

REFUGEE LAWYERS ASSOCIATION OF ONTARIO

RESPONSE TO LEGAL AID ONTARIO'S PANEL STANDARDS IMPLEMENTATION PROPOSAL

March 2, 2015

The Refugee Lawyers Association has long advocated for enforcement of panel standards which would ensure refugees and immigrants represented with Legal Aid funding are competently and ethically represented. The RLA shares LAO's concern that panel standards should promote this goal and be reasonably enforced in practice.

The RLA proposed and drafted LAO's first refugee panel standards, which set out realistic minimum standards in representation of refugee claimants. The mandatory language used was amended by LAO to more discretionary language, which somewhat diluted the standards—though their intention remained clear. LAO has also relied on its traditional investigation and panel removal process, which did not involve the bar or give a clear channel for complaints. The result has been that LAO has not had an effective mechanism for enforcing standards of representation. We would welcome the development of a more accessible complaints process involving the bar in the implementation of panel standards.

Recently LAO has adopted new panel standards for refugee hearings, appeals and judicial reviews. These set out an idealized list of best practices, in mandatory terms. These standards include expectations that may be realistic in some cases but unrealistic in others—particularly where there is a disjuncture between what LAO is willing to fund and the expectations set out in the standards. These standards provide a useful definition of ideal standards, but their application in practice must be reasonable.

The implementation proposal LAO has prepared requires all lawyers to go through an application process screened by a committee of staff lawyers, with applicants viewed as

questionable being referred to a Peer Review Committee. The proposal sets out that the Peer Review Committee would be composed of two private bar lawyers and one staff lawyer. That committee would then make a recommendation to LAO's administration, which would make the final decision. The recommendation can be for approval, conditional approval, or refusal/removal. If a recommendation to refuse empanelment is made, and this is accepted, the administration would then proceed through the conventional process set out in the *Legal Aid Services Act*. Likewise if conditions for empanelment are not met, this would lead to the administration proceeding to removal, following the procedure set out in the *Legal Aid Services Act*.

The RLA does not support the proposal to have all lawyers go through a detailed application and screening process. We do not believe this is necessary if a complaints process is implemented, and are concerned it will have collateral impacts.

We propose that LAO should adopt and implement a Peer Review Committee, and allow this to operate. The RLA's position is that the goal of improving on panel standards would be better achieved through an accessible, efficient and transparent complaints-driven process than by requiring all lawyers to go through the proposed screening process.

Our position is that LAO should require panel members to undertake to comply with the panel standards within the representation funded by LAO. This undertaking would be confirmed annually, as is the current practice. However a detailed application and screening process would not be required.

LAO should implement a Peer Review Committee, which meets regularly, reviews complaints and has the authority to recommend (as in the LAO proposal) continued empanelment, conditional empanelment or removal.

LAO should have an official assigned to receive complaints and refer them to the Peer Review Committee. The public should be informed of this, so that it is clear to the public

where to channel complaints. The Peer Review Committee should meet regularly, as the Area Committee does.

The Peer Review Committee should be made up of three private bar lawyers who are experienced and expert in refugee law. Qualification of these lawyers would include: being a member of the Area Committee; being certified by the Law Society of Upper Canada as a specialist in refugee protection law; or being agreed to by LAO and the RLA as an experienced refugee lawyer suitable for the Peer Review Committee. Limiting the Peer Review Committee to private bar lawyers would ensure it is truly perceived as a Peer Review Committee. This should lend weight to its recommendations, which may ultimately be litigated, as well as promoting trust that it will apply the standards reasonably in practice.

The Peer Review Committee should develop clear practices and procedures. Where it recommends conditional empanelment, it should be limited to proposing conditions which can be met –taking into account available resources. Conditions should be practical and attainable.

The process would need to allow both for complaints from the public (including clients themselves) and from within LAO (e.g. in response to staff or Area Committee review of BOCs, merit assessments, change of solicitor requests, etc.).

We believe that a complaints process in itself will significantly reduce the problems that our clients face with quality of representation from a minority of counsel. We would be pleased to work with LAO to develop this system.

The effectiveness of this process could be assessed over a period of time, after which the question of changing LAO's approach to empanelment could be revisited if it is still felt that this is necessary.

We prefer this approach both because we believe that an effective complaints process at LAO is necessary and long overdue, and because we have significant concerns with LAO's implementation proposal.

These concerns include:

1. The proposal creates the perception that all counsel are under suspicion, as all counsel must meet a heavy administrative burden to apply and undergo what is seen as a process of preventive screening and possible remediation by LAO. This aspect of the proposal has provoked a uniformly negative response among RLA members. Most lawyers willing to do Legal Aid work do so out of a sense of commitment, despite LAO fees being substantially lower than market rates and despite tariff limitations. Requiring the majority to go through such a process, as a means to remove a minority, is excessive.

We are very concerned that the proposed approach will deter both lawyers who already do Legal Aid work and new lawyers who may want to do the work but perceive too many obstacles to empanelment. A process that deters competent lawyers will effectively become a barrier to accessibility for refugees and immigrants who get Legal Aid certificates.

2. The proposal is resource-intensive, creating not only an onus on all lawyers but also on LAO's administration. A new bureaucracy screening all lawyers as applicants is created. The end result of this process will be that even where removal is recommended and determined (and likewise where conditions lead to refusal or removal), the lawyer will be entitled to litigate and challenge the decision under the *Legal Aid Services Act*. This added cost would be unnecessary if an effective complaints mechanism is implemented.
3. The application process is geared towards lawyers who appear regularly before the RPD, and has given the impression of excluding lawyers who are expert but either appear in other immigration law proceedings or do not appear often before

the RPD. This is not consistent with the new panel standards, which recognize varied practice realities. Even if the application process is amended, it will likely create both this perception and a reality of such lawyers having to go through a cumbersome application evaluation process. This will act as a deterrent to perfectly competent counsel. This problem is eliminated if lawyers are only required to undertake to uphold the panel standards.

4. The proposal requires that all members of the panel re-apply and go through this process all over again once every three years. This is excessive, may lead to capable lawyers dropping out of the panel, and in any event creates a constantly renewed demand on the time and resources of both lawyers and LAO's administration. Even if the application and screening process were adopted, we do not see any purpose in making people who had already gone through it do so again. The RLA proposal simply requires that lawyers reaffirm their undertaking, as they do now.
5. The RLA does not support the proposal for a separate Appellate panel unless membership on this panel will entitle lawyers to LAO coverage of the leave applications they deem meritorious, including four hours' coverage for their time spent reviewing the merits of a file. We see no purpose to a separate Appellate panel when there is no funding for both positive and negative merit assessments. The *status quo* is that lawyers get no funding if the RAD committee or Area Committee do not agree a case has merit. The elimination of judicial review opinion certificates continues to have a very significant adverse impact on refugees and immigrants. LAO has repeatedly stated that the merit assessment issue would be tied to the panel standards, yet the merit assessment issue remains unresolved. The prolonged and continued failure to resolve this points to the gravity of systemic changes being adopted despite concern that they will adversely impact accessibility.

In summary, in principle the RLA supports LAO's efforts to improve the quality of representation of our clients. We disagree strongly, however, about the approach. Our

position is that LAO should maintain empanelment based on lawyers' commitment to adhere to panel standards, while implementing an accessible complaints-based Peer Review Committee.

Yours truly,



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