



***Submission of the Canadian  
Human Rights Commission  
to the Committee on the Elimination of  
Discrimination against Women***

February 2013

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## 1 THE CANADIAN HUMAN RIGHTS COMMISSION

The Canadian Human Rights Commission (CHRC) is Canada's national human rights institution (NHRI). It has been accredited "A-status" by the International Coordinating Committee of National Human Rights Institutions (ICC), first in 1999 and again in 2006 and 2011.

The CHRC was established by Parliament through the *Canadian Human Rights Act* (CHRA) in 1977.<sup>1</sup> It has a broad mandate to promote and protect human rights. This includes providing access to a complaints process as well as a dispute resolution process.

As part of the CHRC's work, it has taken action to protect the human rights of vulnerable groups by investigating complaints, issuing public statements, tabling special reports in Parliament, and representing the public interest in the mediation and litigation of complaints. The CHRC also submits shadow reports to UN treaty bodies.

The Constitution of Canada divides jurisdiction for human rights matters between the federal and provincial or territorial governments. The CHRC has jurisdiction pursuant to the CHRA over federally regulated service providers and employers. Provincial and territorial governments have their own human rights codes and are responsible for provincially/territorially regulated sectors.

The CHRC fully supports observation of the rights and obligations enshrined in the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW). It welcomes the development of a General Recommendation on the important issue of access to justice.

The following submission to the Committee on the Elimination of all forms of Discrimination Against Women (the Committee) is focussed on how to improve access to justice for women in the context of NHRI protection processes, and how to increase the range of domestic avenues available through which women can assert their rights and find effective remedy. It is based on a recognition that those facing discrimination suffer more acutely if they lack access to justice. Accordingly, States and all actors should work with those who are most vulnerable to identify and address barriers to access to justice.

Within this context, the CHRC has focused on the barriers to access faced by Indigenous women<sup>2</sup>, who are among the most vulnerable people in Canada. Throughout this submission reference is made to relevant provisions of the UN *Declaration on the Rights of Indigenous Peoples*, which provides "the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world"<sup>3</sup>. It is recommended that the Committee refer to the relevant provisions of the Declaration when developing its General Recommendation.

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<sup>1</sup> *Canadian Human Rights Act*, RSC 1985, c. H-6, s. 2.

<sup>2</sup> Throughout this submission, the terms 'Indigenous' is used to refer to the first peoples of the land, or "Aboriginal peoples of Canada" as defined by section 35 of the Canadian Constitution, who include Inuit, Metis and Indian or "First Nations" (both status and non-status) peoples.

<sup>3</sup> *UN Declaration on the Rights of Indigenous Peoples*, article 43.

## 2 LEGAL, INSTITUTIONAL AND STRUCTURAL CHALLENGES

The CHRA provides the CHRC with a broad mandate to promote and protect human rights. The CHRC has a mandate to receive complaints from individuals or groups of individuals – or to initiate a complaint itself – where there are reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice in the course of employment or the provision of a service.

The CHRC has developed and uses a comprehensive dispute resolution system, where complaints can be voluntarily mediated before a complaint is officially filed or before it is investigated, as well as at any time during the investigation of the complaint.

At any time after the filing of a complaint, the CHRC may request that the Canadian Human Rights Tribunal (CHRT), a quasi-judicial body, institute an inquiry into the complaint. The CHRT may then issue a decision which is binding on the parties to the complaint. During CHRT proceedings, the CHRC does not represent the complainant, but rather represents the public interest.

The following submission highlights the barriers women may face in accessing the CHRC's processes. It provides examples of the measures that the CHRC has taken to address these barriers, as well as examples of relevant provisions of the CHRA. We offer these examples for the Committee's consideration as good practices.

### 2.1 Institutional and Procedural Obstacles

#### *Accessibility of documents*

To effectively access the protections that CHRC processes provide, potential complainants need access to information about those processes in a way that they understand<sup>4</sup>.

The CHRC has taken steps to address this challenge, including by:

- improving its use of “plain language” to ensure that its materials use a level of language that is appropriate to the general public;
- translating the publications available on its website into both official languages of Canada (English and French), as well as into some Indigenous languages; and
- re-designing its website to ensure that it is accessible to persons with disabilities, including by making its publications available in multiple formats.

The CHRC also offers assistance in drafting a complaint to individuals whose literacy or disability poses a barrier to accessing the CHRC's processes.

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<sup>4</sup> *Supra* note 3, articles 13 and 16.

### ***Effective protection of complainants***

Complainants attempting to access the protection offered by the CHRA sometimes face retaliation for asserting their human rights<sup>5</sup>.

To address this challenge, the CHRA provides that it is a discriminatory practice for a person against whom a complaint has been filed, or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim of the discriminatory practice<sup>6</sup>. Additionally, the CHRA indicates that a person is guilty of an offence who threatens, intimidates or discriminates against an individual because that individual has made a complaint or given evidence or assisted in any way in respect of the initiation or prosecution of the complaint<sup>7</sup>.

### ***Referral to alternate process***

Under the CHRA, the CHRC can refuse to deal with a complaint where the alleged victim ought to exhaust grievance or review procedures otherwise reasonably available. In practice, the CHRC regularly refers complaints to other processes. The CHRC is careful to avoid such referral in cases where it may not be appropriate, and may impact upon the complainant's ability to receive appropriate redress.

Accordingly, the CHRC ensures that such referrals are not made where there are doubts about the fairness or efficacy of the other process, or where there is a need to proceed with the matter without delay, for example, where:

- the complainant experienced physical violence or is likely to experience physical violence<sup>8</sup>;
- a complaint of harassment has been made and the harassment is ongoing such that there is a risk of continuing harm;
- the complainant is in poor health or has a disability which is life-threatening or which seriously affects her ability to carry out day-to-day activities with dignity;
- the complainant has suffered, or may suffer, serious economic loss should the CHRC not intervene immediately; and
- the complaint is of systemic discrimination and it is in the public interest for the CHRC and the Tribunal to deal with it<sup>9</sup>.

The CHRC has also developed guiding principles for developing community-based dispute resolution processes. These principles include: 1) making the process accessible; 2) obtaining community input about the process; 3) making sure the decision-maker knows about human rights; 4) ensuring impartiality and independence; 5) allowing people to bring a representative;

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<sup>5</sup> This is particularly the case for Indigenous women facing violence. See *supra* note 3, article 22(2) which provides that States and Indigenous peoples shall take measures to ensure, "that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination".

<sup>6</sup> Section 14.1.

<sup>7</sup> Sections 59 and 60.

<sup>8</sup> *Supra* note 3, Article 34.

<sup>9</sup> Canadian Human Rights Commission, Internal Policies: Policies and Procedures Manual.

6) giving people the opportunity to be heard; 7) encouraging people to share information; 8) keeping information confidential; 9) giving reasons for decisions; 10) ensuring the process is acceptable to everyone involved in the dispute; and 11) ensuring that there is no retaliation. These guidelines are based on principles of natural justice, with consideration for both individual and collective rights<sup>10</sup>.

### **Recommendations:**

It is recommended that the Committee promote the accessibility of documents in terms of literary levels, multiple languages, cultural accessibility, and formats that are accessible to people with disabilities.

It is recommended that the Committee promote measures aimed at protecting complainants from retaliation in order to increase accessibility of redress mechanisms for complainants. This may include waiving requirements to exhaust alternate remedies where such a process may increase risks for the complainant (eg. violence, ill health or economic loss), or where referral to alternate redress reinforces existing systemic barriers. It is further recommended that the Committee urge States to include such protections in the enabling legislation of NHRIs.

It is recommended that the Committee promote the development of community-based dispute resolution processes that are based on principles of natural justice. Where appropriate, such as in Indigenous communities, such processes should take into account both an individual and collective perspective, and should give special regard to women or other vulnerable groups.

## **2.2 Social Barriers**

### *Acknowledging the differing experience of women in process design and implementation*

The lived experiences of women and men often differ greatly. This must be taken into account in the design and implementation of NHRI processes to ensure that women can access these processes on an equal basis with men.

The CHRC has developed a Gender Integration Framework to ensure that, where the consideration of gender is integral to the issue that is being considered, this is identified early and acted upon throughout the process. Consideration of the experiences of particular groups of vulnerable women who are impacted by multiple or intersecting grounds of discrimination is integrated into this analysis.

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<sup>10</sup> *Supra* note 3, articles 1, 2, 4, 5, 9, 13, 15, 18, 34, 44 and 46(3).

**Recommendation:**

It is recommended that the Committee encourage the application of a gender analysis by States, NHRIs and others involved in the administration of justice. Consideration of the lived experiences of women, including the particular experiences of vulnerable groups of women, should be integrated into policies and programs. This will serve to promote gender equality.

## 2.3 Practical and Economic Challenges

### *Costs to complainants*

The CHRC's processes were designed to be less formal than court proceedings and to allow complainants and respondents to self-advocate without the need to employ lawyers to argue their case. However, with the increased legalization of society in general, many complainants and respondents now feel the need to retain counsel before accessing the CHRC's processes. This has resulted in increased costs to many complainants, impacting upon their ability to access these processes on a basis equal with others.

At the CHRT, this challenge has been exacerbated by a recent decision of the Supreme Court of Canada<sup>11</sup> which has determined that the CHRT cannot award legal costs related to its proceedings.

**Recommendation:**

It is recommended that the Committee encourage States to ensure that human rights mechanisms are designed to be accessible to all complainants, regardless of their economic means.

## **3 ADDITIONAL CHALLENGES FACED BY INDIGENOUS WOMEN**

Indigenous peoples, including Indigenous women, represent one of the most disadvantaged segments of Canadian society. Compared with non-Indigenous people, they experience higher unemployment rates, much lower personal income rates, lower educational levels, higher rates of disability and poorer rates of health and overall quality of life, including less access to safe

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<sup>11</sup> *Canada (Attorney General) v. Mowat*, 2011 SCC 53.

drinking water. Incarceration rates are significantly higher than the national average, and Indigenous prisoners often face systemic and institutional discrimination<sup>12</sup>.

### 3.1 Access to CHRC Processes

#### *Section 67 and Access for First Nations Peoples*

Section 67 of the CHRA was repealed in June 2008. This section effectively shielded the federal government and First Nations community governments from complaints of discrimination relating to actions arising from or pursuant to the *Indian Act*. As a result, the jurisdiction of the CHRC has been extended.

In the years since repeal, the CHRC has identified several additional challenges that arise in the context of Indigenous women accessing the CHRC's dispute resolution processes:

- Many Indigenous peoples harbor a historical distrust of government and government agencies. The CHRC, as is the case with many NHRIs, is a government-created body, though it acts independently.

The CHRC has attempted to address this challenge through the creation of the National Aboriginal Initiative (NAI)<sup>13</sup>, which has conducted extensive in-person outreach with Indigenous communities. It has also developed a dedicated website with knowledge products targeted to Indigenous peoples<sup>14</sup>, partnered with national Aboriginal organizations in various initiatives, and conducted awareness sessions and webinars with Indigenous communities to provide education about the CHRC and its processes.

- In other cases, Indigenous peoples identify an ideological conflict between their legal traditions and customary laws and “western” human rights concepts. This leads to skepticism as to whether the CHRC's processes are an appropriate venue through which to advocate for their rights. This may prevent Indigenous peoples from filing complaints of discrimination.

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<sup>12</sup> Canadian Human Rights Commission, *Social Equality in Canada: A Submission from the Canadian Human Rights Commission to the United Nations Human Rights Council as part of the Universal Periodic Review (UPR) of Canada's Human Rights Obligations*, 2008.

<sup>13</sup> For more information on this initiative, see [www.doyouknowyourrights.ca](http://www.doyouknowyourrights.ca).

<sup>14</sup> See, for example: *Your Guide to Understanding the CHRA* [available at: [http://www.doyouknowyourrights.ca/nai-ina/individuals\\_particuliers/chraguide\\_guidelcdp-eng.aspx](http://www.doyouknowyourrights.ca/nai-ina/individuals_particuliers/chraguide_guidelcdp-eng.aspx)] which was developed in partnership with the Native Women's Association of Canada and is available in three Indigenous languages; and *A Human Rights Handbook for First Nations* [available at: [http://www.doyouknowyourrights.ca/nai-ina/organizations\\_organisations/handbook\\_guide-eng.aspx](http://www.doyouknowyourrights.ca/nai-ina/organizations_organisations/handbook_guide-eng.aspx)] which is aimed at assisting First Nations leaders and administrators identify and resolve human rights issues in First Nations communities.

The CHRC is also set to release a “toolkit” for developing community-based dispute resolution processes in First Nations and other Indigenous communities next month. The entire Toolkit is based on the guiding principles for dispute resolution referenced above. Readers are repeatedly reminded to consider how and when they can include women in the development of the process and once it is implemented.



In order to address this challenge, with the repeal of section 67, Parliament added an interpretive provision to the CHRA. This provision requires that the CHRC, CHRT and the courts consider First Nations legal traditions and customary laws when applying the CHRA, provided these legal traditions or customary laws respect the principle of gender equality<sup>15</sup>. This provision confirms the importance of community-based dispute resolution processes<sup>16</sup>. The CHRC has also developed *A Toolkit for Developing Community-based Dispute Resolution Processes in First Nations Communities*, which is soon to be published.

- For most of its history, the CHRC has not dealt with the issues that have surfaced since the repeal of section 67; consequently, there is a need to increase staff familiarity with Indigenous legal traditions and customs.

In addition to providing staff and Commissioners with training on Indigenous history, legal traditions and customary laws and the *Indian Act*, the CHRC has developed important partnerships with individuals and organizations who are experts in these areas. For example, the CHRC has developed a roster of practitioners who have experience mediating disputes in First Nations communities and has utilized the services of these individuals to extend the CHRC's in-house capacity and to ensure that the process is more accessible to Indigenous peoples. Many of the CHRC's lawyers have also participated in annual meetings of the Indigenous Bar Association, developing relationships with Indigenous lawyers, judges and others working in the legal profession.

- The CHRC has traditionally used a mostly paper-based process in its investigation of complaints. This may impact on the accessibility of the process to Indigenous peoples due to reasons of language, literacy and cultural appropriateness, particularly where knowledge is transmitted through oral traditions<sup>17</sup>.

To address this challenge, the CHRC has amended its Policy and Procedures Manual to encourage investigators not to rely too heavily on a paper-based process but to consider conducting interviews by phone or in-person where appropriate and resources allow.

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<sup>15</sup> The interpretive provision states: "In relation to a complaint under the *Canadian Human Rights Act* against a First Nation government, including a band council, tribal council or governing authority operating or administering programs or services under the *Indian Act*, this Act shall be interpreted and applied in a manner that gives due regard to First Nations legal traditions and customary laws, particularly the balancing of individual rights and collective rights and interest, to the extent that they are consistent with the principles of gender equality."

<sup>16</sup> *Supra* note 3, articles 5, 9, and 11(2).

<sup>17</sup> *Supra* note 3, articles 13(2) and 15(2).

## **Recommendations:**

It is recommended that the Committee encourage States to support NHRI's measures aimed at addressing historical systemic challenges facing Indigenous women in accessing human rights processes. This may include the development of culturally appropriate public education materials and training, to be available in Indigenous languages, and developed in partnership with Indigenous peoples and particularly, Indigenous women. It may also including sensitivity training of NHRI staff regarding Indigenous peoples, with a focus on issues facing Indigenous women.

It is further recommended that Indigenous legal traditions and customs be incorporated into existing human rights processes and in community-based dispute resolution processes. Partnerships formed between NHRIs and Indigenous peoples, and specifically Indigenous women, in overcoming barriers to access to justice should be encouraged and highlighted as good practices by the Committee.

## ***Violence and Other Barriers***

- Indigenous women in Canada experience systemic discrimination and bear a disproportionate burden of violence. For example, Indigenous women face rates of spousal violence that are three times as high as those facing non-Indigenous women<sup>18</sup>. The Native Women's Association of Canada has estimated that over the past 30 years, more than 600 Indigenous women and girls across Canada have gone missing or have been murdered. Yet, the majority of these cases remain unresolved.
- Moreover, the geographic remoteness of some Indigenous communities contributes to the isolation of many Indigenous women, impacting upon their ability to access the CHRC's processes. This access may be further impacted by limited availability in many of these communities to appropriate legal assistance<sup>19</sup>. Furthermore, non-governmental organizations and legal and advocacy support networks face financial constraints which impede their ability to provide assistance.

Taking these realities into account, the CHRC plans to explore research and dialogue projects to deepen our understanding of barriers faced by Indigenous women in vulnerable circumstances in asserting their rights<sup>20</sup>. Such barriers may include fear of retaliation, not understanding the processes and not having confidence in asserting their rights<sup>21</sup>. These initiatives will continue to inform policy, procedures and staff training of the CHRC.

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<sup>18</sup> Native Women's Association of Canada, *Sisters in Spirit Initiative Literature Review*, March 2008, available at [http://www.nwac-hq.org/en/documents/SISLiteratureReview\\_March2008\\_Final.pdf](http://www.nwac-hq.org/en/documents/SISLiteratureReview_March2008_Final.pdf).

<sup>19</sup> *Supra* note 3, articles 11(2), 15(2), 18, 19 and 38.

<sup>20</sup> *Supra* note 3, article 22(2).

<sup>21</sup> *Supra* note 3, articles 15(2), 18, 19, 22(2) and 38.

CHRC staff have received training to identify barriers to effective access to human rights processes caused by a complainant's experiences of violence, as well as how to mitigate such barriers.

**Recommendations:**

It is recommended that the Committee focus attention on the need for States and others to address the underlying issues that prevent Indigenous women from accessing justice on a basis equal with others, including the need for adequately funded legal and advocacy support networks.

It is recommended that the Committee underscore the importance of States and others to work in partnership with Indigenous women to determine the most effective strategies for overcoming barriers to access to justice, including in relation to community-based dispute resolution processes.

It is recommended that the Committee encourage States to consider the impact of legislation on Indigenous women's access to human rights processes and to institute reform where such legislation interferes with Indigenous women's enjoyment of substantive equality in this regard.

It is recommended that the Committee encourage States to seek the involvement of NHRIs in legislative reform initiatives that address systemic discrimination facing Indigenous women.

### **3.2 Federally-Sentenced Indigenous Women**

Indigenous women in the federal justice system often face discrimination, leading to over-representation in federal prisons. This is complicated by mental health issues and by systemic issues in the administration of prisons. Administrative barriers – including the use of measures such as discipline and solitary confinement (known as “segregation” in Canada) – may exacerbate mental health issues and may limit an inmate's ability to access their rights, for example by filing a complaint with the CHRC. These barriers may also limit access to inmate advocates – including, but not limited to, legal counsel – who might be able to assist women in identifying administrative policies and decisions as potential violations of the CHRA, and subsequently filing complaints.

Recognizing the gravity of these issues, the CHRC has identified the situation of Indigenous women in corrections with mental health issues as a priority. A high level systemic discrimination team reviews cases currently within the system and makes recommendations on how best to proceed, given the need for distinct approaches to address some of the systemic

elements of the complaints that surface<sup>22</sup>.

In 2003, the CHRC published a report entitled *Protecting Their Rights: A Systemic Review of Human Rights in Correctional Services for Federally-Sentenced Women*. In this report, the CHRC made various recommendations to improve the ability of women to access vital processes while deprived of their liberty.

**Recommendation:**

It is recommended that the Committee consider unique barriers to accessing justice facing women prisoners, particularly vulnerable groups of women, such as Indigenous women and women with disabilities, including mental disabilities. These barriers are often of a systemic nature and require gender-responsive and culturally-appropriate solutions.

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<sup>22</sup> *Supra* note 3, articles 21(2) and 22(2).