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Human Rights Legal Support Centre (HRLSC) Submission on Human Rights Tribunal of Ontario's proposed changes to Form 1 and the Rules of Procedure

Introduction

Thank you for the opportunity to comment on the proposed draft documents relating to the revision of the Individual Application: Form 1, amendments to the HRTO Rules, the Public Hearing Docket and the document relating to protocol for members of the public to observe a HRTO hearing. Given the HRLSC's legislative mandate to provide support services, including legal services, respecting applications to the Tribunal, the Centre is uniquely placed to offer our insights.

With respect to the document informing the public on how they might gain access to the public hearings conducted by the Tribunal, the Centre applauds the HRTO's initiative in this matter. In so far that it will aid the public in identifying matters being heard by the HRTO, the HRLSC has no objection or comments regarding the Public Hearing Docket proposed by the Tribunal. The "How to Observe a Hearing" provides simple and clear directions to the public on how to observe a Tribunal hearing. It would be useful to also indicate how far in advance of hearings the docket will be posted.

Turning to the HRTO's Rules, the HRLSC appreciates the Tribunal's effort to streamline the process and move the application process along expeditiously. However, we are concerned that the reduction in the time for parties to complete certain actions will have a particularly negative impact on unrepresented Applicants and Respondents. Additionally, we are concerned that reduced timelines for action request may result in an unintended increased administrative burden as parties pursue avenues to address the consequences of shortened time frames. This issue will be explored further in these submissions.

Lastly, the HRLSC appreciates the Tribunal's efforts to simplify the Form 1. The elimination of sections 9 and 16 through 19 makes sense. In particular, the request for lists of documents and witnesses at the application stage was time-consuming and of little to no value. We do have some concerns about the removal of the information contained in the supplemental forms which we believe is of great assistance to the

parties and the Tribunal in understanding the nature of the Code allegations being made. Our specific concerns will be addressed in later sections of this document.

Before turning to our specific concerns, we want to note that whatever revisions are finally decided upon for the Form 1, we would expect that the parallel revisions will be made to the Form 2. For example, we would expect that there would also be a revision to the Response removing the questions related to documents and witnesses. Similarly, the word and page limits in the revised Form 1 should also be reflected in a revised Form 2.

Revised Form 1

Removal of HRLSC referral information

This revised Form 1 has removed the section, on page 1, which refers applicants to the HRLSC for advice about filing. Since the 2008 change to the human rights system, the HRLSC has been listed as a resource for applicants on the Form 1. Applicants are directed as follows: "For legal advice and assistance, contact the Human Rights Legal Support Centre**."**

Our office answers hundreds of calls every week about how to complete the Form 1. This is an essential referral which appropriately diverts potential applicants to our services to ensure they file complete applications. This enhances access to justice and reduces the HRTO's administrative burden when incomplete applications are filed.

This referral should be retained on page one with a hyperlink to the HRLSC website.

Removal of HRLSC as representative option

The HRLSC has been removed as an option for "Representative" (section 1, option B). In the current Form 1, the HRLSC is listed as a separate entry.

As one of the three pillars in the human rights system, and the only statutory agency providing legal services to applicants, it is important to distinguish our representation from other types of representatives. It is useful information for the HRTO and the human rights system in general when conducting statistical analyses. Moreover, the HRTO Rules treat the HRLSC differently with regard to the method of delivery of documents to the HRTO. Therefore, HRTO staff would need this information in the Form 1 to identify whether that rule applies in a particular case.

The HRLSC should be retained as a separate option for indicating type of representative.

Page limitation on applicant's narrative (Section 5)

The HRLSC is aware of the concerns that lie behind the imposition of a page limit on an applicant's narrative. The issue of excessive and/or inappropriate information being provided by applicants creates administrative burdens for the HRTO and challenges for respondents. However, we believe equity and accessibility considerations should be paramount. Given the vast majority of applications are filed by unrepresented applicants, we believe that there should not be any limit placed on length of section 5. For those applicants who file excessively lengthy narratives, the HRTO can use its discretionary powers to issue directions or refuse to accept applications beyond a certain length.

In our own work at the HRLSC, our legal staff regularly submit applications which exceed ten pages. For complex and systemic applications, fifteen or more pages would be typical.

Without a page limit, applicants can provide the background to and full details of their allegations which then allows respondents to fully understand the allegations and their context. In turn, respondents can provide robust responses. The HRLSC's experience is that mediations are far more successful the more the information the parties have about the other's position. In our view, robust pleadings encourage early resolution.

The HRTO should remove the 5-page limit in Section 5. If a limit is to be imposed, it must be significantly longer, and no shorter than 20 pages.

Removal of Supplemental Forms

While there are some questions in the current supplemental Forms 1A,1B, 1C, 1D and 1E which could be omitted, the wholesale removal of these forms is problematic. The only questions from these supplemental forms that have been included in the draft Form 1 relate to employment as a social area and simply seek to clarify the nature of the Respondent.

There are many useful questions in the supplemental forms. For example, if an applicant alleges age discrimination, the supplemental forms ask for date of birth. Similarly, applicants are asked to describe their identity based on race, ethnic origin, creed, citizenship, etc. There are also very useful questions aimed to clarify the nature of the adverse treatment. In addition, all supplemental forms currently ask the applicant to explain how their code ground is connected to the adverse treatment they received

such as this question: “Explain why you believe you were discriminated against based on your creed.”

With the introduction of a limit on the number of words and pages that can be used to describe an applicant’s allegations, key questions about those allegations are particularly important to include in the Form 1. The majority of applicants file without legal advice or assistance. As a direct access system, the application form should include key targeted questions eliciting key information based on the selected *Code* grounds and social areas. Without these types of targeted questions, the HRTO will increase its administrative burden with an increased need to send out Notices of Incomplete Applications or Notices of Intent to Dismiss (NOID).

The British Columbia Human Rights Tribunal’s complaint form provides an example of using targeted information and questions for each section, which can be found here. If the HRTO has not already reviewed the BCHRT’s form, it may useful to consider doing so when finalizing the changes to the Form 1.

The HRTO should review key questions from the current supplemental forms that provide essential information and incorporate these into the new Form 1.

Form 1 accessibility

As Tribunals Ontario moves forward with its digital first mandate, the HRLSC commends that any revised HRTO forms, such as the Form 1, be provided in accessible formats in accordance with the AODA standards.

Revised Rules

Shortened Time Frames for filing Form 2 (Rule 8.1), Form 3 (Rule 9.2) and Response to Notice of Intent to Dismiss (Rule 13.2)

The reduction in the time for parties to file their pleadings will decrease access to justice and increase administrative burdens on the HRTO.

It is important to remember that a key principle of the HRTO’s direct access model was that the parties, applicants and respondents alike, need not retain counsel in this legal proceeding. Many applicants and respondents file their pleadings on their own. The time frames in the current Rules are reasonable. The HRLSC does not support the shortening of the time for filing a Response, Reply or NOID submissions.

The shortening of time frames will burden both parties and the HRTO with a substantial increase in requests for the extension of time. It is worth noting that the Rules were

revised several years ago to lengthen the time for filing a Reply from 14 days to 21 days in recognition of the inadequacy of two weeks for applicants to file a Reply (which caused an inordinate number of extension requests).

As a key stakeholder, we regularly provide legal advice to applicants on their Replies and their NOID submissions. By shortening the time frames for these filings, the ability of those applicants to seek out and receive advice will be substantially impaired. Responding to a NOID can be a legally complex issue for applicants to understand and respond to. Two weeks is not a reasonable time frame. The HRLSC's legal counsel regularly provide legal advice to applicants who have received a NOID from the Tribunal. Applicants who contact the HRLSC would rarely be able to have their appointment with legal counsel within two weeks.

Undoubtedly, the shortening of the time frame for parties to file their pleadings will increase requests for extension of time by the parties. At this challenging time when there are already significant delays in the processing and adjudication of applications, these proposed changes would exacerbate the HRTO's administrative burdens.

The HRLSC opposes the shortening of time frames for the filing of a Response (Rule 8.1), Reply (Rule 9.2) and NOID submissions (Rule 13.2).

Removal of the applicant's choice to file Reply (Rule 9)

Removing an applicant's ability to file a Reply in answer to issues raised in a Response is both unfair and ineffective. From a procedural fairness perspective, there are often issues raised in Response which require a reply. This can arise because a respondent has access to information not within the direct knowledge of the applicant. For instance, if an applicant has alleged that a service provider has not accommodated them, the Response may provide financial information related to undue hardship due to cost. The applicant is likely to want to provide additional information about the alleged cost of the accommodation in relation to the service provider's business.

The proposed Rule provides discretion for the HRTO to determine if a Reply is required. While in theory this is an answer to the procedural fairness issue, in practice there are two key serious concerns. First, in order for the HRTO to accurately determine when a Reply should be requested, legally trained staff will be required to review every Application and Response filed. With approximately 4,500 applications filed annually, reviewing each set of pleadings is an absurd amount of work which will only lead to backlogs in the processing of Applications and possibly into other administrative work. Second, many applicants will likely decide to file Form 10 to seek to reply to a Response if they are not given the option. This then requires respondents to file a Form

11, and then a HRTO adjudicator to decide the issue of whether to permit the reply. This "backdoor" reply will become a new administrative and adjudicative burden.

In summary, the proposed removal of the right of applicants to file a Reply is neither fair nor efficient.

The HRLSC opposes the changes to Rule 9. The HRTO should continue to permit applicants to file a Reply.

Withdrawal of Applications with Prejudice (Rule 10)

The HRLSC has concerns about both with the process and substance of the changes to Rule 10.

It is unclear from the proposed changes to Rule 10.5 whether a decision by the HRTO to "not accept" or "dismiss" a subsequently filed similar Application will be an administrative or adjudicative decision. Determining what is an "abuse of process" and what is "substantially similar" requires an adjudicative determination, with procedural fairness to the parties. Notably, there is no mention in this section about how the affected parties will be notified and/or how they can make submissions to the HRTO.

A direct access model means that some applicants may file incomplete or incorrect Applications. Where the originally filed Application requires significant corrections, such as the removal or addition of respondents, social areas or grounds, we often advise callers to withdraw the first erroneous application and file a new one. This ensures that the applicant provides a complete and accurate Application, while minimizing the administrative work by HRTO through unnecessary Form 10 to amend an Application.

The HRLSC is opposed to any administrative process that would give the HRTO the power to dismiss a substantially similar Application for "abuse of process". Any decisions should be adjudicative and be guided by the principles of procedural fairness.

Redacting of witnesses from Applications and Responses

Rules 6.7 and 8.6 should be removed from the Rules to align with the removal of question 19 regarding witnesses from Form 1.

Parties Agreement to Confidentiality of Mediation

For greater clarity, the Rules 15 and 15A should contain language that requires the parties to agree to the confidentiality of the mediation process (whether verbally or in writing). This is particularly important for unrepresented parties who may not understand the legal concept of settlement privilege.

Conclusion

The HRLSC appreciates the HRTO's consultation on the proposed changes. As a key partner, we want to help improve the accessibility to and efficiency of the human rights system in Ontario. Should you wish further input from the HRLSC on these changes or on future changes, we would welcome those opportunities.