



The Advocates' Society La Société des plaideurs

January 27, 2022

VIA EMAIL: consultation@lao.on.ca

Mr. Charles Harnick, Q.C.
Chair of the Board of Directors
Legal Aid Ontario
Atrium on Bay
40 Dundas Street West, Suite 200
Toronto, Ontario M5G 2H1

Dear Mr. Harnick:

RE: Proposed Minimum Experience Standards for Enrolment on Legal Aid Ontario Roster

The Advocates' Society (the "Society"), established in 1963, is a not-for-profit association of approximately 5,500 members throughout Canada, including approximately 4,500 in Ontario. The Society's mandate includes, among other things, making submissions to governments and others on matters that affect access to justice, the administration of justice, and the practice of law by advocates.

A number of the Society's members do legal aid work, and the Society is a longstanding member of the Alliance for Sustainable Legal Aid. The Society strongly believes that a well-funded, sustainable, and effective legal aid system is indispensable for ensuring access to justice for low-income and marginalized Ontarians. The Society further believes that legal aid clients should be served by high-quality lawyers. Consistent funding for legal aid is one manner of ensuring there is an adequate number of high-quality lawyers willing to accept legal aid certificates.

The Society writes this letter to respond to Legal Aid Ontario's ("LAO") consultation on the proposed minimum experience standards that lawyers must meet to be enrolled on LAO's roster and to be eligible to provide legal aid services to clients in specific areas of law. We sincerely appreciate the opportunity to provide LAO with our feedback on the standards. The Society struck a task force composed of advocates who provide legal aid services in the areas of criminal, family, and immigration and refugee proceedings to review and discuss the proposed standards. Please find the Society's feedback below.

I. Introduction

As noted above, the Society supports LAO's desire to ensure high-quality representation for clients represented by roster lawyers providing certificate services.

In considering the proposed minimum experience standards for enrolment on the roster, the Society believes it would have been helpful to understand any limitations or shortcomings of the current standards that LAO was attempting to address. LAO has not provided the following information in the

consultation documents, which would be of assistance in assessing the anticipated effectiveness of the proposed standards for enrolment:

- The current composition of the various panels, including:
 - a breakdown of the years of call of the various members;
 - how many panel members were initially enrolled on a conditional basis;
 - how long they have been on the various panels; and
 - how many panel members are the most active;
- The number and nature of complaints to LAO about panel members, and if complaints are made more frequently with respect to new or newer panel members;
- The number of requests for changes of lawyer made to LAO, and if those requests are made more frequently with respect to new or newer panel members;
- The number of LawPRO claims and Law Society of Ontario (“LSO”) complaints made on behalf of or by legally aided clients, and if these claims or complaints are more concentrated amongst new or newer panel members.

The Society submits that it is important for LAO to collect and publish such statistics (if LAO is not already doing so), and to consider this data the next time changes to the roster requirements are contemplated. We would appreciate receiving this information should LAO have it in its possession.

In the absence of information about the issues, if any, that the new proposed standards are intended to remedy, the Society believes that the proposed standards would act as a barrier to entry for young lawyers who would otherwise take on legal aid work, creating a multi-faceted access to justice issue.

The proposed roster standards do not include provisions – which are included in the current standards – that allow for flexibility in the application of the minimum experience requirements. Specifically, the proposed standards remove the discretion of directors general to recognize other experience as equivalent to the minimum experience requirements, sections that allow for exceptions to be made based on local need, and sections that allow for conditional enrolment on the roster.

The Society recognizes that section 26(4) of the new *Legal Aid Services Rules* states the following:

If an applicant does not meet a requirement relating to the experience required to be a roster member, the Corporation may enrol the applicant on the roster on the condition that the applicant meet the experience requirement and complete the specified training or professional development or other program to the satisfaction of the Corporation, within the period specified by the Corporation.

The Society further notes that section 27(2) of the *Legal Aid Services Rules* sets out that LAO may impose conditions on a roster member’s authorization to provide legal aid services at any time, including requirements to meet minimum experience requirements within a specified period, or for mentoring or supervision.

However, there is no reference to sections 26 or 27 of the *Legal Aid Services Rules* in the proposed minimum experience standards, and sections 26 and 27 do not mention the possibility of recognizing experience equivalent to the minimum standards.

First, the lack of reference within the proposed roster standards to the discretion provided for in the *Legal Aid Services Rules*, or to the possibility of conditional enrolment, is a problematic omission (and/or

outright contradiction) that needs to be remedied. Potential applicants will not necessarily go behind LAO's published material to the governing legislation to enquire whether there is any discretion or flexibility in the application of the requirements, considering the mandatory language in the proposed standards that "[t]o be authorized to provide legal aid services in a particular area of law, an applicant for enrolment on the Roster or a roster member **must satisfy the Corporation that they meet all applicable criteria for that area of law ...**".¹ This will discourage qualified lawyers from applying for enrolment on the roster.

Second, the Society is concerned that this omission reflects an intention by LAO to apply the discretion very rarely, if at all. The Society recommends that LAO continue to apply the minimum experience standards flexibly, with regard for local need and conditions, to enrol new calls, transitional calls, or other capable lawyers who do not meet the experience requirements in the proposed standards.

Legal aid work provides valuable experience for recently trained counsel to develop concrete, practical skills. The Society notes that the elimination (or diminished use) of mechanisms for flexibility in the application of the requirements for enrolment on the roster would constitute an insurmountable barrier for most new calls. Critically, the new standards will also negatively impact racialized lawyers. According to the LSO's *Statistical Snapshot of Lawyers in Ontario*, in 2019, there were 5,360 racialized lawyers in their first nine years of call.² By comparison, there were only 2,023 racialized lawyers with over 40 years of call, and 3,980 racialized lawyers between 30 to 39 years of call.³ Thus, lawyers with more experience tend to be white, and lawyers with less experience are more likely to be racialized. Racialized groups will therefore experience a negative, disproportionate impact because of LAO's proposed standards; they will be less likely to have the requisite experience for enrolment on the roster. The lack of discretion in the application of the roster standards would also have a disproportionate impact on lawyers working outside large or established firm settings, where initial experience can be gained through work for privately retained clients.

We further expand upon the importance of retaining discretion and flexibility in the application of the roster standards with respect to each specific area of law below.

The Society recommends that LAO monitor and measure the effectiveness of the new roster standards after they are implemented in order to make any necessary adjustments to ensure Ontarians have an adequate supply of high-quality legal aid providers and services.

II. Criminal Law

The Society does not agree with the elimination of mechanisms that enable directors general to recognize other experience as equivalent to the minimum experience requirements and to grant exemptions from standards of minimum experience. The Society believes that the removal or reduced application of these mechanisms for flexibility will create a barrier to recently trained lawyers undertaking legal aid work, which is essential for the professional development of young counsel in private practice.

¹ See Legal Aid Ontario, *Schedule: Minimum requirements to be authorized to provide legal services by area of law*, p. 1 (emphasis added).

² Law Society of Ontario, *Statistical Snapshot of Lawyers in Ontario from the Lawyer Annual Report (LAR) 2019* [undated] at p. 5, online: https://lawsocietyontario.azureedge.net/media/iso/media/lawyers/practice-supports-resources/equity-supports-resources/snapshot-lawyers2019_eng-aoda.pdf

³ *Ibid.*

Criminal Roster

The Society notes that both the current and proposed roster standards require a breadth and depth of completed practice experience that is difficult for newly trained lawyers to obtain. The proposed minimum experience requirement of “**Completion** of a minimum of 20 criminal law files within the last 3 years before seeking authorization”⁴ is particularly problematic, given the current COVID-19 backlog, limitations in available plea and trial time, and the inherent time requirements of more complex criminal matters. Both the current and proposed standards appear to the Society to be somewhat arbitrary in the selection of numbers of mandatory completed matters and their nature. We point out that jury trials and certain types of evidentiary applications, for example, happen at different frequencies in different judicial jurisdictions, and that matters of the same general type may require quite different levels of legal skill.

However, the current standards adequately address the challenge of overly onerous admission requirements by providing for a generous discretionary power to admit lawyers possessing the necessary skills and experience. The Society believes that the existing mechanisms for the recognition of equivalent experience and the provisions for conditional enrolment on the roster are appropriate. In particular, the Society sees the current alternative of a 20% practice concentration in criminal law for the past two years as a reasonable and helpful standard. Its elimination is notable and unreasonably exclusionary. The Society acknowledges that the development of a comprehensive, yet realistic standard for enrolment on the criminal roster might always be challenging. Mechanisms for flexibility address potential problems and ensure that capable lawyers will be permitted to take on legal aid work and serve clients in need.

The Society supports the existing continuing education requirement for lawyers on the criminal roster,⁵ and encourages LAO to continue to offer specific skills-based training to address potential areas of continuing concern related to roster lawyers’ conduct of criminal matters.

Extremely Serious Matters (ESM) Roster

The Society agrees that counsel providing client service for extremely serious cases should be well-qualified and have significant practical experience in criminal law. However, the Society considers that such experience may well be gained while a lawyer is also practising in other areas. We prefer the existing wording requiring “a minimum of 5 years of 100 per cent criminal practice concentration *or the equivalent*”⁶ to the proposed requirement that a rostered lawyer *solely* practice criminal law.⁷

Similarly, the Society believes that provisions for conditional enrolment on the ESM roster with necessary skills and experience should continue to be included in the standards. These provisions allow for

⁴ Legal Aid Ontario, *Schedule: Minimum requirements to be authorized to provide legal services by area of law*, p. 1 (emphasis added).

⁵ The current criminal law standards require “a minimum of six hours of continuing legal education (CLE) in criminal law” (see Legal Aid Ontario, “Criminal law standards”, online: <https://www.legalaid.on.ca/lawyers-legal-professionals/interested-in-doing-legal-aid-work/criminal-law-standards/>), whereas section 27(4) of the *Legal Aid Services Rules* says that “Every roster member shall, with respect to each area of law in which they are authorized to provide legal aid services, complete a minimum of three hours of continuing professional development each year.”

⁶ Legal Aid Ontario, “Minimum Experience Requirements for Extremely Serious Criminal Matters (ESM)”, online: <https://www.legalaid.on.ca/lawyers-legal-professionals/interested-in-doing-legal-aid-work/minimum-experience-requirements-for-extremely-serious-criminal-matters-esm/> (emphasis added).

⁷ Legal Aid Ontario, *Schedule: Minimum requirements to be authorized to provide legal services by area of law*, p. 2.

appropriate flexibility in the determination of counsel's ability to represent clients in complex criminal cases carrying the possibility of significant consequences.

The Society considers that strict application of the proposed standards may incentivize litigation that may, in certain contexts, be contrary to the best interests of the client and to the efficient administration of justice.

Of particular concern to the Society is the requirement in the proposed standards of completion of at least one of each of various types of *Charter* applications.⁸ As noted above, *Charter* issues arise and are litigated at different rates across the province. Not infrequently, compelling *Charter*-related arguments are met with appropriate action by the Crown before litigation of the issue. This proposed requirement seems to be particularly arbitrary.

Complex Case Rate – Criminal

The Society views the proposed requirements for time-limited eligibility to receive the Complex Case Rate as appropriate.

Gladue Roster

The Society supports LAO's stated intention to consult with Indigenous communities and stakeholders to meaningfully improve the cultural competence and ability of lawyers providing services to Indigenous clients.

However, given the pressing need to provide culturally appropriate service to Indigenous clients, the Society does not support changing the Gladue roster standards before this consultation has taken place. While the Society recognizes that the draft Gladue roster standards are intended to be interim standards, the draft standards are significantly less comprehensive than the current standards (omitting, for example, the requirement for familiarity with local resources for Aboriginal clients) and do not include the possibility of conditional enrolment, which may deprive remote communities of legal aid service providers. The Society believes the current standards should remain in place while LAO undertakes direct consultation and engagement with Indigenous communities and stakeholders, including on the issue of the appropriate standards for enrolment on the Gladue roster.

The Society was pleased to note the inclusion of the *Guide for Lawyers Working with Indigenous Peoples* (a joint project of the Society, the Indigenous Bar Association, and the LSO) on the draft Reading List.

Creation of New Rosters for Youth and Criminal Mental Health Matters

While the Society recognizes the special need to ensure quality service to some of LAO's most vulnerable clients, we do not support the creation of separate youth and criminal mental health rosters to achieve this goal.

⁸ See Legal Aid Ontario, *Schedule: Minimum requirements to be authorized to provide legal services by area of law*, p. 2: "Within the last five years before seeking authorization, ... the roster member must have conducted a minimum of five contested Charter applications related to disclosure, search and seizure, detention or arrest, right to counsel, section 11(b) and abuse of process."

These areas of law are not generally separate from general criminal practice. Many lawyers who accept these cases do so as adjuncts to the rest of their work. Creation of these new rosters with their attendant roster standards invites the same issues described in previous sections above. The proposed requirements are significant in terms of number of completed matters required prior to roster enrolment and would be particularly difficult to meet for recently trained lawyers beginning their practices and building their client base. In particular, clients in Ontario Review Board proceedings are almost exclusively represented on legal aid certificates, and so it will be difficult for less experienced counsel to attain the required minimum of 5 completed ORB proceedings in the last four years prior to authorization.⁹

All lawyers are required by the LSO's Rules of Professional Conduct to perform any legal services undertaken on a client's behalf to the standard of a competent lawyer. In accepting any retainer, lawyers must always assess their own ability to deliver competent and professional service, particularly in unfamiliar legal contexts. Rather than relying on the creation of new rosters, the Society recommends that roster lawyers undertake continuing self-assessment and evaluation, whether formal or informal, to determine their competence to accept a particular youth or mental health-related case.

III. Family Law and Proceedings under the *Child, Youth and Family Services Act, 2017*

The composition of family law legally aided clients largely includes the most vulnerable of clients who have the following unique circumstances:

- First, clients involved in child protection proceedings are at a great disadvantage in terms of a power imbalance. They are facing child protection agencies, with their abundant resources and generally very experienced and knowledgeable counsel, with the prospect of having the most serious order being made against them – that of having their children removed permanently from their care.
- Second, many clients involved in domestic family law proceedings also face great power imbalances with their spouses, including emotional, physical, and financial abuse.
- Third, many child protection and family law clients suffer from mental health and substance abuse issues.
- Fourth, for many clients, a family law matter or child protection matter will be their first involvement with the legal system.

For these reasons, it is critical for individuals involved in child protection or family law matters to have access to fully or partially subsidized legal representation to avoid being self-represented. In addition, since the advent of the COVID-19 pandemic, there has been a much greater reliance on technology. Almost all family law courts have proceeded virtually since March 2020. This is anticipated to continue for the foreseeable future. While there are many benefits to technology, many family law clients do not have the necessary tools to engage in electronic proceedings (for example, laptops, smart phones, or the ability to afford data). They also do not have the necessary skills to successfully use the Justice Submissions Online portal or Caselines, or to navigate the myriad of practice directions in each court. Legal assistance is essential to ensure family law litigants are able to navigate the system and proceedings can proceed as efficiently as possible.

⁹ Legal Aid Ontario, *Schedule: Minimum requirements to be authorized to provide legal services by area of law*, p. 4.

However, it can be difficult for litigants who are eligible for legal aid certificates for child protection matters or other family law matters to find counsel willing or able to accept legal aid certificates. Legal aid certificates for complex cases are usually not sufficient to cover all the reasonable time spent by a family law lawyer on a file, even with increased hours provided by way of discretionary increases. Some litigants with very difficult files can obtain services from the Family Law Office at LAO, but they cannot accept all cases.

For the above reasons, it is imperative that family law clients continue to have access to a full roster of capable counsel to assist them with their cases and that the current rosters not be reduced or made unduly prohibitive to enter.

The Society is concerned that the proposed minimum experience standards, and their concomitant lack of discretion for unique circumstances, may impose significant barriers to entry for lawyers, and in particular young lawyers, who wish to take on legal aid work, thereby creating a vacuum of lawyers to perform said work and an access to justice issue for financially eligible applicants. In particular, the vast majority of clients who require lawyers in child protection cases are legally aided. Very few are represented by counsel on private retainers. It may not be possible for young lawyers to meet the standard of “[s]ubstantial involvement in a minimum of 15 CYFSA proceedings must have been completed within the last 3 years before seeking authorization [...]”, without the application of appropriate discretion by LAO or the recognition of equivalent professional experience.¹⁰

The Society submits that the current eligibility requirements for both the family law and *CYFSA* rosters are already quite stringent and already provide quality assurance. These may be combined with continuing education requirements on an annual basis for all members of the LAO roster, both for the family law roster and the *CYFSA* roster. In the alternative, the requirement for a minimum of 20% of practice concentration in family law (which includes child protection work) could be expanded, either initially or each year that a lawyer remains on the roster, to a fixed cap, subject to exceptions based on local need (for example). Moreover, LAO already provides for a robust complaint process if a client wishes to change counsel and has a valid reason for doing so, including not receiving adequate representation from their chosen counsel.

IV. Refugee and Immigration Law

History of Standards

In 2013 and 2014, LAO consulted stakeholders for the purpose of determining what – if any – additional standards should be required for private-bar lawyers undertaking refugee and immigration work pursuant to legal aid certificates. The impetus was “part of LAO’s larger effort to ensure that LAO clients – who are among the most vulnerable members of Ontario society – receive consistently high quality legal representation.”¹¹ The feedback from the private bar was positive, with the then-president of the Refugee

¹⁰ Legal Aid Ontario, *Schedule: Minimum requirements to be authorized to provide legal services by area of law*, p. 5.

¹¹ Legal Aid Ontario, “Refugee & immigration panel standards” (31 March 2015), online: <https://web.archive.org/web/20150420203825/http://legalaid.on.ca/en/publications/refugeepanelstandards.asp>

Lawyers Association stating, “[w]e have been asking for many years that the minority who represent people negligently be removed from the Legal Aid panel.”¹²

A new set of empanelment rules were introduced in the beginning of 2015. They were applied to lawyers already within the LAO system, as well as to new lawyers who wished to represent clients through legal aid certificates. The new standards were divided into two tiers: the “general” panel (mostly for first-instance tribunal work and immigration applications), and the “appellate” panel (for work before appellate panels and the courts).

Admission to the panels required lawyers to demonstrate membership in one of five categories.¹³ The categories were arranged by hierarchy, so that if a lawyer could not demonstrate membership in the first category, then the lawyer would need to demonstrate membership in the second category, and so on. The categories were based on a lawyer’s experience within the immigration and refugee system, but with abundant discretion to empanel lawyers who lacked the necessary experience, in some cases with conditions for the lawyer to meet within a specified timeframe.

Applicants had to provide several supporting documents. If those documents were not available, they had to otherwise prove to LAO that they should be empanelled. This could include the provision of writing samples and references.

The empanelment process could take months. Once admitted to the panel, lawyers had to demonstrate ongoing compliance with a “best practices guide” for refugee and immigration law and were subject to occasional quality audits. Lawyers who had been approved for conditional empanelment were required to meet additional requirements, including (among other things) submission of completed work to designated mentors or panel officers, completion of testing, attendance at training programs, or ongoing mentorship/supervision. Empanelment needed to be renewed every three years.

Lawyers applying for the appellate panel were required to be enrolled on the general panel and had to provide proof that they had undertaken appellate matters in refugee and immigration law, or had equivalent experience.¹⁴

¹² *Toronto Star*, “Legal Aid vows to ‘weed out’ bad refugee lawyers” (20 April 2015), online [republished]: <https://www.toronto.com/news-story/5566335-legal-aid-vows-to-weed-out-bad-refugee-lawyers/>

¹³ The categories for the general panel were:

1. Recent experience: in the past two years, the lawyer had dedicated a minimum of 25% of their practice to refugee or immigration law and had completed ten or more specified steps within the refugee/immigration process. These steps include preparing Basis of Claim forms, Humanitarian and Compassionate applications, or appearing before tribunals and/or courts; or
2. Historical experience: in the last five of the past seven years, the lawyer had dedicated a minimum of 25% of their practice to refugee or immigration law and had completed twenty-five or more specified steps within the refugee/immigration process. These steps include preparing Basis of Claim forms, Humanitarian and Compassionate applications, or appearing before tribunals and/or courts; or
3. Alternative experience: a demonstration that the lawyer was able to deliver high quality services; or
4. New call: the lawyer was a new call practising for less than two years and sought to meet the panel standards conditionally; or
5. Transitional experience: the lawyer had been practising for more than two years and wished to meet the panel standards conditionally.

¹⁴ Legal Aid Ontario, “LAO Panel Standards, Refugee and Immigration: Appellate” [undated], online: <https://www.legalaid.on.ca/wp-content/uploads/panel-standard-appellate-05-2015.pdf>

In sum, the 2015 empanelment process was rigorous, but provided LAO staff with discretion to admit lawyers who had not previously had experience in immigration or refugee matters. The result was an onerous and tedious process for lawyers, and a drain on LAO staff resources. The impact of the new empanelment process was a “reduction of the panel from 680 in July 2015 to 291 in March 2016”.¹⁵

Unsurprisingly, LAO decided to modify the onerous empanelment standards in or around late 2018. These ongoing current standards require the applicant lawyer to demonstrate membership in the recent experience category, or the historical experience category.¹⁶ However, LAO retains wide discretion to allow the empanelment of lawyers who do not meet any specific category or requirement, including new calls. Furthermore, ongoing demonstration of quality work and conditional empanelment is much less stringent than the 2015 empanelment requirements.

The Proposed Standards

The proposed standards for admission to a “roster” are also divided into two tiers, the general roster and the appellate roster. For admission to the general roster, applicants *must* demonstrate minimum experience of having completed ten or more specified steps within the refugee/immigration process in the past two years. These steps include preparing Basis of Claim forms, completing Humanitarian and Compassionate applications, or appearing before lower-level tribunals. For admission to the appellate roster, the applicant lawyer must have completed ten or more specified steps before appellate tribunals and/or the courts.

As noted above in the introduction to this letter, there is no discretion provided in the proposed standards themselves to admit new calls, transitional calls, or other capable lawyers who do not meet the experience requirements in the proposed standards.

Concerns with the Proposed Standards

If strictly applied without flexibility, the proposed refugee and immigration standards will prevent new calls and racialized lawyers from working in refugee and immigration law, undermine access to justice, and fail to ensure high-quality work by roster members, all of which is contrary to section 17(2) of the *Legal Aid Services Act, 2020*.¹⁷

The new standards use mandatory language. There are no alternative criteria for meeting the specified requirements, including equivalent experience or demonstrated capability. The result is that new calls will not be able to gain admission to the roster. Nor will most new calls have the opportunity to meet the standards by obtaining the required experience through the retention of private clients.

By definition, refugee claimants have fled countries where they fear persecution. Many are experiencing the mental health ramifications of traumatic experiences such as arbitrary detention, inhumane treatment, and even torture. Many do not speak English. Many have not yet had work permits issued to

¹⁵ Legal Aid Ontario, *Racialized Communities Strategy* (March 2020) at p. 214, online: <https://www.legalaid.on.ca/wp-content/uploads/LAO-Racialized-Communities-Strategy-2020-EN.pdf>

¹⁶ Legal Aid Ontario, “Minimum experience requirements for immigration and refugee law” [undated], online: <https://www.legalaid.on.ca/lawyers-legal-professionals/interested-in-doing-legal-aid-work/minimum-experience-requirements-for-refugee-law/minimum-experience-requirements-for-refugee-and-immigration-general-services/>

¹⁷ S.O. 2020, c. 11, Sched. 15.

them, or work in menial positions due to a lack of language skills and Canadian work experience. As a result, most lawyers who undertake LAO-covered immigration and refugee work are paid through legal aid certificates. It is not reasonable to expect that a new call or an individual without experience in the area of refugee and immigration law will be able to obtain ten private clients within two years.

As noted above, not only will this result in an insurmountable barrier for most new calls, the new standards will also negatively impact racialized lawyers. This adverse impact on racialized lawyers has the consequence of limiting access to justice for immigrant and refugee communities, a mostly-racialized group. In LAO's *Racialized Communities Strategy* published in March 2020, LAO recognized that to reduce barriers to access to justice, it needed to "actively recruit[] and engage[] legal service providers that are able to deliver direct services in different languages".¹⁸ Furthermore, LAO stated that it would work towards the objective of ensuring that "[t]he percentage of racialized people working at all levels of LAO and across all LAO service channels is at least equal to the representation of racialized people among low-income Ontarians".¹⁹ The new roster standards will have the opposite impact and reduce access to justice for LAO clients.

Finally, LAO's roster standards should focus on quality of service, a goal that is not necessarily linked to a lawyer's experience. The new standards do not provide for ongoing auditing of lawyers, ongoing education or professional development, mentorship, or any other check on the work performed by roster lawyers. They also fail to demand that roster lawyers dedicate a certain amount of their practice to the area throughout a specified period of time, thereby permitting lawyers to "dabble" in immigration and refugee work. The fact that LAO's legislation requires roster members to provide a high quality of service is insufficient. The concern is a return to the pre-2015 era where a handful of lawyers provided substandard and incompetent service to hundreds of immigrants and refugees.

Recommendation

As of October 2019, only 395 lawyers in Ontario were on LAO's Immigration and Refugee Panel.²⁰ LAO has acknowledged that of this number, there is a smaller "pool of lawyers who are accepting certificates".²¹ LAO has further recognized that the requirements for empanelment may explain the small number of lawyers accepting certificates.²² These numbers do not bode well for the future of legal aid services for Ontario's refugees and immigrant population.

Roster standards should advance access to justice. They should encourage new calls and racialized lawyers to provide immigration and refugee services, while ensuring the high quality of work undertaken. The proposed standards will have the opposite impact. The Society recommends that the proposed standards be revised to permit enrolment on the roster where a lawyer does not have the proposed requisite experience, with appropriate safeguards. LAO must implement *and* enforce standards that safeguard excellence in legal services.

¹⁸ Legal Aid Ontario, *Racialized Communities Strategy* (March 2020) at p. 18, online: <https://www.legalaid.on.ca/wp-content/uploads/LAO-Racialized-Communities-Strategy-2020-EN.pdf>

¹⁹ *Ibid.*, at p. 1.

²⁰ *Ibid.*, at p. 20.

²¹ *Ibid.*

²² *Ibid.*, at p. 14.

V. Post-Enrolment Quality Assurance

The public deserves and should receive quality legal services from roster lawyers. It is undoubtedly important for LAO to take reasonable steps to ensure that lawyers who are authorized to provide legal aid services are competent at the entry point of enrolment on the roster. However, to ensure the quality of legal aid services, it is equally important for LAO to manage its roster to ensure the ongoing competence of lawyers representing legal aid clients.²³

While measures for ongoing quality assurance after a lawyer's enrolment on LAO's roster are not the focus of the current consultation, the Society wishes to address this issue briefly given its importance for ensuring Ontarians receive high-quality legal aid services.

Procedure for Removal of Roster Members

The Society notes that s. 28 of the *Legal Aid Services Rules* ("Obligations of roster members"), Schedule 1 to the Rules ("Legal Aid Services Standards"), and LAO's Professionalism policy all set out standards for roster lawyers.

However, the rules pertaining to the enforcement of roster standards confer LAO with extensive open discretion to remove roster members without articulating the criteria, events, or conduct that would trigger removal. In addition, LAO does not outline any due process protections extended to counsel facing removal.²⁴

The Society recommends that:

- LAO predicate enforcement of roster panel standards on a "triggering event" such as a judicial or client complaint or non-trivial billing irregularities;
- LAO develop clear parameters for the review of a lawyer's practice; and
- LAO develop procedures that ensure fairness in the process.

Supporting Roster Lawyers to Develop Competencies

The adoption of rigid standards for enrolment on the roster as discussed above, coupled with a quality assurance model that focuses on remedial or punitive measures for mistakes or incompetence that have already occurred, may not best serve the public or be the most effective use of LAO's limited resources.

The Society suggests that LAO explore the development and implementation of a competence framework that increases preventative and front-end measures to support lawyers in their day-to-day practice and facilitates lawyers' delivery of quality legal aid to clients.

²³ The LAO framework for ensuring the competence of roster lawyers overlaps with the LSO's authority to regulate lawyer competence under the Rules of Professional Conduct. The Society notes that the LSO is currently reviewing its continuing competence framework, and suggests that LAO keep abreast of any changes in Ontario lawyers' regulatory requirements to maintain competence, in order to consider the impact on LAO measures for ongoing quality assurance.

²⁴ See *Legal Aid Services Rules*, ss. 38ff.

TAS recommends that LAO establish a mutually respectful relationship between LAO and roster lawyers that promotes a comprehensive view of competency. In particular, TAS recommends that LAO consider adopting measures such as:

- Increasing opportunities for junior counsel to receive mentorship from and shadow more senior lawyers;
- Expanding the availability of funding for second-chair counsel, allowing less experienced lawyers to benefit from the guidance of senior counsel;
- Making senior counsel available to answer questions from less experienced counsel on specific files;
- Working with the LSO to create continuing legal education and practice management skills training specifically applicable to the provision of legal aid services;
- Working with LawPRO to increase premium credits for roster lawyers who complete CPD and practice management skills training;
- Creating practice management tools to assist lawyers with common skills and activities (such as, for example, checklists for interviews or obtaining client instructions);
- Creating model precedents and making them available to lawyers providing legal aid services to streamline the work performed on a file;
- Simplifying the administration of a legal aid practice in areas such as billing and obtaining authorizations for disbursements;²⁵ or
- Increasing LAO tariffs, including increasing lawyers' hourly rates, to attract well experienced lawyers to incorporate legal aid work as a component of their practice and accept legal aid files throughout their careers.

The Society recommends that if LAO is interested in implementing such a comprehensive competence framework, LAO ought to engage in robust consultation with stakeholders, including the bar, on these forward-looking measures and other innovative ideas to help support lawyers in their legal aid practice.

Thank you for the opportunity to provide you with these submissions. We would be pleased to answer any questions you may have regarding the Society's feedback on the proposed minimum experience standards.

²⁵ Lawyers who take on legal aid certificates experience undue administrative burden in LAO file management, including in:

- obtaining a certificate and ensuring that the certificate covers the proper items;
- obtaining authorizations for funding for experts and other disbursements;
- navigating a cumbersome billing system;
- preparing discretionary increase applications, many of which are rejected or substantially reduced; and
- following up on payment delays.

This administrative burden overlays chronic underfunding of legal aid lawyers' work.

Yours sincerely,



Deborah E. Palter
President

CC: Vicki White, Chief Executive Officer, The Advocates' Society

The Advocates' Society's Task Force

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