review was an investment in a process of appreciative inquiry and collective visioning and not merely an external assessment by outside experts. This report reflects the knowledge and insights generated within that collaborative process considered through the lens of the extensive expertise of the CRT to provide recommendations that are grounded in the ambitions and realities of the North.

Another important principled commitment guiding the review was that the process itself generate a lasting benefit for all involved with it. Knowledge was gathered in ways that distributed that knowledge beyond the members of the CRT. Participants and informants were given space to find and share meaning in their experiences and aspirations.

This engagement afforded an opportunity for those within the human rights system and stakeholders and citizens interested in the work of human rights to connect with one another in a process of reflecting and re-envisioning human rights in the NWT. This is not simply an essential information source for the review. Engagement is crucial for the legitimacy and success of any reform efforts that might result from the review.

The review methodology was comprised of three broad components: Review of Structure and Mandate of the human rights system in the NWT, File and Document Review, and Key Informant Consultations.

Across Canada, human rights protections and processes are the subject of legislator, media, academic, bureaucrat, legal, judicial and citizen attention. The Northwest Territories is no exception. Robust documentation about the human rights experiences of Northerners exists in many forms. This review has been informed by the considerable available documentation. Many of these documents are identified and referenced throughout this report.

Accessing the lived experiences and aspirations of Northerners was crucial to the review process. This was achieved by creating opportunities for individuals to share their knowledge in person, in writing and by phone. Interviews, small group sessions and large group gatherings formed the basis for most of the consultations.

Information for the review was gathered in a way that acknowledged the diversity of participants, and respected the broad and varied way people prefer to communicate. During small and large-group gatherings, a circle process was used. This approach was characterized by inviting participants to enter into a dialogue where sharing and listening were equally valued. It encouraged mutual respect, allowed participants to speak without interruption, and created connections between those present.

Framing the review so that the CRT does not exclusively acquire and hold all of the knowledge and learnings from the process was key to the long-term success and impact of the review itself. This approach was consistent with the education and promotion mandate of the *Act*, and it provided a chance for people to reflect on the system from the perspectives of the purposes and aspirations for human rights protection and not simply from an operational effectiveness and efficiency perspective.

Review Process and Methodology

For this review to be truly comprehensive, information sources needed to be diverse, and the way the information was collected needed to be flexible and varied. The review findings and recommendations are therefore grounded in information and data that was gathered from the following sources:

I. The NWT *Human Rights Act*
II. Inquiry Database, Complaint Data, Files and AP Decisions 2009-2014
III. Key Document Review
IV. Relevant Canadian/NWT Case Law
V. Dialogue and Consultation with System Stakeholders and Public Key Informants

I. Review of the NWT *Human Rights Act*

The Northwest Territories *Human Rights Act* was reviewed to assess a number of elements, including its legislative history, transcripts of the Standing Committee on Social Programs proceedings, statutory objectives, coherence, accessibility, logic, breadth, consistency, intended and unintended impacts, how it is being interpreted and implemented to see whether these interpretations were reasonable or helpful, and finally, the statute's overall comparison to some other Canadian human rights statutes.

II. Review of Inquiry Database, Complaint Data, Files and AP Decisions 2009-2014

The Inquiry Database compiled by the DHR containing statistics for each year 2009-2014 including: number of inquiries by month, area, grounds, community and time spent on each

inquiry was reviewed. The DHR also prepared and provided a data report containing information, chronologically, by file number, date opened, complainant, respondent, area, ground, status (settled, dismissed, referred to AP) and date the Director's file closed. In addition, the DHR provided: a settlement data report showing the date, area/ground, and the terms of the settlement, including financial and other terms. To ensure accuracy to the extent possible the CRT coordinated this information with the DHR's "Adjudication Panel Referrals/Appeals/Judicial Reviews-Status of Files" report.

The CRT conducted a file review focused on individual complaint files for the years 2009-2014. This period was selected to consider the most current data. A random sample of files was selected across the time period and reflecting variations in activity levels on files. The representativeness of the sample: year of the case, duration of the file (opened and closed), ground, area (accommodation, service, employment etc.), region of the NWT and disposition (settled, dismissed, withdrawn/abandoned or referred) was assessed against the general trends and statistics contained within annual reports and other data provided to the CRT. The file review also tracked complaints or concerns about the DHR process; nature of the complaint (i.e. individual or systemic); legal representation; scope of persons involved in the file and remedies requested. Data from the file review and the DHR settlement data were also used to analyze settlements, including the type of complaint, area, region and terms of settlement.

The Human Rights Commission can't hold human rights as theirs.

Community Member

The CRT maintained a sample log and prepared a spread sheet compiling all of this data. The sample was expanded, as necessary, during the course of the review to address any significant anomalies in the sample population. The file review was not intended as a comprehensive statistical or data review. The resource and time intensity of such a review would have been disproportionate to its return given the purpose and scope of the current review. The file review was helpful to provide a textured and grounded sense of the complaints process within the human rights system and to understand and confirm the CRT findings throughout the review process.

The CRT also reviewed the AP hearing decisions (2008-2014); appeals from dismissals of complaints (2007-2008) and decisions from the NWT Supreme Court relating to the DHR and the AP. These decisions were reviewed for issues, time frame from referral to resolution, length and complexity of decisions, presence of legal representation and result, remedy or dismissal.

III. Other Key Document Review

The documents reviewed by the CRT included: Annual Reports of the Human Rights Commission, submitted to the Legislative Assembly since 2009 (including lists of education and outreach activities and programs); minutes and report of the Working Group; public educational materials prepared by the Human Rights Commission available through the office of the DHR; policies and procedures of the DHR and the AP; sample forms and correspondence (including: the DHR Complaint Form; the Database Inquiry Form; The Human Rights Complaints

Process-A Guide for Complainants and Respondents, DHR opinion letter, form for dismissals with the reasons, Notice of Appeal to the AP, Policy and procedures for Early Resolution or Mediation of a Complaint, AP Interim Rules for Pre-hearings and Hearings and Adjudicator Assisted Mediation).

IV. Review of Relevant Canadian/NWT Case Law

Relevant Canadian and NWT case law was reviewed generally and with specific attention to the following issues: test to be applied by the DHR in dismissal and referral of complaints, standard of review applied by AP on appeals from the dismissals by the DHR; standard of review for judicial review of AP decisions; independence of the AP; and validity of s.72 of the *Human Rights Act* establishing an offence and penalty upon finding of discrimination under the HRA.

V. Dialogue and Consultation

i. System stakeholders

Consultations with human rights system stakeholders included teleconferences, bilateral dialogues, exchanges of documents and other information resources. CRT members held five meetings with the Working Group, two meetings with the Human Rights Commission, two meetings with the Adjudication Panel, and three meetings with the Director of Human Rights and staff. In addition, less structured contact with various officials occurred throughout the review period.

ii. Public – key informants

Community engagement was central to the review process. Input from key informants was sought about the current and preferred future state of human rights in the Northwest Territories. For the purposes of this review, a key informant is a person or an organization within the NWT that:

1. Holds an interest or expertise in human rights;
2. Has interacted with the human rights system in some way;
3. Has had their human rights affected by others;
4. Works in areas connected or related to the mandate of the *Human Rights Act*;
5. Supports persons or organizations through a human rights interaction or experience.

Community engagement included individual interviews, written submissions and both small and large-group meetings. Gatherings ranged from those focused on specific experiences and needs of identified groups, to those more generally focused on bringing together participants from varied backgrounds, characteristics and interests. The CRT connected with over 100 individuals and over 25 groups and organizations. Participants were given the opportunity to speak privately with the CRT if they wished and were assured that their identities and input would not be shared with staff or decision makers within the Human Rights System without their express consent. The consultations were designed to help the CRT understand the reality

of human rights in the Northwest Territories, identify priority areas for detailed examination, and tap into the knowledge and insights of Northerners.

Consultation participants were recruited using several methods. Individuals and organizations were invited to self-identify through an on-line invitation for contact, local expertise was engaged to identify and contact community builders, leaders, advocates, and representatives from communities of interest were identified and invited into dialogue. Additional targeted outreach was undertaken to address gaps that emerged from this invitational process.

Consultations provided an opportunity to engage with a broad range of individuals:

1. Aboriginal persons
2. Members of the legal community
3. Religious groups
4. Service clubs and organizations
5. NWT housing officials
6. Members of the LGBTI community
7. Union & employee association officials
8. Employer representatives
9. Chamber of Commerce
10. Seniors
11. Franco-Tenois representatives
12. Youth advocates
13. Community advocates
14. Women's rights advocates
15. Persons with disabilities
16. Immigrant and newcomer advocates.

iii. Collaborative Visioning Workshop

Following the initial community engagement and outreach phase of the review, the CRT invited key stakeholders (representative of knowledge, perspectives and views from the initial dialogues and consultations) together with officials from the human rights system to participate in a facilitated visioning session to explore issues, themes and observations that emerged from the earlier consultation activities. Participants were asked to reflect on their experiences with the existing human rights system in the NWT, provide input and response on a set of key questions and themes that arose out of earlier consultations and contribute to a collective vision for the future of human rights.

This workshop was crucial to the review process because it provided the CRT with a richer sense of whether the original vision and aspirations for human rights in the NWT continues to be shared across the community. From this basis the review assessed the current system and how or whether it is succeeding in meeting these aspirations and the needs of the individuals, communities and organizations within the NWT. The central role of stakeholder and public

input ensured that the review and recommendations were shaped by in the NWT context rather than by more standard externally-generated operational or outcome measures and models that may not be appropriate for the context and circumstances of life in the North.

The visioning session also provided an opportunity to bring together all of the individuals who form the human rights system to engage with each other for the first time in the ten years that the *Human Rights Act* has been in place. Staff from the Director's Office, Commission Members and Adjudication Panel members had not previously reflected collectively and collaboratively on the work of the human rights system, although leadership from these entities had previously been in dialogue. This generated vital insights for the review and marks a significant milestone, in the review team's view, in the evolution of human rights protection in the Northwest Territories.

iv. Comparative Statistical Review

In addition to ensuring that the review and recommendations were informed and anchored in the local knowledge and context the CRT considered the inputs, outputs and outcomes against national data available from other Canadian statutory human rights agencies on complaint numbers, protected areas, protected characteristics, time lines, education activities, and staffing. Although the human rights context is different in each territory and province, this analysis is helpful in identifying trends and outliers worthy of further examination.

v. Targeted Interviews with Key Informants within Canadian Commissions and Tribunals

In addition to considering the human rights system in the NWT within the broader national context of Canadian statutory human rights agencies the CRT undertook a deeper review of the experience of certain commissions and tribunals similar in scope and jurisdiction to the NWT human rights system through targeted interviews with key informants. In particular, the CRT paid attention to the experiences within jurisdictions that have undergone significant reforms in the last few years including Ontario, British Columbia and Nova Scotia. The recommendations in this review are informed by the current context, models and reforms within human rights systems throughout Canada.

PART II:
PURPOSE, PROMISE AND POTENTIAL OF HUMAN RIGHTS IN THE NWT

The CRT carefully reviewed the social and legislative history of the *Act* along with its structure and substance to distill the central purposes, objectives and principles sought. This review identified four central purposes and objectives that originally drove the creation and structure of the system. The *Act* sought to create a comprehensive, fair and effective, accessible system capable of addressing pressing social problems and promoting social change. These founding aspirations and objectives of the human rights system in the NWT anchored the CRT review of the strengths and weaknesses, successes and failings, and opportunities and challenges for the human rights system in the NWT.

These purposes and objectives are consistent with the history and evolution of human rights protection and its aspirations in Canada. The development of broad based human rights legislation extending beyond the early protection in employment through fair practices and similar legislation was an important evolution. Human rights protections expanded to other areas of public interest in equality of access and treatment including accommodation and public service. As well, the application of the Charter of Rights and Freedoms to statutory human rights instruments placed significant emphasis on comprehensiveness as an important ambition of human rights protection.[1]

The desire to ensure fair decision making prompted the move away from internal government enforcement mechanisms toward the development of independent human rights agencies. Subsequent jurisprudence reinforced and heightened the importance and concerns for institutional independence to ensure impartial processes.[2] One of the significant factors influencing the development of administrative agencies to deal with human rights in Canada was a need to provide access and support for parties. In the process, lawmakers rejected other enforcement options including criminal and civil proceedings, favouring instead the creation of more accessible and flexible administrative processes.[3]

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[1] *Vriend v Alberta* [1998] 1 S.C.R. 493.

[2] MacKeigan *v.* Hickman, [1989] 2 S.C.R. 796; Bell Canada *v.* Canadian Telephone Employees Association, [2003] 1 S.C.R. 884; Canadian Human Rights Act Review Panel. *Promoting Equality: A New Vision*. Ottawa: Department of Justice, 2000.

[3] Tarnopolsky, Walter Surma. "The Iron Hand in the Velvet Glove: Administration and Enforcement of Human Rights Legislation in Canada" (1968), 46 *Can. Bar Rev.* 565; Seneca College *v* Bhadauria, [1981] 2 S.C.R. 181.

The creation of these statutory bodies also reflected the understanding of human rights as a matter of public interest that could not be served by processes oriented to private dispute resolution or ascription of individual culpability. The approach to human rights as a matter of public law in Canada was reflected in the integrated remedial and educative mandates of human rights bodies in Canada that existed uniformly until recent reforms in Ontario and British Columbia that delinked and abandoned the public interest in human rights from private dispute resolution.

The development of protection for human rights in the post WWII period was deeply rooted in aspirations to promote and secure a human rights-respecting culture and a recognition of the societal stake in addressing individual human rights abuse. This wider social reform and justice agenda informed the structure and substance of human rights protection in Canada, thereby driving the creation of commissions with educative mandates, and shaping the remedial nature of *Acts* and the shared duty of accommodation between individuals and society. Individuals are to bear their duty only to the point they are able without "undue hardship" at which point the burden of addressing the broader systemic factors limiting accommodation must be taken up through promotion of societal change. The education and public outreach mandates of human rights bodies were intended to create capacity to do this work.

The process is very legalistic and intimidating.

Aboriginal Activist

The purposes and objectives of the NWT human rights system are consistent with the historical development and social and legislative objectives of human rights protection. A review of the legislative history including legislative debates and standing committee submissions, along with a careful review of the substance and structure of the *Human Rights Act* reveals and confirms these as the purposes and objectives the *Act* aspires to reflect and deliver, namely: **Comprehensiveness, Fair Consideration of Complaints, Accessibility,** and **Protection and promotion of human rights to address individual and systemic discrimination and secure greater equality in society**. A brief overview showing evidence of these animating purposes and objectives within the NWT human rights system is helpful to ground the assessment of the system in realizing these goals.

In November 2000, Bill 1, the Northwest Territories *Human Rights Act* was tabled in the NWT Legislative Assembly. MLA Charles Dent, who introduced the Bill, stated that,

> "...in the Northwest Territories, we need modern, comprehensive, human rights legislation, including a tribunal process to ensure fair consideration of complaints. This new legislation must ensure that every resident of the Northwest Territories has equal rights and opportunities without discrimination. Our legislation must also provide the means by which these rights may be enforced and protected. I believe that through consultation across the Northwest Territories and with proper cooperation between all parties, human rights legislation can be proposed that reflects the ideals of our northern society."

Bill 1 was distributed to 115 interested individuals and organizations (including Aboriginal , governments, non-governmental organizations, band councils and municipal councils). In summer 2001, the Department of Justice conducted community consultations in 10 communities and held further consultation meetings with approximately 30 representatives of municipal, Aboriginal, labour and other organizations and societies.

The Bill received Second Reading in the Legislative Assembly on February 22, 2002 and was referred to the Standing Committee on Social Programs for review which reported on its review to the Legislative Assembly on October 22, 2002. The *Act* was passed and came into force on January 1, 2004.

A. COMPREHENSIVENESS OF THE *HUMAN RIGHTS ACT* AND SYSTEM

The NWT *Human Rights Act* clearly reflects the intention to ensure comprehensive protection for human rights within the NWT. Noteworthy in this respect is the Preamble's reference to the Universal Declaration of Human Rights and the "vital importance to promote respect for and observance of human rights in the NWT including the rights and freedoms under the Canadian Charter of Rights and Freedoms and the rights and freedoms protected under international human rights instruments." The explicit reference and endorsement of international human rights is unique among other similar Canadian human rights legislation. While it may not result expanded protection under the *Human Rights Act*), it certainly reflects the purpose and intention that is likely to inform a broad interpretation and application of the *Act*.

The prohibited grounds of discrimination within the *Human Rights Act* also reflect this commitment to provide comprehensive protection including for example, gender identity, political belief and association and social condition. Quebec and New Brunswick are still the only two other jurisdictions in Canada to include social condition as a prohibited ground of discrimination.

B. FAIR CONSIDERATION OF COMPLAINTS

The *Human Rights Act* has created, within the NWT human rights system, three separate bodies, the Human Rights Commission, the Director of Human Rights and the Adjudication Panel. The structure, roles and relationships of the three constitutive bodies within the NWT human rights system clearly reveals the high value placed on independence as a means to ensure fair and impartial consideration of complaints. The rationale for independence in order to balance power to ensure impartiality and fairness is found in the Standing Committee report. Importance was placed on the creation of three separate and distinct agencies in terms

of function; the Human Rights Commission (Commission), the Director of Human Rights (DHR) and the Adjudication Panel (AP). The implications of this emphasis are outlined below.

I. The Human Rights Commission

The Human Rights Commission is comprised of 3-5 members appointed by the Commissioner on the recommendation of the Legislative Assembly. Subject to the particular responsibilities of the Director, the Commission is generally responsible for the administration of the *Human Rights Act* and reports to the Legislative Assembly.

The Standing Committee pointed out that given the Commission's responsibility for promoting the objects of the *Human Rights Act* through education, creating policy guidelines and acting as an advisor on human rights issues, it was necessary to allow the Commission to engage in research on human rights to fulfill the goals of the *Act*.

The initial draft of the Bill had the DHR as a member of the Commission; however, there was concern this would give the DHR too much authority. The Bill was amended to make the DHR secretary to the Commission. The decision to provide the DHR with the authority to make decisions on complaints was designed to promote efficiency in the complaints process. The DHR's decision-making role over complaints initiated by the Commission, made it necessary, in the Committee's view, for the Legislative Assembly to appoint the Director.

II. The Director of Human Rights (DHR)

Anyone claiming a contravention of the *Act* may file a complaint with the DHR (s. 29). The DHR performs a screening function and is obliged to inquire into the complaint. The DHR may accept, dismiss, or defer the complaint (ss. 43, 44) if it is more appropriately dealt with in another proceeding. Once a complaint has been filed or initiated, the DHR is required by s.33(1) of the *Act* to provide assistance to the parties to attempt to settle the matter by agreement unless the complaint is deferred, dismissed or referred for an adjudication by the Director. The DHR does this through early resolution or mediation processes. If the complaint is not settled, deferred or dismissed, the complaint is referred to the AP for a hearing.

The role or function of the DHR in dealing with a complaint was considered by the Court in *Aurora College and Niziol and Boullard* (2007 NWT SCt). In its decision, the Court said that the function of the DHR is to screen complaints. This screening function is not adjudicative but administrative with a low threshold of assessment of merit. The DHR is not to weigh evidence, but rather, make a common sense assessment of the evidence to determine whether the complaint is trivial or vexatious, the threshold in the *Act*. The DHR should consider: if the complainant's version is accepted as true, could it reasonably be considered as evidence of the discrimination alleged and warrant a hearing? This standard was later considered in *Diavik Diamond Mines, 2007 NWTSC*. The Court articulated the standard as requiring reasonable evidence, which, if believed, could substantiate the complaint regardless of the weight of the

respondent's evidence. The respondent's evidence should not be ignored, but to take it beyond the trivial and frivolous threshold in the *Act*, the focus is on the complainant's evidence.

III. The Adjudication Panel (AP)

The Adjudication Panel is an independent agency of the NWT Legislative Assembly. Each member of the panel is an adjudicator appointed by the Legislative Assembly. The AP hears complaints referred to it by the DHR and appeals from the dismissal of complaints by the DHR. An adjudicator may hear an in-person complaint, by teleconference or by written submissions.

The AP is authorized by section 52 (3) of the *Act* to hold pre-hearing conferences at their discretion to "discuss issues relating to the complaint and the possibility of simplifying or disposing of issues" and to assist them in understanding the hearing process. The AP can require parties to attend a pre-hearing conference. Such conferences facilitate AP adjudicator-led mediation to resolve a complaint if the parties agree. Adjudicators can assist parties to resolve complaints without a hearing should they wish to do so.

In its review of the Bill the Standing Committee noted that the adjudication function served by the AP must be separate from the education and investigation roles of the Commission and DHR to promote compliance with the principles of natural justice related to independence and impartiality aimed at ensuring fair process.

C. ACCESSIBLE SYSTEM

There was great concern expressed when the *Human Rights Act* was drafted and debated about the accessibility of the complaint process. Adequate funding of the Commission was seen as a primary issue in addressing accessibility concerns. In addition to adequate funding, many presenters that came before the Standing Committee asked that the Legislature create an arms-length independent advocate position to assist parties through the complaint process. Such an advocate would assist the parties to fill out required forms, gather necessary evidence and support, and prepare the case for presentation. Section 22 (1) of the *Act* reflects concern to provide support where necessary to access the complaint process.

22. (1) The Commission may
(a) appoint the assistants it considers necessary to advocate for or to assist a party in pursuing the remedies available to the party under this Act; and
(b) fix the remuneration, duties and the other terms of appointment of those assistants.

While several presenters suggested that legal counsel should provide this assistance and be available at every stage of the process, others thought that legal counsel should only be

provided at the adjudication and appeal stages of the process. The *Act* leaves this decision to the discretion of the Commission within the resources available to them for legal assistance. The Commission piloted an initiative to enhance legal representation at the adjudicative stage where it deems the complaint raises particularly important issues of public interest. This initiative required and received additional funding from the Legislature because the Commission did not have capacity within existing resources to fund significant legal representation by outside counsel.

The *Act* also addresses the concern that parties be able to access help to resolve their problems and issues by requiring the DHR to support settlement through mediation or other efforts to resolve matters at the earliest stage of engagement with the system. Further evidence of the emphasis and importance placed on accessibility, as an orienting value of the system, is reflected in the use of administrative processes that "in principle" do not require or assume legal representation for parties.

The focus on education and promotion within the *Act* might also be read as a concern for accessibility in its broadest sense. The ultimate purpose of the human rights system is to achieve a society in which members are free from discrimination and are treated with respect and dignity. The education and promotion mandate is focused on social change so that access to human rights is the norm and does not require complaint and remediation.

D. ADDRESS INDIVIDUAL AND SYSTEMIC DISCRIMINATION AND PROMOTE SOCIAL CHANGE

The overarching purpose/objective driving the NWT human rights system and indeed the development of human rights protections in Canada is the aim of achieving a human rights respecting culture in society. The system is aimed at identifying and addressing discrimination and promoting social equality as it presents at individual and institutional/systemic levels. The individual complaint process provides an opportunity to remediate individual harms and, in the process, reveals broader systemic factors and issues that require attention to secure and protect human rights.

The education and promotion mandate of the Commission is clearly focused on this objective. Several presenters to the Standing Committee focused on the importance of giving the Commission the authority to engage in research for the promotion of human rights in the NWT. Presenters also requested that orientation programs to educate employers, non-governmental organizations and the public about the new legislation be added to the Commission's mandate.

Feedback through the Standing Committee process suggested the Commission should have the ability to contract with community groups to deliver education programs designed to eliminate

discrimination and educate on human rights issues. Allowing community organizations to participate in the delivery of education programs was thought to have the potential to increase the number of people educated about human rights. It was also thought important to allow the Commission to design flexible education strategies to meet regional needs. The *Act* allows responsibility for education to be delegated by the Commission to the DHR. Sections 22(3) and 27.1(3) also enable the Commission and the Director to enter into agreements with community organizations for such services.

E. CONCLUSION

The NWT human rights system reflects the commitments and objectives underlying human rights protection historically and still broadly shared throughout Canada. Indeed, the NWT system developed with explicit attention to this historical development and was built upon the best knowledge and practice within Canada when it was created 10 years ago. At the time of its creation, the NWT stood as the most comprehensive *Human Rights Act* in Canada. In the view of the CRT these purposes and objectives remain the most appropriate and fundamental for human rights. Not only are they historically grounded, they continue to underlie national and international human rights instruments and efforts. However, these purposes and objectives are not always reflected or realized in the practice of human rights protection and promotion. A decade later this comprehensive review process examines the extent to which the NWT human rights system has been able to realize these goals through its work and where it might be improved.

PART III:
10 YEARS ON: IS THE NWT HUMAN RIGHTS SYSTEM ACHIEVING ITS PURPOSES, PROMISE AND POTENTIAL?

A. INTRODUCTION

The efforts to develop a human rights system for the NWT and the robust efforts by all the bodies within this system to realize the system's promise and potential for promotion and protection of human rights in the NWT are laudable. Notable throughout the consultation process was the level of commitment to human rights, and the high level of awareness concerning the founding vision that animated the development of the human rights system. There remains a deep passion and commitment for human rights as an integral part of the work to build a just and prosperous society in the NWT. It was also evident through the public dialogues that human rights live as a significant value and objective within community and for different actors and institutions. Human rights are not viewed as the preserve or work of the human rights system alone. This commitment to the value and importance of human rights remains a significant opportunity and resource for the human rights system to achieve its goals and realize a bigger impact in the NWT in the future. Achievement of the system's goals is, however, constrained by the *Act's* current structure, interpretation, and application.

After a decade of development and experience with the human rights system, leaders from each of the bodies within the system recognized the need for review, assessment and reform. This review has been informed by their insights and recommendation and seeks to enhance and support such efforts to make operational adjustments within the system. It also provides an opportunity to consider the need for more significant adjustments to the system beyond the existing structures of the system. The CRT was impressed by the considerable recent efforts of the Process Improvement Working Group to identify challenges and to consider what can be done within the existing structures to address problems and realize greater benefits. This is important work not only for the directions and solutions it suggests but for the frustrations and challenges within the system it revealed. The review took into account the issues identified by the Working Group, examined and assessed the solutions proposed and recommends ways forward.

It is helpful to provide an overview of the Working Group's findings and recommendations as background for the comprehensive review findings and recommendations.

B. CURRENT WORKING GROUP REVIEW AND REFORM EFFORTS

The NWT HRC Process Improvement Working Group (WG) consists of two Commission members, two members of the AP, the DHR and Deputy DHR. The WG was constituted and began a series of meetings in 2013 to discuss the current state of the NWT human rights process and explore process improvement. The WG met thirteen times over the period August 13, 2013-October 2, 2014.

In its 2013-2014 report, the WG identified a number of challenges and problems with the current processes and structure. They acknowledged the current adversarial/legalistic model does not seem to be delivering justice for many parties. Based on their own experiences within the system and with claimants and respondents they were concerned that the process does not fairly or thoroughly resolve human rights issues. Further, the WG noted the current model deals primarily with individual complaints and is not addressing systemic issues. The working group committed in its 2013-2014 report to exploring whether a restorative approach should be used to resolve human rights issues in NWT and, if so, to exploring what such an approach would require within the NWT context.

We need help to build capacities so problems can be avoided or dealt with properly within the workplace or organization.

Business Leader

The WG also considered legislative changes to: raise the threshold for referral to the AP; to give the DHR carriage of complaints; and transfer AP file administration to the DHR.

One of the significant structural issues the WG noted was the role and responsibility of the Commission. The Commission's mandate includes developing and conducting education programs, doing research and promoting understanding and compliance with the *Act*. It also has an advocacy role and the ability to initiate complaints and become a party to complaints before the AP. The Commission does not, however, have a direct role in the complaint process prior to referral to the AP. It is not apprised of the complaints that come to the DHR or of the mediation process/results at the DHR. This makes it difficult for the Commission to fulfill its general obligations under Section 20 of the *Act* for education and promotion but specifically to: "monitor and assess the effectiveness of the administration of this *Act* and report as it considers necessary to the Legislative Assembly" and to advise the Legislative Assembly on matters related to the *Act*.

The overall orientation of the *Act,* to address human rights as a matter of public interest, appears to rest implicitly upon the publicly appointed Commission and its responsibility for promotion and education. It is difficult for the Commission to discharge this responsibility with respect to public interest without some knowledge and involvement with complaints earlier in the process.

At its October 1-2, 2014 meeting the WG identified the biggest issue for the system currently is accessibility, given the number of parties navigating the system without support or representation.

C. CURRENT ISSUES, CHALLENGES AND OPPORTUNITIES

The comprehensive review examined the structure, interpretation, application and operation of the *Human Rights Act* and system in terms of realizing its central purposes and objectives. The analysis and recommendations of this review are primarily focused on how to provide a comprehensive, fair and accessible system for the promotion and protection of human rights in the NWT.

This section provides a detailed description and analysis of our findings on each of these key issues for the human rights system in the NWT: Comprehensiveness, Fairness, Accessibility, and Protection and Promotion of Human Rights. Within each section we provide recommendations directed at addressing particular problems directly related to the particular objective/issue. It is important to recognize, however, that these purposes and objectives cannot be fully understood or achieved in isolation from one another. The major recommendations of this review are focused on the structure and operation of the system as a whole and how it might fulfill the purposes and objectives for which it was created. The major recommendations are contained in PART IV of this report.

I. Comprehensiveness

As mentioned in our review of the purposes and objectives of the *Human Rights Act* we noted that lawmakers paid careful attention to national developments in human rights and sought to include all of the recognized grounds for discrimination in Canada. As a result, the NWT *Human Rights Act* was and remains the most comprehensive in Canada in terms of protected grounds. This is a strength of the *Act* and speaks to the desire for an *Act* that can provide comprehensive protection for human rights in the NWT. While the identification of new grounds is likely to continue and is worthy of constant attention and reflection to ensure protections in the NWT remain comprehensive, in our view the currently listed grounds are sufficient. The CRT feels that efforts should be directed toward exploring and explaining existing protected grounds and areas to ensure broad access to the protection under the *Act* before considering adding additional ones.

The *Act* is similarly broad in terms of the spheres of activity to which protection extends. It protects against discrimination in the areas of: employment, goods, services, accommodation and facilities, tenancy, publication and harassment. In light of this breadth, the very narrow definition of person within the *Act* is curious. The definition extends coverage of the *Act* beyond natural persons to include an "employment agency, employees' organization,

employers' organization and occupational association." The effect of this definition is to leave out of the scope of the *Act*'s application organizations that provide goods, services and accommodations or participation in publication for example unless said organizations are related to employment. This significantly reduces the reach of the *Act*. The CRT could find no example of this limitation being applied to dismiss a complaint. We cannot identify any reason for such a narrow definition. We recommend that it be addressed to include all relevant organizations or institutions. This restrictive application also appears in section 71 of the *Act* with respect to the authority to initiate proceedings against certain persons. These "persons" are also limited to those within the employment sphere.

The *Act* is potentially too comprehensive or broad in terms of the timeline of its application. Section 29(3) of the *Act* provides the DHR with unlimited authority to extend a complaint regardless of its age. This may be generous, considering the NWT has one of the longest open periods for filing a complaint in the first place (2 years). This would allow human rights system resources to be deployed to issues that had not otherwise been considered a priority by the party bringing the issue forward. However, it may also allow for the *Act* to address cases of historical abuse or harassment where we know that the nature of the harms in such cases can cause trauma rendering it difficult for claimants to proceed within time limits. Indeed, the Ontario government has just recently recommended changes to timelines within the criminal justice process in cases of sexual harassment to accommodate this fact. The discretion afforded the DHR in the *Act* is very broad. It would be helpful to determine principles that help structure the use of this discretion. In line with the major recommendations of this review, it is important to exercise this discretion in light of the public interest.

Similarly, there seems to be a potential issue with the breadth of the remedial powers provided within the *Act*. Section 72 (1) provides for the possibility of a charge and summary conviction in addition to the remedial powers provided to the AP under section 62 of the *Act*. This means that under the *Act* it is an offence subject to a substantial fine on summary conviction for any person to contravene the *Act*. This provision is problematic for several reasons. First, there is no process identified within the *Act* as to who and how to commence the summary conviction process. Secondly, section 72(1) imposes guilt before trial yet requires the consent of the Attorney General to commence a prosecution. Third, the courts have consistently held that the purpose of human rights legislation is remedial - to prevent and rectify discrimination and compensate and protect victims, rather than punish moral blameworthiness.[4]) The penalty contemplated by section 72(1) is beyond the remedial scope of the nature and purpose of human rights protection as it is inherently punitive.

The CRT also considered the comprehensiveness of the system in terms of its reach and scope. Our review of the system's activities, including case files, decisions and education and

[4] *Canadian Human Rights Commission v. Taylor, 1990 SCC; Warman v. Warman, 2005 CHRT, 43* and *Warman v. Lemire, 2009 CHRT 26*

promotion activities reveals that it is heavily and narrowly oriented towards the individual complaint process in contrast with the relative lack of focus on systemic issues or on education and promotion (proactive and preventative) work.

The reach of the human rights system is comprehensive within the legislation. It is applicable throughout the Territory excepting where the *Canadian Human Rights Act* applies to a matter within Federal jurisdiction. However, in practical terms, the activities and work of the system are concentrated significantly within Yellowknife. This makes some sense given the relative population size of Yellowknife and the concentration of business and employment in its region. However, even accounting for this fact, the reach of the human rights system seems limited within other population centres and communities in the NWT. This is an issue that the DHR and Commission are aware of and have sought to address through outreach and education activities.

The Annual Reports detail the Commission's efforts to visit communities and provide information and education about the human rights system and how to access it. Other educational efforts have sought to make information available. Services, however, remain concentrated in a single location, which requires complainants from elsewhere in the Territory to send their complaints to the main location to be dealt with. Our consultations and discussions with those within or familiar with the experience accessing the Commission and other government institutions from across the NWT (particularly within Aboriginal communities) suggest that the lack of presence at a community level is impacting their use of the system. This also poses a particular challenge for recent efforts to ensure greater accessibility and support for intake and early resolution when the parties are not able to come to the central offices.

This issue is not unique to the human rights system but, nevertheless, it is significantly narrowing the reach of the human rights system. We understand from discussions with the DHR that there is precedent and willingness on the part of staff to travel to deal with particular complaints. In our view this is helpful but potentially only a partial solution to the problem. It does not address the impact that the lack of presence and connection in community may be having on individuals' knowledge and willingness to file a complaint in the first place. It also has little effect on the proactive and preventative efforts to ensure human rights through promotion and education.

Review Findings:

1. The Northwest Territories *Human Rights Act* is one of the most comprehensive in the country, and its breadth of reach and potential positive impact on the lives of vulnerable Northerners serves as a national exemplar.

2. The discretion provided to the DHR to extend the deadline for filing a complaint is exceptionally broad. Such extensive discretion is usually accompanied by clear and transparent guiding principles, which are absent from the legislation or policy.

3. The definition of person in the *Act* includes an "employment agency, employees' organization, employers' organization and occupational association." This has the effect of leaving out organizations that provide goods, services and accommodations unless the organizations are related to employment. This significantly reduces the reach of the *Act*.

4. Under section 72 (1) of the *Act*, it is an offence subject to a substantial fine on summary conviction for any person to contravene the *Act*. This provision is counter to the accepted remedial purpose of human rights legislation.

Specific Recommendations:

1.	Consider developing principles to guide the use of the Director's discretion to extend a complaint regardless of its age under Section 29(3), particularly taking into consideration public interest.

2.	Amend the definition of persons and Section 71 to broaden application beyond employment-related organizations.

3.	Repeal Section 72(1) of the *Act*.

II. Fair Consideration of Complaints

The *Act* was structured to assure independence in the roles and relationships among the constituent parts of the system: the Commission, DHR and AP. Independence was sought in order to ensure the impartiality required for fair and effective human rights protection. Impartiality refers to the state of mind of the decision maker and the ability to decide with an open mind free from influences that would bias one's view of the parties or the issues.

Individual and institutional independence is essential to prevent interference or undue influence on decision makers. It protects against bias which is key to upholding public confidence in the fairness of administrative agencies and their decision-making procedures. The requirements of independence will vary depending on the role of the institution or decision maker. Administrative tribunals range between those that serve functions more akin to the executive and those that are more judicial in nature. Those administrative bodies that

are closer to the judicial end of the spectrum in their adjudicative functions exercising court-like powers and procedures may require a higher level of independence.[5]

Independence is not, though, a value in its own right but needs to be tailored to what is required in order to secure impartiality to ensure fairness. It is important that the right balance with respect to independence in institutional arrangements be struck so that service of this objective does not adversely result in isolation, silos, system dysfunction and incoherence.

The Process Improvement Working Group's concerns suggest that the right balance may not exist within the NWT system. Roles and relationships are not clearly coordinated, making it difficult to achieve the purpose and objectives set out for the human rights system. The priority placed on the value of independence within the system has created unnecessary barriers to appropriate collaboration and efficiencies. The bid for precision in roles and responsibilities and protection against interference with decision-making within the system has resulted in a lack of clarity and coordination. Independence is achieved through restrictive and sometimes complex legal and administrative structures, which has made it difficult to deploy human resources to provide coherent support to human rights system components. As well, decision-making is disjointed and distributed in a complex manner. Our consultations revealed that individual, institutional and corporate citizens do not understand the existing structure, and prefer a simplified model.

The Commission should ask: "What do you need from us?" "What matters about this?"

Community Member

Concern for a fair system in which parties can have faith in decision makers should be a driving influence on the structure and organization of the human rights system. Close attention to the current roles and relationships of the three bodies that make up the human rights system leads to the same conclusion that has compelled the Working Group – that the system needs adjustment to allow for coherence and collaboration.

a. Commission

Section 20 of the *Act* outlines the main responsibilities of the Human Rights Commission. The Commission's responsibilities are focused heavily on promotion and education.

A review of the Commission's education efforts reflects a fairly narrow focus on promoting the *Act* and the complaint process related to its mandate to "develop and conduct programs of public information and education designed to eliminate discriminatory practices that are contrary to this Act;" (s.20(d)). The Commission's education efforts are not generally focused on the broader promotion of respect for human rights. The description of the Commission's responsibility with respect to promotion within the *Act* may make it challenging to undertake a broader mandate however, since it is express in very general (and somewhat unclear) terms. For example the Commission is generally charged with promoting "a climate of understanding and mutual respect where all are equal in dignity and rights;" (s. 20(a)) and also with

[5] Bell Canada *v.* Canadian Telephone Employees Association, [2003] 1 S.C.R. 884.

promoting "the policy that the dignity and worth of every individual must be recognized and that equal rights and opportunities must be provided without discrimination that is contrary to the law;" (s.20(b)). The CRT found it difficult to distinguish these two provisions and to understand what promoting a policy entails.

Through a review of Commission activities and publications and our consultations these educational activities seem largely focused on providing information about the *Act* and the complaint process. These efforts clearly focus on the Commission's responsibility to promote an understanding and acceptance of and compliance with the *Act* as required by s.20 (e). It is not clear, however, that the focus on the individual complaint process has resulted in the promotion of a climate or policy of human rights in a broad and integrated way within the NWT. One of the most common comments we heard throughout the public consultations reflected a sense that the human rights system is only really concerned with complaints but has little concern for the broader issues of systemic discrimination or inequality.

Perhaps this is related to one of the notable omissions from the Commission's mandate. There is no explicit reference to the Commission's responsibility to protect or assure the public interest. The *Act* implicitly reflects a public law understanding of human rights and the promotion responsibilities in Section 20 point to a public interest mandate yet it is not articulated clearly in the *Act*. The absence of an explicit responsibility related to public interest is particularly problematic given that the Commission can initiate complaints and can elect to become a party to a complaint before the AP. It is unclear from the *Act* under what conditions or for what reasons the Commission could or should elect to do so.

There is also a logistical issue with respect to the Commission's role in the complaint process since the *Act* makes no provision for the Commission's involvement or connection to the complaints process. How is the Commission to know when it should initiate or involve itself in a complaint?

This alienation from the complaints process is also problematic given that the Commission is responsible under s.19 to the Legislative Assembly for the administration of this *Act* and under s.20(e.1) "to monitor and assess the effectiveness of the administration of this *Act* and report as it considers necessary to the Legislative Assembly". It is clear that this responsibility is subject to the responsibilities held by others under the *Act* for administration. However, given the breadth of the responsibilities of the DHR for administration, (section 27(1)(f)) DHR is generally responsible to carry out the administration of this *Act*) it is not clear what remains for the Commission. Nor is it clear how, beyond asking for a report from the DHR and the AP, the Commission could fulfill its responsibility to monitor and assess the effectiveness of the *Act*.

This also generates an odd relationship between the Commission and the DHR because the Commission structurally and practically depends upon the DHR. The DHR is Secretary to the Commission, and the Commission relies on the DHR staff to support or carry out its activities

because it has no permanent staff of its own. Despite this relationship the Commission is responsible for administration of the *Act* and to monitor and assess effectiveness. Yet, the Commission has little access to information and no administrative authority so all it can do is report to the Legislative Assembly any issues that develop. The relationship with the DHR is also difficult with respect to the Commission's discretion to initiate complaints. The Commission has no role or oversight with respect to the complaint process and limited access otherwise to information related to potential complaints so it generally relies on the DHR for advice with respect to initiating complaints. Were the Commission to initiate a complaint it would then go to the DHR to investigate and determine whether to dismiss or refer.

Finally, the lack of involvement in the complaints process makes it difficult to fulfill the Commission's promotion mandate because it cannot provide any review or oversight with respect to the disposition of complaints and, perhaps more significantly, settlements. It is important to acknowledge that given the very low threshold for referral to the AP there would be little opportunity to provide input in the public interest within the current system beyond being able to make better decisions regarding initiating and joining complaints. However, the rate of settlement at the DHR level is significant and there is no mechanism for review or oversight of this significant body of complaints in the public interest.

It is difficult to see how the Commission can discharge its responsibility for promotion through education and reporting activities alone. Along with their education mandate the Commission has the authority to undertake research it considers advisable to promote human rights. The Commission has not engaged in significant research to date although its desire for sound research and data ultimately led to this comprehensive review. While significant independent research projects would be beyond the human and financial resources of the Commission, it would be helpful for the Commission to consider how best to capture information and pursue or support important research questions in conjunction with the work of education and promotion.

Another significant means to fulfill this promotion and education mandate would be through the complaint process by bringing its own complaints or joining others at the AP level. There are significant resource implications for both in terms preparation and representation of such claims. The Commission does not currently have any dedicated staff and has a very limited budget for its activities. The Commission recently received funding for a trial project to provide legal support. Commission intervention in this way is also not likely to have a significant effect in terms of the promotion of human rights given how few cases are actually decided each year by the AP.

The Commission, and indeed the entire Working Group, recognizes these issues with the mandate of the Commission. They have taken some steps within the existing structure to try to improve the situation. The legal aid funding project is one example. Another is the decision that Commission members (initially through a contracted lawyer on the Commission's behalf

and more recently members themselves) would begin attending the pre-hearings at the AP to determine whether the case is such that the Commission should join as a party. This addresses the information gap for the Commission noted earlier. It proved very costly to engage counsel for this purpose. It also posed another process issue since the pre-hearing stage before the AP is late in the complaint process for the Commission to be determining whether it wants to be a party. It causes delays for the other parties if the Commission joins and makes its position and arguments known after the pre-hearing process.

b. Director of Human Rights

In our review of the DHR, we considered the structure of the Office of the DHR and the roles of the DHR and staff. We also reviewed the standard or test to be applied by the DHR in dealing with complaints as set down in decisions of the NWT Supreme Court.

The current staff of the DHR consists of the DHR, the Deputy Director, an administrative assistant and three human rights officers (HRO) with varying responsibilities. Initial contact by a complainant with the office is typically by telephone, email or walk-ins. The inquiry may involve a simple question or may be more detailed. The inquiry is handled by a human rights officer responsible for intake who will obtain contact information and details about the complaint. If the complainant is in Yellowknife or in a close-by community the complainant will be asked to come to the office for a meeting to obtain more information. Often the intake HRO will assist in filling out the complaint form and ask that the complainant review and revise it if necessary and then sign it.

At the intake stage, the officer will assess the complaint to ensure it falls within the jurisdiction of the *Act*. In a case which is not in the jurisdiction of the *Act*, the HRO will advise the complainant that their complaint is not one that can be handled by the human rights system and explain the reasons for this. In some cases, they may direct the complainant to another appropriate agency or process better suited to deal with their problem.

A file review showed that for 2013 and 2014, the files were better organized than before, with separate sections for intake and investigation. The investigation, which is normally by the Deputy DHR, is not extensive but usually has the complaint and supporting facts. The Deputy DHR sends letters to the respondent advising of the complaint and asking for their response, which is then sent to the complainant asking for the complainant's response if there is any. The Deputy DHR's opinion as to dismissal or referral is passed on to the DHR. The separation of the various stages into distinct files under the new filing system has made it much easier to track and follow the complaint process.

The DHR has also made sincere efforts to make the system easier for parties to navigate by developing educational materials to assist complainants and respondents through the complaint process. These include: the Complaint Form, the Human Rights Complaints Process-A Guide for Complainants and the Human Rights Complaint Process-A Guide for Respondents.

An HRO is assigned to investigate an accepted complaint and if they require more information to make a decision to dismiss or go forward with the complaint, it will be requested from the parties. The parties may choose mediation at any time in the process before a decision is made by the DHR. The DHR will appoint a mediator from the staff or from outside the DHR office. Mediation is voluntary and confidential.

The DHR also recently introduced an "Early Resolution Process." If the parties agree to participate they will meet generally in person within 60 days of the complaint being filed to seek an early resolution. This process is a facilitated discussion and is conducted on a "with prejudice" basis. Its aim is to help the parties better understand each other's position and to identify and discuss the issues that need to be resolved and hopefully lead to a resolution. The intention is that even if it does not result in settlement it will assist the parties and the process by clarifying the claims and central issues.

There is lots of retaliation if you come forward... employment is at risk.

Community Member

This has the potential to provide greater access to justice for unrepresented parties because they are able to understand the issues better in order to prepare for the hearing should the case be referred. In order for this process to hold such an advantage for the parties, they must be held to the information they provide within the sessions. Otherwise, the early resolution process could cause significant harms for parties who feel that they were misled or lied to or who are confused about why some information provided to them cannot be shared with the AP at the hearing stage. As it was initially rolled out, the early resolution process was the subject of significant concern from members of the legal profession. Much of their concern relates to the issue of whether information shared is with or without prejudice. It is significant that this provision is less attractive to those with legal representation, who are well positioned to negotiate. This strategic negotiation advantage is lessened if the information and positions taken can be relied on throughout the proceedings.

Another general issue with early resolution and mediation is the general disincentive for parties to engage at the DHR stage of the process. It is perhaps not surprising that counsel would recommend to their clients not to participate in early resolution given the very low threshold for referral to the AP. There is a sincere structural disincentive to take part in any settlement, and particularly one that, if it fails, may have revealed information that weakens ones position in front of the AP, given that most cases will be referred if they are not settled. Attempts to settle then, particularly for parties represented by counsel, are only worthwhile if it is more advantageous in terms of costs and potentially reputation to settle quietly rather than proceed to the AP. If a settlement offer is rejected there is no harm in having tried. If, however, what is shared with the other side can be relied upon later at the AP the strategic advantage is lessened, at least for parties who understand how the process works.

The low threshold for referral affects parties' willingness to engage in the settlement efforts of the DHR. It also has an effect on the investigation conducted by the DHR and thereby on the

support the process provides to parties. Section 41 (1) requires the investigator to prepare a written report for the DHR. The section does not require the investigator to make any findings or recommendations and does not reference any of the factors (in section 44) the Director might consider in determining whether to dismiss or refer. In practice, the investigator's reports often do include recommendations but they only conduct an investigation to the level necessary to establish what is required to meet the very low threshold for referral. Often these limited investigations do not offer a detailed review of all of the facts and make few findings. This reduces information available relevant for settlement, limits information available to parties in preparation for an AP hearing, and makes identification of systemic issues that might warrant involvement by the Commission difficult.

This does not seem to be in keeping with the intentions of the *Act* given the extensive provisions and powers established within the *Act* for investigators to obtain access to information. The *Act* seems to contemplate a more robust investigative process in support of a serious gatekeeping function for the DHR. The judicial interpretation of the *Act* establishing a very low threshold and thus reduced role for the DHR in investigating and assessing complaints requires legislative amendment to alter.

Despite the low threshold for referral, the DHR is responsible generally for the administration of the *Act* (s.27(1)(f)) yet the DHR has no responsibility to consider the public interest in carrying out legislated functions. This is significant because the DHR makes determinations on complaints, provides reports and generally helps the Commission carry out its mandates. It is also an issue with respect to settlement because absent any oversight responsibility the DHR must attempt settlement yet cannot oversee or intervene to ensure that it is reasonable, fair or in the interests of human rights protection and promotion.

As noted in the previous section, the relationship of the DHR to the Commission is worthy of careful attention. In addition to all of the DHR's other responsibilities the DHR serves as Secretary to the Commission. This has the advantage of ensuring information flow between the DHR and the Commission. However, while the reporting relationship flows from the DHR to the Commission the work flow tends in the opposite direction. The Commission has no staff resources and has the authority to delegate work to the DHR.

The DHR is further responsible to generally assist the Commission in carrying out its responsibilities. Given the significant role of the DHR in terms of information and oversight of work it is problematic that the DHR has no advisory role with the Commission. As a matter of practice, it is our observation that the current actors within these roles have worked hard to establish better communication and working relationships than the *Act* provides. The current DHR and staff and the current Chair of the Commission and Commissioners should be commended for making the system work through greater openness and recognition and reliance on expertise where appropriate. However, the functionality of the system cannot rely

on the good will and personal commitments of actors within the system to overcome issues generated by weaknesses in the way the *Act* structures roles and relationships.

The current structure also seems to result in significant and potentially unpredictable workload demands for the DHR. Any increased activities or role for the Commission results in an increase in workload for the DHR and her staff. The *Act* does not make provision for any negotiation with respect to the capacity of the organization. It also leaves the DHR will little control over some of the work staff must undertake despite her supervisory responsibilities. For example, if the Commission decides to pursue a particular idea or direction with respect to education the DHR has no choice but to assign staff to carry out the task. This also creates some challenges in terms of developing capacity and expertise if DHR office staff does not have authority to provide leadership and advice in their areas of work but rather await direction from the appointed Commission members.

c. Adjudication Panel

The hearing process at the AP is very formal, legalized and adversarial. We have reviewed all of the decisions listed on the AP website. In general, the decisions are long, legalistic and written for lawyers or reviewing courts. This is particularly problematic because usually one or more of the parties is self-represented and not legally trained. The AP is aware of the issue and expressed concerns as part of the Working Group and in discussion with the CRT.

The AP does not provide funding to support representation for parties. In fact, in its May 2014 decision in *Portman v. GNWT*, 04/11R, 05/11R, the AP dismissed the complainant's request to have counsel appointed stating that the *Act* gives the right to be represented by counsel, but not the right to have the AP appoint counsel for a party or to require the public purse to pay for counsel. The NWT has limited legal aid clinics and the NWT Legal Aid Plan does not currently fund human rights complaints. As a result parties, particularly complainants, are very often self-represented and must navigate the hearing process themselves.

Given the legalistic nature of the process, this lack of legal representation compromises access to and the effectiveness of the *Act* especially where one party has counsel and the other, usually the complainant, is unrepresented. We also note that it causes significant issues for adjudicators within an adversarial process that generally relies on parties (ideally through their counsel) to present the facts, issues and arguments in their own cases. AP panel members shared with the CRT their concerns with ensuring access and fair process in the face of unrepresented or under-represented parties. The legislative history of the *Act* clearly shows it was not intended to be a process requiring legal counsel to navigate. The AP has significant flexibility with respect to its procedures in order to accommodate less formal or non-adversarial processes. Yet the increasing complexity of human rights law and the involvement of counsel (often for respondents) has resulted in more formal and legalistic proceedings.

The AP also plays a significant role in the settlement of complaints through mediation so that fewer cases go to hearing. This means that fewer cases receive public exposure and receive little input and attention related to issues of public interest. Even in those cases that do go to hearing, absent the Commission joining as a party which seldom happens, it is not clear how the public interest is presented and considered. In discussion with members of the adjudication panel, they indicated that they often try to decide the complaint on the most straightforward issue and do not pursue more complicated issues unless necessary. This may be somewhat helpful in terms of reducing the length and perhaps complexity of decisions but it can mean that broader questions of the public interest at stake in a case do not receive consideration or comment.

The other significant challenge for the AP, given the small number of cases they get each year together with the settlement rate at the AP, is how to build adjudicators' capacity and expertise without regular experience deciding cases. The exposure to cases through pre-hearing and mediation is helpful in this regard. Building capacity and expertise would also be a concern if the threshold at the DHR were raised or if a greater number of cases are settled at the DHR stage. This would mean even fewer cases coming before adjudicators.

The issue of capacity and expertise development for adjudicators warrants further attention in conjunction with any changes in the system. We understand this is not an issue unique to the human rights system. One option that was proposed to us during our consultations was to explore the potential for a unified administrative tribunal model in the NWT. This may be more or less attractive depending upon whether the system embraces a restorative approach that extends to the AP level as well. If so, it might be challenging to integrate such an approach into a unified or amalgamated tribunal model if it is premised on a shared adversarial approach.

As part of the review we examined all of the available case information and data from the AP. This information and data was not as easy to access and analyze as might be expected. The AP has data on its file status from 2004 to 2014, compiled in a document entitled: "Adjudication Panel/Referrals/Appeals/ Judicial Reviews". This document shows file number, complainant and respondent; area/ground; date referred and outcome. This document is not current or complete and had to be cross-referenced with the DHR Complaints Filed data to get current data. Also many of the complaints in the AP document are shown as settled but no record seems to exist of details of the settlement terms.

For those cases that went to hearing and decision there is no data in this document as to the decision or remedy. The only means of assessing this was to review all of the decisions. We understand that information tracking and sharing between the AP and the DHR is currently being addressed by the Working Group so that an up-to-date registry can be maintained. The resulting data will be an important source for future study. Current administrative support arrangements for the AP, which involve support being provided from outside the existing

human rights system resources, may contribute to the difficulties experienced in keeping data and documents up-to-date.

The AP also maintains a website with decisions of the NWT Human Rights Adjudication Panel; Appeals of the Decisions of the Director of Human Rights; Northwest Territories Supreme Court; and, Latest Releases. Under the NWT Adjudication Panel there is a list of decisions from 2008-2014. This website is difficult to navigate. Making the website easier to use would contribute to improving access to the valuable information found in the AP decisions.

Review Findings:

1. The organizational structure of the human rights system is unnecessarily complex and difficult to access and navigate for decision-making and client service. Roles and relationships are not clearly coordinated, making it difficult to achieve the purpose and mandate set out for the human rights system. Administrative services for the AP are delivered in a way that seeks to protect the independence of the AP, but seems to cause unnecessary complexity and inefficiency.

2. The threshold at which complaints are referred to the AP for a hearing is too low to allow the DHR to perform a necessary complaint screening function. As a result, investigations only have to establish what is required to meet the very low threshold for referral. These limited investigations rarely offer a detailed review of all of the facts and make few findings. This impacts access to justice and procedural fairness because it can create a strategic power and information imbalance in favour those with legal representation.

Specific Recommendations:

1.	The organizational structure of the human rights system should be realigned to improve the system's capacity to promote and protect human rights in the NWT. Specifically, the realignment should integrate and align promotion and protection activities under a single entity. Administrative support needs of the human rights system should be closely examined and perhaps enhanced.

2.	The threshold for complaint for referral to the AP should be raised through an amendment to the *Act*. A higher threshold should include public interest considerations and an assessment of the legal strength of the case by the Commission as part of broader recommendations for organizational realignment found in the major recommendations section of this document.

3.	Investigation report requirements should be expanded and clarified. Section 41 (1) directs an investigator to prepare a written report but no recommendation is required. There is no relationship to the findings the DHR may make referenced in Section 44. This enhancement does not require a legislative amendment.

4.	Administrative support for the AP should be provided through the DHR. This would simplify administrative procedures, without compromising the independence of the AP. The current resource allocation for this support should be maintained and transferred to the DHR.

III. Accessibility of the System

Access to justice is a significant issue across Canada and at every level of the justice system. It is not a challenge unique to the NWT human rights system. However, given the aspirations of the *Human Rights Act* as a mechanism for social change, this becomes an issue of fundamental significance for the human rights system. This overarching goal coupled with the express intention of the NWT system to provide support for those most vulnerable by ensuring a place to come for help with their problems compels careful and ongoing attention to the issue of accessibility. The CRT's consultations revealed that citizens across demographic lines describe a lack of understanding of the human rights system, or a fear of accessing the system due to complexity, language or cultural barriers, or concern about resulting retaliation. The rate of self-representation, under representation and literacy/cultural/ language issues create significant barriers to access. Over legalization of the process makes it unattractive and ineffective. As we heard throughout the public consultations, the overwhelming focus of the system on individual complaints has meant limited outreach and activity on issues of systemic inequality.

The focus on service provision in relation to individual complaints is also a challenge given the Commission's single primary location. The CRT consultations suggest that access to and knowledge of the human rights system is significantly dependent on location and proximity to infrastructure. The service provision focus and centralization of operations combine to create additional access issues for those in other population centres and more remote communities. In addition to the difficulty of service provision across the NWT, the challenges of situating human rights protections in the context of Aboriginal rights and self-governance as explicitly recognized in the Preamble to the *Human Rights Act,* is another significant issue of accessibility.

The DHR is clearly aware of and concerned with accessibility issues. They have made several changes to their intake and complaints processes over the three years seeking to improve access, experience and efficiency of the system. Previous to these changes the process generated long delays, required a significant amount of paperwork of complaints, created false

expectations and confusion regarding the status and nature of the investigation and DHR decisions (many parties expected factual findings and thought the Director's determination was the final decision in the matter) and DHR letters were lengthy and complex.

The DHR has made several helpful operational changes within their existing role and responsibilities to improve access and experience of the system including: assigning dedicated HRO to intake so that they can develop knowledge and skills assisting people or supporting them to find help elsewhere if issue is not within jurisdiction; revising the complaint forms, reducing to one form rather than the four previously required; instituting a more integrated team based approach in the office to streamline the processing of files and address unnecessary delay and backlog; managing expectations regarding the function and assistance available through the DHR, for example referring to "assessment" instead of "investigation" wherever possible to more accurately reflect the nature of the inquiry required by the referral threshold; redesigning assessment and decision letters to be shorter and written with a view to accessibility (other relevant materials are provided now as attachments instead of including them within the letters); development of an "early resolution model" as part of a commitment to bring people together and support problem solving at the earliest opportunity.

I need to have confidence in the Human Rights Commission before I would send people there.

Executive Director

The CRT views these as very positive steps but recognizes (as the DHR, staff and WG members reflected as well) the limits posed by the current structure of the system in effecting significant improvement on accessibility. These efforts have certainly increased access to the current system. However, part of the issue of access as we have understood it is not merely barriers to accessing the current services and system but, rather, that the current services and system may not provide access to just outcomes for individuals and communities. This is, for example, at the core of the concerns we heard through the public consultations with the failure of the human rights system to be engaged in addressing systemic human rights issues in the NWT. Indeed, many were concerned that inattention to the systemic nature of inequality also resulted in an inability of the human rights system to provide justice in individual cases because they could not address claims that are reflective of systemic and ongoing social inequality.

Access to justice clearly requires attention to ensure supports to access services within the existing system however, it is first imperative to ensure the system as it is currently structured is capable of providing justice. As the purpose and objectives of the *Act* reveal, human rights are a matter of public interest because they are about much more than private interactions between individuals. Human rights fundamentally concern the ways in which social relationships are structured and experienced at individual, institutional and systemic levels. Justice, in the context of human rights, requires attention to individual incidents and their circumstances, context and causes to understand the institutional and systemic change needed to secure a human rights respecting society.

The WG identified access to justice as one of the most significant issues within the system. Their mandate was to consider what changes to process within the existing system would

enhance and improve the system. In that context it is not surprising that the options they considered are oriented to increasing access within the confines of the existing structure. The WG considered the following possible means of addressing the issue:

1. Provision of legal aid to complainants
   The WG acknowledged that this would only provide a partial solution because complainants may not qualify for legal aid, but may still not be able to afford representation.

2. Carriage of complaint by the Commission.
   The WG acknowledged that implementation would be difficult within the current structure and role of the Commission. They noted the Commission has no staff and would have to develop a bureaucracy to administer the process. There would also be significant resource implications associated with this reform.

3. DHR carries the complaint.
   This would see the DHR contracting lawyers to work in a manner similar to a prosecutor in the courts. DHR staffing would grow by one to enable the office to provide direction to the contract lawyer prosecuting the case. The new position would likely require legal training, but this could also reduce the amount currently being spent when seeking legal advice, and would ensure someone in the office is able to assist with drawing up mediation agreements.

4. Adopt the "restorative process" for resolving human rights complaints.
   The WG felt that this approach holds long-term promise, but since it is unlikely that every complainant could be required to participate (nor would it be desirable to force them for example in sexual harassment complaints), there would still be a need for something similar to the current hearing process. Given the very small numbers of complaints and staffing to undertake resolving complaints, the WG concluded that adopting such an approach would likely increase costs substantially.

5. Use a staff lawyer to represent the Commission.
   Some similar issues noted in 2. above, and if the DHR provides the supervision, then the lawyer would either not be available for mediation, or would have a conflict going to a hearing, which then means a contract lawyer still would need to be used.

After initial review of the options the WG concluded that the preferred approach is "3." above – having the DHR carry complaints. It was agreed all three agencies will lobby the Legislative Assembly to provide funding to support this approach and the Commission would be prepared to advise the Legislative Assembly the $50,000 in additional annual funding received by the Commission for the pilot project should be transferred to the DHR to support the change in approach.

Selecting this option clearly assumes continuation of the current structure. As such it does little to address the most significant issue with respect to access to justice, namely, the over legalization of the human rights system that has generated the need for representation and rendered the process inaccessible to many.

As the major recommendation in Part VI of this review makes clear, the CRT is of the view that more significant change to the system is needed to enhance the justice available within the system. This would alter the nature of the system such that different supports would be more appropriate to ensure accessibility. For example, a system focused less on the adjudication of individual complaints through adversarial processes may not require legal counsel as a means of supporting access. It may, though, require greater investment in facilitators to support parties.

Review Findings:

1. Self-representation, under representation and literacy/cultural/ language issues create barriers to access to the human rights system. Over-legalization of the process makes it unattractive, ineffective and inaccessible. Respondents in human rights dispute resolution often have the benefit of legal representation, but complainants overwhelmingly do not have legal counsel to guide them through the dispute resolution process. Complainants seeking opportunities to improve their circumstances, situations and experiences are required to navigate a legal system that focuses on procedure, precedent and unfamiliar language.

   Citizens across demographic lines describe a lack of understanding of the human rights system, or a fear of accessing the system due to complexity, language or cultural barriers, or are concerned about resulting retaliation.

2. The individual complaint focus makes it difficult to effect systemic and institutional changes.
   During consultations, individuals correctly questioned why they should bear the burden of seeking systemic reforms. Individual complaints and complainants can help identify and understand systemic discrimination, but an intentional focus and resource deployment is needed to go beyond finding remedies for individuals affected by systemic issues.

   The human rights system lacks a structured approach to identifying and addressing systemic discrimination in the Northwest Territories. Human rights, as a catalyst for social change, warrant ongoing attention. It will be essential to develop means of assessing progress and impact toward this goal. Measuring the contribution and impact of the human rights system to this objective will require more than collecting

data on individual cases. Particular attention must be paid to the indicators of success based upon the objectives and goals.

3. There is limited outreach and service to population centres and communities outside Yellowknife. Access to and knowledge of the human rights system is significantly dependent on location and proximity to infrastructure. Although technology and transportation allows the human rights system to connect with outlying communities, the nature of human rights work does not align with a traditional client service structure. Relationships are key to understanding experiences and providing appropriate support and assistance. The reach of current in-person education activities is very limited, and the impact is difficult to measure.

4. There has been lack of significant attention to accommodating human rights protections within the realities of Aboriginal rights and self-governance which are explicitly recognized in the Preamble to the *Human Rights Act*. Human rights promotion and protection activities to-date involving Aboriginal communities have not been adapted to integrate with Aboriginal rights and customs. There has, for example, been little or no consideration of how the largely individual focused understanding and approach to rights within the existing regime fits with Aboriginal law and justice ways that place significant value on the collective rights and community. The current system also leaves little room include traditional or customary conflict resolution and peacemaking knowledge and processes.

Specific Recommendations:

1. Establish an ongoing advisory group of key community, business and government stakeholders to help monitor and evaluate promotion and protection activities, with a focus on community impacts and systemic discrimination. This would need to be supported by the development of evaluation tools and measures that go beyond measuring inputs and outputs. Efforts should focus on evaluating the human rights system's success in achieving or pursuing the objectives for the *Act* that were articulated when it was introduced.[6]

[6] The Nova Scotia Human Rights Commission has developed an evaluation framework that may be helpful in this regard.

2.	Move dispute resolution processes away from the current adversarial/legal model. A new approach should focus on responding to the identified needs of parties, which includes reducing the need for legal counsel, improving relationships among parties, and identifying and addressing systemic issues of discrimination. Depending upon the nature of the processes adopted at the AP there may be a need to revise the role of counsel at pre-hearings contemplated under Section 55 of the *Act*.

3.	Work specifically with Aboriginal communities to identify and develop a role for the human rights system within the framework of Aboriginal self-governance and collective rights. There may also be opportunities to collaborate with the Canadian Human Rights Commission to improve how Aboriginal communities are served.

4.	Increase presence in and connections with communities across the NWT by building partnerships with organizations that are present in those communities. One example would be to partner with community justice committees or coordinators. This recommendation is more fully explored in the Major Recommendations section of this report.

IV. Addressing Individual and Systemic Discrimination and Promoting Social Change

As discussed above, in conjunction with the issue of access to justice, the current human rights system in the NWT is fundamentally oriented in its structure and operations towards individual dispute resolution. This stands in contrast to the original intention underlying the establishment of the *Act* as a means of addressing social inequality in order to improve life in NWT for everyone. The vision that lies at the heart of the *Human Rights Act* and that which we heard articulated and shared by members of the public through the consultations was of NWT as an inclusive and just society.

Human rights are core to the vision of an inclusive and just society, and the hope (and sometimes disappointment) we heard through our consultations was about the Commission's role in promoting and working towards that vision. Key informants identified the need for social change in the NWT that relates directly to human rights opportunities and deficiencies. In its simplest form the question we heard was: where is the Commission on these issues? Where are they while we are working to address systemic inequality that keeps generating the cases of discrimination?

The current structure of the human rights system has led to the focus on individual complaints and the bifurcation of promotion, education and research from the central work of the system. There has been little focus on supporting research and knowledge of systemic issues. This is completely understandable within the current structure. Such work would not have roots or practical application in the current system given the lack of focus on the public interest in

connection with individual dispute resolution. It is within the mandate of the Commission to do this work but they rightly assess that with their limited resources they could make very little difference on broad based social inequality and so focus their efforts on educating about the *Act* and the complaint process.

This speaks to the lack of integration and collaboration within the human rights system (as discussion more fully earlier) but also the lack of partnerships outside the system. The operational service provider model has made outreach and development of collaborative partnerships more difficult. As we discovered through our consultations, other equality seeking and social justice focused organizations do not think of the human rights system as a potential partner in this work because they associate them with the complaints process. Likewise, the human rights system's outreach is generally focused on education about what they do rather than considering the connection of human rights to the issues already attracting attention from coalitions. The Commission also notes that the perception of their role has made some efforts at collaboration more difficult because of a common public view of their role as either a service or funding provider.

Building the partnerships around common concerns and issues will take some time. A concerted effort is needed, however, rather than relying on individual complaints to be a catalyst for systemic responses/social change. The collaborative visioning session revealed significant opportunities for the human rights system in this respect. It was clear to the CRT that the entities and individuals already working toward achieving social change in NWT were eager to have the NWT Human Rights Commission as a partner.

This effort to work more collaboratively to promote human rights and support social change is more challenging within the current structure and bifurcated roles and responsibilities between the DHR and Commission. The separation of promotion and education from the active mandate and public service of the DHR makes building the depth and breadth of relationship with community partners and stakeholders more difficult. The opportunities to build collaboration exist in connection with shared work and responsibility for concrete issues demanding response. The current focus and structure of the human rights system alienates the Commission from such work and the opportunities that it presents. It isolates and abstracts the promotion and education mandate from the concrete harms at individual and collective levels that result from discrimination and inequality.

Review Findings:

1. The human rights system is fundamentally oriented towards individual dispute resolution, with few resources directed toward identifying and addressing systemic discrimination. As a result, individual remedies, through settlement and AP orders, are plentiful but have minimal impact on achieving social change.

2. Knowledge about systemic discrimination in the NWT is limited. As a result, expertise in this area has not developed. Capacity can be developed through research, collaboration and action.

3. Entities and individuals across the NWT who work in their own ways toward achieving social change seek the NWT human rights system as a partner. The Commission, DHR and AP would all benefit from pursuing community partnerships and relationships through enhanced knowledge of community issues and contexts, and increased influence within those communities.

Specific Recommendations:

1. The human rights system should design and implement an approach to identifying and addressing systemic and institutional discrimination that does not rely solely on its dispute resolution process. Elements to consider include:
    a. Working with community groups and individuals to identify and prioritize issues
    b. Researching best practices from other jurisdictions in terms of disrupting systemic patterns of discrimination
    c. Making a consistent effort to identify systemic issues and elements in all interactions with members of the community, and not just within the dispute resolution processes.

2. The human rights system should build stronger relationships with community groups and organizations. The limited resources of the human rights system, and the critical importance of human rights work, compel a collaborative approach to helping society evolve in positive ways.

PART IV: MAJOR RECOMMENDATIONS

Previous sections of this report highlighted some specific recommendations that should be pursued independent of whether more substantial reform is undertaken. However, in the view of the review team, the specific recommendations are consistent with and should be pursued along with or in conjunction with the following integrated set of major recommendations.

The following recommendations cut across the legislative purposes and objectives that drove the design of the current human rights system: Comprehensiveness, Fair Consideration of Complaints, Accessibility and Addressing Individual and Systemic Discrimination to Promote Social Change. Achieving these objectives demands a more fundamental change and a coordinated response.

Focusing on recommendations contained in the previous sections can undoubtedly lead to improved human rights processes and experiences for residents of the NWT. However, the fundamental shifts required in approach to promotion and protection will be difficult to achieve without placing an emphasis on the recommendations contained in this section.

The major recommendations contained in this section will require a general audit of the *Act* to ensure all the related references to the role and responsibilities of the Director, the Commission and the AP reflect the reforms.

A. MAJOR RECOMMENDATIONS

The major recommendations of the Comprehensive Review Team relate to the human rights system more purposefully pursuing the original purposes and objectives of the *Act* by realigning the roles, responsibilities and authorities of the Commission, the Director of Human Rights and the Adjudication Panel, and by creating community capacity for human rights promotion and protection.

A shift in the approach within the human rights system in the NWT to a restorative one is recommended in order to more fully realize its original intentions and objectives. A review of the legislative history and the stated purposes of the *Act* itself indicate clearly that human rights protection in the NWT is considered not merely a matter of public support for private dispute management and resolution but a matter of significant public importance and interest. The nature of human rights issues and disputes as they arise in the public relationships between members of NWT society are matters of utmost importance to the wellbeing and

success of the NWT. This is evident in the promotion and education mandate of the Human Rights Commission.

The current structure of the *Human Rights Act* makes it difficult to fulfill this public interest mandate. As discussed above, as the *Act* is currently structured the Commission has very little role with respect to the handling of individual complaints. While it can join a complaint before the adjudication panel or initiate its own complaint it often lacks information and knowledge owing to the structure of the system in order to utilize these powers to ensure the public interest. As the entry points for the public interest into the process they are inadequate to ensuring the protection and promotion of the public interest in human rights.

In order to fulfill the intentions of the *Act* the CRT recommends a change in the roles and relationships of the Director of Human Rights and the Commission with respect to the complaint process. These changes recognize the importance of the public interest within the complaints process and the significance of the complaints process to the overall mandate to promote human rights in the NWT. It would also provide a more integrated process capable of recognizing and connecting individual cases of discrimination to institutionalized and systemic factors and patterns.

This reform would change the institutional relationship between the Director of Human Rights and the Commission by bringing them under a single banner "The Human Rights Commission" and single authority and reporting structure. It would require a shift in responsibility for individual complaints from the DHR to the Commission, with the DHR fulfilling certain administrative functions on the Commission's behalf.

1. Changes in the Role/Responsibilities of the Commission

The recommended reforms would require a significant shift in the role of the Commission. The Commission is responsible for the overall mandate of ensuring the public interest in the protection and promotion of human rights is fulfilled. It would be helpful if this were made more explicit in the section of the Act detailing the function of the Commission.

The Act currently reads:

20. In addition to its other responsibilities under this Act, it is the function of the Commission
(a) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;
(b) to promote the policy that the dignity and worth of every individual must be recognized and that equal rights and opportunities must be provided without discrimination that is contrary to the law;
(c) to develop and conduct programs of public information and education designed to eliminate discriminatory practices that are contrary to this Act;
(d) to undertake the research it considers advisable to promote human rights and to eliminate discriminatory practices that are contrary to this Act;
(e) to promote an understanding and acceptance of and compliance with this Act;

(e.1) to monitor and assess the effectiveness of the administration of this Act and report as it considers necessary to the Legislative Assembly; and
(f) to advise the Legislative Assembly on matters related to this Act.

As indicated in the earlier discussion of the review findings, the nature of the Commission's mandate to promote human rights is unclear. How is this to be fulfilled and how does it relate to the rest of the work of the human rights system? A revised structure would clarify this relationship and make it possible for the Commission to meaningfully pursue its mandate with respect to promotion. Clarification and expansion of the Commission's role and responsibilities will also address issues of comprehensiveness and access to justice by enabling the Commission to play a more active role in advocating for human rights and addressing systemic issues of discrimination through outreach and collaboration within the NWT.

We recommend that section 20 of the *Act* be amended in the following ways:

1. Add a responsibility to "administer and enforce the provisions of this *Act*"
2. Include an explicit reference to the Human Rights Commission advancing and protecting the public interest through protection and promotion of human rights
3. Clarify sections 20 (a) and (b) to describe integrated promotion mandate. It is not currently clear what is meant by "promoting the policy" nor its relationship to promoting climate within the NWT. Consider one statement regarding promotion. E.g. promote understanding and recognition of the dignity and worth of every individual and the right to be free from discrimination with respect to sharing benefits, opportunities and responsibilities within the NWT. Advocate for, foster and protect a climate and culture of respect for human rights in the NWT.
4. Amend s.20(d) to expand the responsibility regarding research. The Commission should retain the responsibility to undertake research it considers advisable to promote human rights and to eliminate discriminatory practices that are contrary to the Act but should also be mandated to "Conduct and encourage research by persons, associations and organizations actively engaged in and related to the field of human rights."
5. Add responsibilities to:
    a. promote and pursue measures to prevent and address systemic patterns of discrimination;
    b. promote and pursue wherever possible non-adversarial processes to resolve complaints aimed at contributing to the understanding and commitment to human rights among parties;
    c. advise and assist government departments and co-ordinate their activities as far as these activities concern human rights;
    d. advise the Government on suggestions, recommendations and requests made by private organizations and individuals; and
    e. co-operate with and assist any person, organization or body concerned with human rights, within or outside the Territory;

2. Change responsibility for complaints: dismissal, referral and approval of settlements

The organizational structure of the human rights system should be realigned to improve the system's capacity to promote and protect human rights in the NWT. Specifically, the realignment should integrate and align promotion and protection activities under a single entity.

a) Planning and priority-identification for promotion and protection activities should rest with the Commission as it is currently constituted.
b) Operational and financial authority should vest in the DHR or some equivalent role that may be created.
c) The DHR or equivalent should be a non-voting member of the Commission.
d) Integrate and align promotion and protection activities under a single banner and common administrative leadership.
e) The Adjudication Panel should remain at arm's length, with support coordinated through the newly formed body.
f) Section 27(2) identifies the DHR as Secretary to the Commission. This role should be redefined consistent with the recommended role of the DHR with respect to the Commission.

The reformed structure would also entail a change in responsibility and threshold for referral. As indicated in the discussion of findings the current threshold for referral is very low. It creates an adversarial adjudicative default within the system which affects the nature of parties' engagement earlier within the process. It makes it more difficult to provide early supports for parties to address issues and makes it more difficult to integrate the promotion and education mandate of the Commission with the complaint process.

The CRT recommends that decision making responsibility for complaints should rest with the Commission. This would require an amendment to the current *Act* which assigns this function to the Director under sections 44 and 46.

We recommend that these responsibilities be given to the Commission pursuant to their general responsibility for administration and enforcement of the *Act* as recommended above. At the same time we recommend that the threshold for referral to the AP be raised by expanding the basis upon which complaints could be dismissed by the Commission. This would enable the Commission to discharge its responsibility to reflect the public interest in protecting and promoting human rights. Section 44 should be amended to contain a positive obligation to deal with a complaint unless there are grounds for dismissal.

We recommend a provision that reads:
43. (1) If the Commission determines that another proceeding is capable of appropriately dealing with the substance of a complaint, the Director of Human Rights may, at any time

before the complaint is referred for an adjudication under section 46, defer further consideration of the complaint until the outcome of the other proceeding. In this section, "proceeding" includes a proceeding authorized by another Act, a civil proceeding or a grievance under a collective agreement.

44. (1) The Commission shall deal with any complaint filed with it unless, at any time after a complaint is filed or initiated, the Commission determines that it should be dismissed or deferred for the following reasons:

In this section, "proceeding" includes a proceeding authorized by another Act, a civil proceeding or a grievance under a collective agreement.

(a) the best interests of the person or class of persons on whose behalf the complaint was made will not be served by continuing with the complaint;
(b) the complaint is without merit;
(c) the complaint raises no significant issue of discrimination;
(d) this Act provides no jurisdiction to deal with the complaint or that part of the complaint;
(e) the acts or omissions alleged in the complaint or that part of the complaint are not the kinds of acts or omissions to which this Act applies;
(f)the substance of the complaint has been appropriately dealt with pursuant to another Act or proceeding;
(g) the complaint is made in bad faith or for improper motives or is frivolous or vexatious;
(h) there is no reasonable likelihood that an investigation or further investigation will reveal evidence of a contravention of this Act; or
(i) having regard to all the circumstances of the complaint, a hearing of the complaint is not warranted.
(j) the complaint or that part of the complaint alleges a contravention of this Act that occurred more than two years before the complaint is required to be filed under subsection 29(2) or initiated under subsection 29(4), unless the Commission extends the time limit for filing the complaint or that part of the complaint under subsection 29(3).

46. (1) The Commission shall refer a complaint to the adjudication panel for an adjudication if the Commission is of the opinion that
(a) the parties to the complaint are unable to settle the complaint; and
(b) the complaint should not be deferred or dismissed under section 44.

A further amendment would be required to s.29(3) to add to the criteria for allowing an extension to require that it be in the public interest to do so.

The recommended reforms contemplate a merging of the Director of Human Rights and Commission under a single banner and administrative structure. It is important that provision be made within the *Act* for the Commission to delegate its functions to the DHR. Such a power

is contemplated within the current *Act* in Section 22 (5) "The Commission may delegate to the Director any of its powers under subsections (1), (2) and (3)." However, it is limited in scope to matters covered in section 22 subsections 1, 2 and 3 which relate to engaging assistance and advice. A similar provision should be added if the recommended changes to the powers and functions of the Commission be adopted.

In practice, we recommend that the Commission should only delegate responsibility to dismiss complaints where the issues are administrative and do not go to the merits of the complaint. Further, the Director should report, for information, any decisions taken pursuant to their exercise of this delegated power.

Further to the Commission's mandate to protect and promote human rights in the public interest the Commission should be required to approve any settlements reached prior to referral to the AP. As the *Act* is currently structured there is no such requirement for approval of settlements. This leaves settlement of complaints to the discretion of private parties without any consideration of the broader issues of public concern related to the protection and promotion of human rights. It also makes it difficult for the Commission to identify and understand any systemic or institutionalized factors connected to an individual complaint. Finally, the lack of oversight for settlements makes it difficult to assure access to just processes that are not subject to power imbalances reflecting existing inequalities or discrimination.

The Human Rights Commission carries a lot of weight – they hold a forum and different people come – they could be a powerful partner

Community Member

We recommend the *Act* be amended to require that any settlement be referred to the Commission for its approval:
(1) When, at any stage after the filing of a complaint and before the commencement of a hearing before the Adjudication Panel, a settlement is agreed on by the parties, the terms of the settlement shall be referred to the Commission for approval or rejection after consideration of whether the settlement reflect the public interest in protection and promotion of human rights.
(2)Where the Commission approves or rejects the terms of a settlement referred to in subsection (1), it shall so certify and notify the parties.

Furthermore, we recommend that Section 33.3, which directs the Director, the Deputy Director, Commission members, staff members, assistants and advisors and employees of community organizations to not disclose any information obtained concerning a settlement agreement that would identify a party to that agreement, unless that party consents to the disclosure, be amended to allow the Commission to disclose all public interest elements in a settlement, unless the Commission deems that a provision would cause undue harm to a party.

3. Commission role before the Adjudication Panel

The recommendations with respect to a more explicit reflection of the Commission's public interest mandate in its role and responsibilities are consistent with the current provisions with the *Act* that allow for the Commission to become a party before the Adjudication Panel. As

noted in this review, the Commission has not exercised this option often. The Working Group has considered how to support greater involvement of the Commission at the AP in cases where the public interest is considered significant. One of the difficulties with doing this within the existing system is a lack of timely information and engagement with cases. This has made it difficult for the Commission to determine when and if they ought to join or even initiate a complaint. It has also caused some process issues for the AP if the Commission decides to join a complaint after pre-hearing work has already been done. Changing the role of the Commission with respect to complaints allows consideration of the public interest earlier and enables the Commission to determine the nature of their continued involvement with respect to a complaint as it is referred.

We think it is important to be clear either in legislation or policy that in appearing at a hearing, presenting evidence and making representations before the AP, the Commission should adopt such position as, in its opinion, is in the public interest having regard to the nature of the complaint.

Within a new integrated Commission structure, staff within the Commission offices (currently the DHR) would include a legally trained staff person capable of providing advice and support to the Commission. The Commission should also retain the ability to contract external legal counsel to represent its interests before the AP where necessary, for example, if there is an issue of conflict or capacity within Commission staff resources. The Commission should also retain the ability, subject to resource limitations, to provide support for claimants before the AP where they deem it necessary. In the view of the CRT though, the implementation of a restorative approach across the system would substantially reduce the need for legal support in order to ensure access to justice. The use of less legalized processes would enable Commission staff and other community based facilitators to support parties through the system.

4. Changes in the Role of the DHR and Relationship with Commission

Furthering efforts to create a comprehensive, independent, accessible human rights system capable of bringing about social change compels modifications to the role of the DHR. Changes are needed to both accommodate the recommended changes to the role of the Commission, and to better align the role of the Director of Human Rights and staff with the broader purpose and mandate of the *Human Rights Act*.

Sections 23 through 28 of the *Act* outline general duties and construct of the DHR, while Sections 29 through 46 detail the roles and responsibilities of the DHR with respect to human rights complaints. These latter sections articulate the prescribed aspects of human rights dispute resolution in the NWT. The majority of recommendations related to changes to the role of the DHR relate to these sections of the *Act*.

As discussed earlier in this report, significant reform has already been contemplated and undertaken with respect to the dispute resolution function of the DHR. The Working Group has focused the majority of its time on considering and beginning to implement changes. These efforts signal a desire and intention to understand and improve the experience of individual complainants and respondents. The CRT believes that the efforts to date can be built upon, and progress accelerated, by broadening the effort to include examining the broader meaning in the individual experiences of Northerners, and by further adapting dispute resolution processes to reflect and respond to the needs and priorities of those interacting with the system.

Recommendations related to adapting the existing dispute resolution processes are designed to refocus the interaction away from the current adversarial model, to one where the DHR facilitates sharing of perspectives, experiences and aspirations among involved parties. With the current low threshold for referral to the AP, the investigation carried out under Section 35 of the *Act* has become an almost meaningless exercise that collects skeletal information. Indeed, this shift is reflected in the DHR's move to use the word "assessment" rather than "investigation" to ensure reasonable expectations in terms of the nature and scope of the work. Although some reforms are underway, investigation activities do not systematically provide parties to a dispute with insight or understanding that could lead to a change in behaviour or improved experience of each other.

The low threshold for complaint referral to the AP does not compel a scant investigation, but that has been the response by the DHR. Under the current dispute resolution regime, this is understandable. In a system that seeks to settle or adjudicate a matter, investing time and effort in building a shared understanding of an experience may not be as necessary. But, in the opinion of the CRT, neither settlement nor adjudication are the preferred outcomes of human rights work. Nor do these outcomes help fulfill the original aspirations of the NWT *Human Rights Act*. Instead, efforts are best invested in helping individuals and communities explore and learn from experiences. This rarely results from private settlement or imposed adjudicated remedies.

A limited investigation also makes it difficult to discern whether institutional or systemic discrimination may be at play within a complaint. The absence of this insight means the human rights system may only identify systemic or institutional elements well into the dispute resolution process, perhaps even as late as at the AP stage. Furthermore, a matter that settles without an exploration of systemic components may never be identified as having broader interest or meaning to society.

Creating space to allow participants in the dispute resolution process to engage to the best of their ability will require a change in the way they are invited into the process. By placing a priority on strong and personal communication, DHR staff can save time, gain more insights into someone's experience and what matters about that experience, and learn about what

may be needed by those involved to move forward. Concurrently through such a process, parties would gain greater understanding of the situation, the issues at play and needs. This knowledge and understanding could create capacity for the parties to come to a resolution of the matter.

The Nova Scotia Human Rights Commission's restorative dispute resolution model is based on this approach. Over the past three years, that Province has reduced its time lines for addressing complaints by more than 70 percent, settlements are more reflective of what matters about an experience for the parties involved and in terms of the public interest, and the dispute resolution process itself causes substantially less harm to the individuals involved.

The Nova Scotia approach is grounded in a set of restorative principles. These principles have informed practices, policies, procedures and all aspects of program design, management and evaluation.[7] As happened in Nova Scotia, the NWT human rights system could design and implement its own approach to human rights dispute resolution by drawing on restorative principles. These principles resonate with the purposes and objectives animating the NWT human rights system – comprehensiveness, fairness, accessibility and attention to individual and systemic discrimination to secure social change.

The restorative approach adopted by the Nova Scotia Commission is based upon Professor Llewellyn's scholarship. The restorative approach she develops is grounded in relational theory. It takes as its starting point, the centrality of relationships not as a goal or an end point but as a fact of the world that warrants careful and constant attention in understanding and protecting human rights. A restorative approach is defined by its attention to connections (relationships) at interpersonal, group, system or institutional levels that are affecting, or may be affected by, a situation.

From this relational theory framework restorative principles for practice are derived that provide further definition to a restorative approach and its practices and processes without reducing or limiting our understanding to particular models or forms of practice. These principles frame what a relational approach entails without prescribing the practices themselves. These principles, while not an exhaustive list, serve as a helpful guide for a restorative approach.

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[7] These restorative principles are drawn from the work of Jennifer Llewellyn. See for example: J.J. Llewellyn "Restorative Justice: Thinking Relationally About Justice" In J. Downie and J.J. Llewellyn (eds.) *Being Relational: Reflections on Relational Theory and Health Law and Policy* (Vancouver: UBC Press, 2011); J.J. Llewellyn and D. Philpott "Restorative Justice and Reconciliation: Twin Frameworks for Peacebuilding" in J.J. Llewellyn and D. Philpott (eds.) *Restorative Justice, Reconciliation and Peacebuilding* (Oxford University Press, 2014); J.J. Llewellyn et al., "Imagining Success for a Restorative Approach to Justice: Implications for Measurement and Evaluation" 2014 *Dalhousie Law Journal* 36(2) *281.*

i) Relationship Focused

A relational approach is focused on relationships and does not focus only at the individual level. A relational approach directs the focus to the relationships between and among the parties involved. This focus on relationships draws attention to the nature or character of the various relationships involved in or affected by a situation.

ii) Comprehensive/Holistic

A restorative approach is comprehensive and holistic in its understanding and response to issues. A restorative approach does not focus only on a particular incident or issue but requires attention to causes, contexts and implications.

iii) Contextual /Flexible

A focus on relationships requires processes and practices that are flexible and responsive to context. It defies cookie cutter or "add-water and stir" models of practice because they cannot take account of the nature of the particular relationships at stake and the parties involved. For example, there may be different needs in terms of cultural practices or related to the safety and security concerns or the complexity or breadth of the issues or parties involved. All would need to be considered in crafting a restorative process or practice or policy.

iv) Inclusion and Participation

It is important to involve those with direct knowledge of the contexts and relationships at stake to ensure the knowledge and capacities needed to address the harms and build a foundation for a different future. A relational framework invites a different lens on harms and their effects through the webs of relationships in which people lives, it prompts a different way of thinking about how different parties should be connected and involved in a restorative process. Rather than requiring parties and non-parties (for example by-standers or supporters) or outsiders vs. insiders, a relational approach invites more complexity than such binary and adversarial choices. It is not enough to simply *include* those affected or with a stake in a situation. Inclusion must be meaningful to the process and its outcome: *participation* is required within a restorative approach.

v) Dialogical or Communicative

The meaningful inclusion contemplated above through collaborative process requires communication. This is often expressed within restorative literature as a commitment to dialogical processes.

vi) Democratic/Deliberative

The commitment to inclusion and participation through dialogue/communication in a restorative approach is connected to the principles of democracy and deliberation that orient a restorative approach. Restorative processes can ensure greater legitimacy of decisions over traditional adjudicative outcomes through inclusive processes in which collaborative deliberation and decision making on outcomes is possible.

vii) Forward-focused, Solution-focused/Problem-solving

A restorative approach is oriented towards the future – to understanding what has happened in order to understand what needs to happen next with a view to creating better conditions for relationship in the future.

The DHR has already gained some experience moving toward a restorative or relational approach, thanks to improvements to the intake process, and by simplifying and sometimes eliminating paperwork. Where possible, in-person assistance is now provided as people begin their journey through the dispute resolution process. Those conversations explore not only what happened, but what matters about that experience, and what should happen next. This beginning effort is a good point on which to build and broaden a restorative approach across the dispute resolution function.

While positioning the DHR to contribute more holistically to assuring the human rights of Northerners will require changes to legislation and practices, it will also be important to ensure that the broader mandate and role of the DHR is reflected in performance evaluation of the incumbent. Although appointed by the Legislature, the DHR receives little direct supervision or feedback from that body. It is recommended that performance feedback relating to the DHR be provided by Commissioners or the Chair of the Commission, but only if the recommendations related to blending responsibility for complaint disposition and human rights promotion and protection are implemented. Otherwise, the Commission or the Chair of the Commission may not be positioned to evaluate and provide feedback on the DHR's overall responsibilities.

The role and relationship of the DHR with respect to the Commission should undergo significant reform. On the model recommended here, the DHR would become in effect the Executive Director of the Commission. The DHR would continue to hold the administrative and operational leadership role within a now blended DHR/Commission body.

It is recommended that Section 27 (1) be amended to designate the DHR as a non-voting member of the Commission. Currently, the DHR serves as Secretary to the Commission as per Section 27(2). This provision should be repealed. Integrating the DHR as a non-voting member of the Commission will allow for a more effective exchange of information. Furthermore, this

blending of responsibilities will reduce any natural tension that arises within an institution where there are independent and competing bodies. This recommendation acknowledges that the DHR needs a stake in the promotion and protection activities of the Commission that matches the workload that flows from this area of responsibility. It will also serve to assure that dispute resolution activities are informed by promotion and protection efforts, and vice versa.

It is recommended that Section 29(3) of the *Act* be amended to add a requirement that any extension of time granted by the Director not unduly prejudice any party and comply with the public interest.

It is recommended that Section 41(1) of the *Act* be amended to require that a report be provided to the Commission that includes a recommendation with respect to disposition the issue under investigation. This would support Commissioner decision-making regarding file disposition. It is further recommended that by policy or practice, an investigation report seek to identify and assess the nature of alleged harms, and the broader context within which harms may have occurred. This should take place regardless of whether the threshold for referral to the AP is raised.

It is recommended, and Section 36(1) provides ample authority, that complaint investigation practices focus on personal collection of information and experiences and move away from paper-based adversarial methodologies. Where possible, parties to an experience or an issue should be brought together to collect information as collaboratively as possible ideally utilizing a restorative approach. This will require building an investigation approach that suits the unique context and way of life in the NWT. This approach should be designed in collaboration with Aboriginal communities to ensure the default investigation approach respects Aboriginal traditions and rights. This approach serves to also identify whether resolution is possible, which eliminates the need for a distinct and separate inquiry into this question.

As referenced in the previous section, responsibility for complaint disposition that currently rests with the DHR under Sections 43 to 46 should be transferred to the Commission. The DHR would oversee intake and investigation activities and coordinate procedures to place reports and recommendations before the Commissioners for decision. In many models, staff are also available to decision-makers to answer questions about the report. The CRT recommends this model for the NWT.

5. Role and Approach of Adjudication Panel

The major changes recommended will have some implications for the work of the Adjudication Panel.

The increased threshold for referral and more intensive investment in facilitating parties to participate with one another at the intake and investigation stages is likely to reduce the

number of complaints referred to the Adjudication Panel. It is also likely to result in better use of the AP process as cases are referred because the nature of the issues require adjudicative attention or because the parties and the public interest require further assistance and attention. One of the concerns with the use of settlement processes within human rights process is that it might preclude attention to genuine legal issues and thus undermine the development of human rights law through the adjudicative processes. The recommended process would ensure that these issues for which parties require the assistance of legal decision makers and the possibility of appeal to the Courts are referred to the AP.

Ensuring such attention is important for the promotion and protection of human rights overall. It is important to note, however, that the existing system perhaps places an unrealistic burden on the AP process to achieve this goal of legal development and reform. As noted, our review of the AP decisions revealed that often the decisions are made on the most straightforward issues (often procedural) that will dispose of the matter. Decision makers do not deal with more issues than necessary to resolve the matter. Given the burden on individual parties to bring and make their cases at the AP this seems a reasonable approach. The hearings often do not have the benefit of a party representing the public interest in a broader sense, resulting in a more narrow focus on the particular interests and issues of the individual parties.

The Commission needs to go further than raise awareness, its needs to work proactively and with others. It is not just about complaints

Community Member

As a means of achieving legal development and reform the AP may thus be of more limited utility. One of the significant advantages of the restorative approach recommended in this review is that it creates other opportunities to reflect upon the systemic and institutional issues that may reflect the need for law reform beyond what is possible in connection with the adjudication of individual claims. The system also ensures greater involvement of the Commission with complaints so that they can become involved to support the public interest issues before the AP where necessary. This would ensure that the public interest is met in ensuring proper attention is paid to addressing or resolving legal issues related to the protection of human rights.

The reforms would also have the effect of reducing parties' demand for a hearing at the AP as the only means of recognizing and addressing their interests and the public interest involved in a complaint. The parties would be more directly engaged and able to address such issues within the DHR and Commission processes.

Another implication for the AP if the recommendation to adopt a restorative approach to the human rights system would be the use of restorative processes at a pre-hearing stage and where the parties wish in place of the traditional adversarial hearing process. A restorative approach to settlement at the AP could be supported by a facilitator with the advantage that it would not require an adjudicator at the resolution process reducing the problems with conflict given the limited adjudicator pool available to then hear the case if pre-hearing efforts to resolve the matter are unsuccessful. Using such an approach also has the advantage of ensuring a familiar approach throughout the system so that parties come through the

DHR/Commission process more prepared to participate at the AP and with a better understanding of the issues and the process. This would be a change in approach to pre-conference and mediation (it would mean a move away from private mediation). It would enable more parties and interests (including supports and those concerned with the public interest) to be involved in the process. It would resolve a significant tension for the Commission being perceived to have to choose which "side" to support in an adversarial process. It would also significantly address the access to justice concerns exacerbated by an adversarial, legalized process.

The use of a restorative approach could also be made available following the pre-hearing processes where a hearing is still required. A restorative approach to a hearing would entail a more inquisitorial role for adjudicators. Interestingly, access to justice issues are forcing adjudicators into such a position in ways that are uncomfortable because of the overall structure of the adversarial process. We recommend careful attention to the models being developed for restorative approaches to hearings by the Nova Scotia Human Rights Commission. The AP has sufficient freedom to select procedures and rules within administrative law that this reform would not require any legislative changes and could be available as an option to the parties.

In order to ensure the public interest role played by human rights decisions it will be important that the *Act* be amended to require that where the complaint referred to the AP is settled by agreement among all parties, the Adjudicator shall report the terms of settlement in its decision with any comment the Adjudicator deems appropriate. As with the suggested reforms regarding settlement at the Commission level, the CRT recommends that the AP assess settlements from the perspective of the public interest in the protection and promotion of human rights. Consideration should be given to authorizing the AP to reject settlements that do not meet this standard. Furthermore, where the Commission has decided to take a role in a matter before the AP, as a party to the matter the Commission should have the ability to approve or decline a settlement agreement.

6. Create Greater Community Capacity for Human Rights Promotion and Protection.
The change in the role and approach of the DHR required by the restorative approach recommended above could pose a particular challenge for the NWT. The approach places a significant emphasis on bringing parties together and on involving others in the process affected by the matter or who could affect a positive outcome. The inclusive and participatory nature of restorative processes enables them to understand incidents in their broader contexts and understand institutional and systemic issues that might be contributing factors or connected to a particular situation. The more inclusive nature of restorative processes can bring community knowledge and resources into the process to support the resolution and to consider how it might require or inform broader social change. Through this broader engagement of stakeholders and communities, restorative processes offer important

educational opportunities and engage the efforts of community members to promote human rights.

As noted earlier in this report, it is already challenging from an access to justice standpoint for the NWT human rights system based in a single location to support services, let alone, outreach and education in other population centres and communities. The challenge is even greater with respect to Aboriginal communities given the uneasy fit between an individualistic model of human rights and Aboriginal rights and justice ways. The move to a restorative approach to human rights is promising because it is grounded in a relational conception of rights that may be more compatible with Aboriginal communities. In addition, a restorative approach is not tied to a rigid practice model. Its processes are based on restorative principles but are flexible in their implementation in order to be responsive to context. This would enable different communities to work within the principled framework of a restorative approach to develop culturally informed and appropriate processes to respond to human rights complaints.

Doing this well would require presence within and knowledge of the various communities across the NWT. This is not a small challenge for a Yellowknife-based organization. It is not, however, a challenge unique to the human rights system in the NWT. In particular, it is an issue shared with the NWT justice system. Justice also faces the challenge of addressing harms within communities and doing so in a way that reflects the public interest and proactively secures public safety. In response to this access to justice challenge the Department of Justice looked to community justice. It developed capacity within communities across the NWT to resolve justice matters at the community level with the help of community justice coordinators. The human rights system could build upon this existing community justice capacity and resource and expand their role to include promotion and protection of human rights.

A restorative approach to human rights fits well within the frame of community justice. Indeed, it may enhance its current capacity. The addition of human rights to the work of community justice coordinators has the potential to build a powerful community based justice resource and advocate. One of the visions for the human rights system when it was introduced was that it would be seen as a place where people could bring their problems and get help. Bringing human rights into the portfolio of the community justice coordinators enables them to become a more comprehensive resource within communities. They would become the place that people can bring their justice problems even if they cannot identify the exact nature of the problem or harm before they arrive. If an individual feels that there is an injustice that needs to be addressed there would be a community resource to help.

This community based resource would then determine where the matter belongs in terms of the justice systems and institutions. But more importantly for the people coming for help (who often do not care which system responds) the community justice coordinator could facilitate a

process to respond. That process may be a restorative process within the human rights system or a restorative/community justice process for other justice matters. In both cases there would be sufficient scope for the processes to reflect the cultural traditions and values of the community.

The other significant opportunity this model presents is the capacity and expertise in human rights that would be developed at a community level across the NWT. Community justice coordinators would then be a significant resource within community for human rights education and promotion. The coordinators' work would not simply be to process individual complaints or cases but to be a proactive advocate and resource for human rights in the community. This would include working with others to understand and address the systemic and institutional barriers to human rights within communities. Furthermore, this model would have the potential to build knowledge and capacity not only within communities but within the system itself.

The entire system would benefit from the knowledge and insights gained by community justice coordinators learning what is required to promote and protect human rights within diverse communities and contexts. As they animate and innovate human rights practices and processes (consistent with a restorative approach) they will generate a body of knowledge within the system about human rights, their meaning and protection that can be shared as a significant resource throughout the NWT and beyond. The deep community level engagement this model makes possible is consistent with the mandate of the human rights system to promote human rights throughout the NWT.

The proposed expansion of community justice coordinators' mandate to include human rights would also secure and stabilize this resource within communities because it would increase the positions from half to full time, thereby increasing the capacity on both fronts and making it more likely that the positions will attract and retain talented individuals who can develop and increase their connections, expertise and skills over time. This would be a significant investment in community but also in human rights. It is an investment, however, that is more likely to impact access to justice at a fundamental level across the NWT than similar investments in legal services to assist complainants to navigate a legalistic process.

The DHR would have to support and coordinate the work and fulfill the administrative and oversight functions needed to ensure fair access to justice. The office would also provide a similar role within Yellowknife with respect to complaints and to address systemic issues through community collaboration and outreach. For these reasons the CRT recommends the following:

1. Create community based human rights facilitators that would work on behalf of the DHR to handle intake, investigation, facilitate conferences and undertake promotion,

education and outreach work for human rights within communities. Fund the existing community justice coordinators (now half time – over to full time) to do this work.

a. Details of this model would have to be worked out in collaboration with the current community justice program within the Department of Justice. Some adjustments may be required in terms of how the current funding, selection and employment arrangements are structured. For example, community justice coordinators are currently employed through community governments or organizations by way of a contract arrangement that provides funds in exchange for service provision. Given the nature of human rights protection it is important that the position be independent of community governments and organizations. However, it would be very important that communities play a continuing role in selection of community justice coordinators because they will have to have the trust and respect of the community in order to work well.

b. It will also be important to provide support (either to co-facilitate or facilitate) processes when the community justice coordinator has a conflict. Given the nature of the role and the restorative approach to the work it is desirable for the coordinators to be connected to the community and to have knowledge of the parties and the issues. Impartiality, the Supreme Court reminds us, does not require an empty mind but an open mind.[8] It is only where the coordinator does not feel he/she can support all parties within the process that a different arrangement should be made. Parties can always contact the DHR directly if they have such concerns and the matter can be worked out collaboratively with the coordinator with due care for the ongoing relationships in the situation. It is also important to acknowledge that the role of a facilitator is different from that of a decision maker in ways that creates less of an issue with respect to impartiality.

   Purposes and advantages of this model:

   i. creates and invests in capacity within communities
   ii. builds stronger relationships between communities and the HR system (making it more comprehensive in reach)
   iii. supports meaningful and expansive promotion of human rights within communities
   iv. addresses access to justice issues
   v. addresses current retention issues with ½ time community justice coordinators by investing in full time positions for greater stability
   vi. builds a common justice resource in communities

[8] R. *v.* S. (R.D.), [1997] 3 S.C.R. 484.

vii. respects Aboriginal rights and self-governance by developing and applying human rights within the NWT in a way that takes account of Aboriginal knowledge and traditions about law and justice. There will need to be mutual learning and agreement about what process principles and elements must be met but while giving scope for different processes that reflect community knowledge and traditions

viii. invests in meaningful outreach and promotion of human rights across the NWT and in a way that is responsive and relevant to communities (not simply messengers for the system – but provide essential knowledge about opportunities and challenges for human rights in NWT)

2. We recommend an initial pilot involving approximately 5 sites (one regional centre and four communities) for at least one year. If the pilot begins at the same time as the DHR office implements a restorative approach they could jointly engage in learning about and developing the model. It would be helpful to establish a virtual learning community among the pilot sites and the DHR so that they can support and encourage one another. Coordinators would not simply take on service provision with respect to human rights complaints but would work collaboratively within their community to host community conversations about human rights, what they mean and how they are understood by the community, how they are relevant to important issues and relationships within community and how they might be improved within community. This work would inform the work of the coordinator but also build their knowledge and capacity for the work within the community.

3. An evaluation framework for the pilots (including Yellowknife) should be developed. It is important that the framework reflect the goals of the human rights work viewed restoratively and not merely assess this work against the indicators of success for the human rights system previously. The definition of success should be established in consultation with the communities involved. Then appropriate indications of success and ways of measuring them can be determined.[9]

4. In conjunction with the pilot or following it, we recommend that the NWT approach the Canadian Human Rights Commission to collaborate on this approach as a test case for how they might work within communities in the NWT. This would have the advantage of creating common capacity within communities on human rights and overcome the significant problems regarding understanding or navigating the jurisdictional divides. The NWT would also become a national leader in opening up

[9] J.J. Llewellyn et al., "Imagining Success for a Restorative Approach to Justice: Implications for Measurement and Evaluation" 2014 *Dalhousie Law Journal* 36(2) *281.*

questions about how human rights can respect and support Aboriginal rights and self-governance.

7. Overview of Specific Recommendations

The following specific recommendations are detailed earlier in the report and reproduced here for easy reference. In the CRT's view these specific recommendations should be implemented regardless of the decision with respect to the major recommendations for system reform. To be clear, however, in the CRT's opinion these specific recommendations will be best served by implementation in conjunction with the major reform recommendations discussed above.

Comprehensiveness

1. Consider developing principles to guide the use of the Director's discretion to extend a complaint regardless of its age under Section 29(3), particularly taking into consideration public interest.

5. Amend the definition of persons and Section 71 to broaden application beyond employment-related organizations.

6. Repeal Section 72(1) of the *Act*.

Fair Consideration of Complaints

4. The organizational structure of the human rights system should be realigned to improve the system's capacity to promote and protect human rights in the NWT. Specifically, the realignment should integrate and align promotion and protection activities under a single entity. Specific recommendations that expand on this are contained in the Major Recommendations section.

5. The threshold for complaint for referral to the AP should be raised through an amendment to the Act. A higher threshold should include public interest considerations and an assessment of the legal strength of the case by the Commission as part of broader recommendations for organizational realignment found in the major recommendations section of this document.

6. Investigation report requirements should be expanded and clarified. Section 41 (1) directs an investigator to prepare a written report but no recommendation is required. There is no relationship to the findings the DHR may make referenced in Section 44. This enhancement does not require a legislative amendment.

7. Administrative support for the AP should be provided through the DHR. This would simplify administrative procedures, without compromising the independence of the AP.

Accessibility of the System

8. Establish an ongoing advisory group of key community, business and government (Aboriginal and Territorial) stakeholders to help monitor and evaluate promotion and protection activities, with a focus on community impacts and systemic discrimination. This would need to be supported by the development of evaluation tools and measures that go beyond measuring inputs and outputs. Efforts should focus on evaluating the human rights system's success in achieving or pursuing the objectives for the *Act* that were articulated when it was introduced.

9. Move dispute resolution processes away from the current adversarial/legal model. A new approach should focus on responding to the identified needs of parties, which includes reducing the need for legal counsel, improving relationships among parties, and identifying and addressing systemic issues of discrimination. Depending upon the nature of the processes adopted at the AP there may be a need to revise the role of counsel at pre-hearings contemplated under Section 55 of the *Act*.

10. Work specifically with Aboriginal leaders to identify and develop a role for the human rights system within the framework of Aboriginal self-governance and collective rights. There may also be opportunities to collaborate with the Canadian Human Rights Commission to improve how Aboriginal communities are served.

11. Increase presence in and connections with communities across the NWT by building partnerships with organizations that are present in those communities. One example would be to partner with community justice committees or coordinators. This recommendation is more fully explored in the Major Recommendations section of this report.

12. The human rights system should design and implement an approach to identifying and addressing systemic and institutional discrimination that does not rely solely on its dispute resolution process. Elements to consider include:
    a. Working with community groups and individuals to identify and prioritize issues
    b. Researching best practices from other jurisdictions in terms of disrupting systemic patterns of discrimination
    c. Developing a lens through which all interactions are viewed so systemic issues and elements are recognized when presented

13. The human rights system should build stronger relationships with community groups and organizations. The limited resources of the human rights system, and the critical

importance of human rights work, compel a collaborative approach to helping society evolve in positive ways.

8. Implementation Advice and Recommendations

This comprehensive review was undertaken by the CRT in the knowledge that few additional resources may be available to support implementation. The CRT also understands the legislative reality of the NWT, and other Territories and Provinces, with respect to the effort and time it can take to bring about legislative amendment.

Although several recommendations have been made with specific regard to amending the *Human Rights Act*, much can be accomplished if legislative amendment is not a timely or available option. The spirit of the recommendations, which can be summed up as promoting community engagement, the pursuit of public interest issues, and integrating restorative approaches into all aspects of the human rights system and its work, can be achieved absent legislative amendment, albeit not as effectively or robustly.

Bringing about change to an entire system demands a deliberate and methodical approach. Efforts to reform the human rights system can look to restorative approaches and principles for guidance. These principles, which are characterized by a focus on relationships, involving individuals who are most affected by an issue, looking to the future while understanding the past, and always understanding contexts and causes, can help shape the way change is brought to the human rights system. As an additional benefit, the very act of approaching this work restoratively will better position system players to approach their work restoratively.

An example may help to illustrate the value of a restorative approach to this work.

"Nothing about us without us" is a phrase often repeated by individuals and communities who seek a role in designing their own futures. So should it be in the NWT with regard to any changes to the *Act*, the human rights system or its impact on Northerners. A collaborative approach to next steps is advised, as a means of ensuring the best possible decisions are made, that knowledge and expertise of constituents is acknowledged and accessed, and that skills and relationships are formed that can help to perpetuate the work of human rights well into the future. Potential and recommended collaborators include individuals who receive protection under the *Act*, front line staff of the human rights system, business, community and Aboriginal representatives, government officials and members of the legal community.

It is important to understand the difference between the approach referenced here, and the concept of consultation. Although consultation is critical to decision-making when public needs or interests are at play, consultation does not equal engagement or involvement.

In addition to the initial learning that will be needed to move forward, it will be important to develop knowledge and skills on an ongoing basis. Although skills and practices are a necessity,

of even more value is developing deeper understanding of the purpose and approach. It will be necessary to consider how to support ongoing learning and reflective practice.

Knowing where to start and what to do next can seem daunting from a distance. However, the Working Group has already begun developing its own priorities and strategies. If recommendations from this report are accepted and adopted, the Working Group is well positioned to coordinate a collaborative process to assess for priority, achievability and impact, and then lead implementation.

Finally, every planning activity should consider evaluation at its outset. Establishing clear objectives naturally requires clarity around desired outcomes. It will likely be that the most desired outcomes are also the most difficult to measure or evaluate. Nova Scotia, for instance, is finalizing its own evaluation framework which seeks to understand the impact of its new restorative approaches on the lives of those it intersects with. After eighteen months of planning, the model is being finalized, and seeks to assess any change in behaviour, any change in relationship between parties, or any increase in knowledge or understanding of human rights that can be attributed to the restorative process. This approach to evaluation requires a more sophisticated framework than the traditional approach of counting inputs, outputs and measuring time lines.

About the Review Team

The Northwest Territories *Human Rights Act* Comprehensive Review was carried out by a team of three individuals whose collective experience includes teaching in such areas as constitutional and human rights law, building and managing effective human rights processes, developing and implementing legislation, and performing human rights adjudication.

Jennifer J. Llewellyn is the Viscount Bennett Professor of Law at Dalhousie University's Schulich School of Law in Halifax, Nova Scotia. Her teaching and research is focused in the areas of relational theory, restorative justice, peacebuilding, truth commissions, international and domestic human rights law and Canadian constitutional law. She has written and published extensively on the theory and practice of a restorative approach to social and political institutions in both transitional contexts and established democracies.

J. Grant Sinclair is a lawyer, and past Chair of the Canadian Human Rights Tribunal where he directed and developed all Tribunal policies and procedures relevant to hearings and mediations. Grant also has extensive consultation experience, and is a public speaker and lecturer. He has hosted officials from various countries' human rights organizations to discuss human rights and compare Canada's procedures and experience with theirs. Most recently, he has engaged with officials, representatives of NGO's, Cabinet ministers, ombudsmen and judges working in the human rights arena in Costa Rica and Brazil.

Gerald J. Hashey is a senior official with the Nova Scotia Human Rights Commission, where he leads the intake and resolution teams. Gerald was the architect of ground breaking reforms that introduced restorative approaches into human rights dispute resolution. The result has been transformational for staff and clients alike. He has extensive experience designing and directing province-wide programs, and regularly advises local, national and international government bodies and agencies on the use of restorative approaches.