

# REFUGEE AND IMMIGRATION STANDARDS IMPLEMENTATION

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*Legal Aid Ontario's (LAO) response to the Refugee  
Lawyers Association's (RLA) submission*

## **Acronym legend**

RLA = Refugee Lawyers Association of Ontario  
LAO = Legal Aid Ontario  
RPD = Refugee Protection Division  
RAD = Refugee Appeal Division  
SRC = Staff Review Committee  
PRC = Peer Review Committee  
DGs = Directors General of Legal Aid Ontario  
JR Merit Assessments = Judicial Review Merit Assessment

## **Background**

In October 2014, LAO's Board of Directors approved strengthened standards for lawyers paid by LAO to represent refugees and immigrants. LAO developed the standards in consultation with the Refugee Lawyers Association (RLA) and other stakeholders in 2013/14. Two separate sets of standards were established: one for first instance tribunal work including the Refugee Protection Division (the "General Standards"), and a second for appellate work such as RAD appeals and judicial reviews (the "Appellate Standards").

In January 2015, as part of its consultation process, LAO presented the RLA with draft guidelines for the implementation of the new standards. The RLA was invited to provide feedback on the draft implementation guidelines by February 2015.

## **LAO's Draft Implementation Guidelines**

The Draft Implementation Guidelines proposed that all lawyers seeking to provide refugee and immigration services would have their quality of work assessed by a Staff Review Committee (SRC) led by an LAO staff refugee lawyer with 15 years of experience in private practice. Applicants whose work quality raised concerns for the SRC would then be referred to a Peer Review Committee (PRC) composed of private bar lawyers and LAO's refugee law senior counsel. The PRC would determine whether the quality standards were

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met or not, whether certain conditions were needed to meet the quality standards, or whether the quality was so poor as to likely render conditions ineffective and create client risk. The concept of conditions was introduced to ensure support for new calls, and to address remediable quality concerns. LAO's Directors General (DGs) ultimately would determine what steps ought to be taken with applicants: acceptance/renewal, conditions, or removal. In the event that a decision for removal was made by a DG, removal would follow established procedures, including the right to a hearing, contained in the *Legal Aid Services Act*. All service providers would have to re-apply for an assessment under the quality standards every three years.

### **The RLA's submission**

On March 1, 2015, the RLA provided a written submission regarding LAO's draft Implementation Guidelines. A copy of the RLA's submission can be found at <http://www.legalaid.on.ca/en/publications/refugeepanelstandards.asp>.

In brief, the RLA supports the implementation of standards as a necessary measure to help ensure that vulnerable clients receive high quality service. The RLA, however, raised the following concerns with the process proposed by LAO:

- Standards must be enforced with an understanding of the realities of practice in the context of tariff limitations
- The implementation process should reflect varied practice realities
- If an appellate panel is to be established, negative and positive merit assessments by appellate lawyers for RADs and judicial review should be funded with a four hour opinion certificate
- Implementation of the standards should be complaints driven, and should not involve front-end screening of all lawyers
- Applicants not subject to a complaint should be entitled to represent refugees and immigrants on legal aid on the strength of a signed undertaking to uphold the standards
- Requiring all lawyers to demonstrate how they meet the standards is both unnecessary and administratively burdensome
- Complaints should be evaluated on a regular and ongoing basis by a peer review committee

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- The peer review committee should be composed of private bar members only.

### **LAO's response**

LAO has a mandate to develop and oversee the delivery of legal aid services pursuant to the *Legal Aid Services Act*. LAO is accountable to the public for the delivery of high quality, cost-effective and efficient services provided within the parameters of a fixed budget.

LAO is grateful to the RLA for the careful consideration that members have given the implementation process. LAO and the RLA are in substantial agreement about the need to have robust standards to ensure that refugees and immigrants funded by LAO receive high quality service. The RLA has some areas of concern with the Draft Implementation Guidelines. These concerns are captured below, together with LAO's response.

### **Standards are an “idealized” list of requirements that may be “unrealistic”**

LAO disagrees that the standards are “idealized” and maintains that they represent basic requirements. LAO's standards, including the Best Practices Guides, were developed in close consultation with stakeholders including the RLA. In LAO's opinion, the standards reflect the way most refugee and immigration practitioners represent their refugee and immigration clients today.

That said, LAO acknowledges that the standards, including the Best Practices Guide, must be applied reasonably. The goal of panel standards implementation is not to take a formalistic or absolutist approach to compliance with the Best Practices Guide but a contextual approach based on an appreciation of reasonable litigation decision making within the parameters of the LAO tariff.

Should concerns be raised that a particular lawyer did not conform to the Best Practices Guide or otherwise comply with the standards these concerns will be discussed with that lawyer prior to decisions being made. Experienced refugee lawyers with private practice experience will assess whether the lawyer's explanation is reasonable and acceptable.

In implementing these standards, LAO's objective is to identify those whose poor quality of service puts clients' rights at risk. Quality concerns will be addressed through conditions

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where it is reasonable to do so. Removal proceedings will be initiated where the circumstances warrant it. In implementing standards, LAO does not intend to hold lawyers to an unrealistic, idealized practice model.

### **Refugee standards implementation appears geared towards those regularly appearing before the Refugee Protection Division**

The Implementation Guidelines will be revised to ensure greater clarity; the refugee standards are geared towards all areas of refugee and immigration practice. Those with varied refugee and immigration practices who produce quality work are, and will continue to be, valued members of the LAO's funded refugee and immigration bar. LAO hopes to partner with the RLA to ensure that this message is clearly communicated to its membership.

### **Appellate standards and RAD/JR Merit Assessments**

The implementation of the new appellate standards and the requirement to be approved under the appellate standards in order to undertake RAD appeals or federal court work on behalf of legally aided clients, create greater confidence in the quality of merit assessments and address the concerns that LAO had when changes were made to merit assessment coverage in 2011. Reflecting this, LAO will fund, to a maximum of four hours, both positive and negative merit assessments in respect of RAD appeals and federal court leave applications made by members of the newly created appellate panel. In addition, LAO will develop a simplified process for appellate lawyers to provide merit opinions to LAO; a very brief statement of the reviewable or appealable issue will normally suffice. In all but exceptional cases, it is anticipated that full coverage will be granted to panel members providing positive merit assessments. Lawyers will be required to provide LAO with a copy of their written submissions or memoranda at the time of billing.

### **Complaints-driven process only**

LAO values the RLA's identification of complaints assessment as an integral part of the standards implementation process, and will modify the implementation process to include complaints. However, LAO is not prepared to make the implementation of standards exclusively complaints-driven. LAO believes, for the following reasons, that the process

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must include an assessment of the quality of all applicants regardless of whether LAO is aware of prior complaints or concerns.

1. As a result of the vulnerability refugee claimants' experience, most do not make complaints, even where quality of representation falls short of acceptable standards. Indeed, historically LAO has received few complaints in relation to quality of service concerns, even in respect of clients who have, by any standard, been poorly represented.
2. A complaints driven process is by definition reactive rather than proactive. LAO, under the *Legal Aid Services Act*, has a responsibility to ensure that all clients receive high quality representation at the outset. Vulnerable clients should not be left to complain after poor representation has resulted in a failed refugee claim. Clients, at that point, may no longer have access to effective remedies and face consequences ranging from deportation to persecution.
3. An exclusively complaints driven process has significant financial costs for LAO, for private lawyers and for the taxpayer. Inadequate representation results in costly appeals and judicial reviews which may not have been necessary had the client been represented by high quality counsel at the tribunal of first instance. LAO believes that an assessment of all applicants' quality of work more fully protects clients' rights and safeguards LAO's financial resources.

### **Reliance on private bar undertakings of quality assurance**

LAO currently relies on undertakings of quality assurance by lawyers to ensure that standards are met. LAO's experience has been that while most lawyers comply with these undertakings, there are some lawyers who either lack the capacity or the intent, or both, to comply with the undertaking. In LAO's experience, the provision of undertakings provides inadequate assurance that standards are being met.

### **Screening all lawyers will create administrative burden**

LAO recognizes that requiring all lawyers to demonstrate that they meet the standards will impose an administrative burden on applicants. In an effort to minimize this burden, and in response to the RLA's concerns, LAO is changing the three year application requirement to five years. In addition, LAO will make the application form as clear, simple and

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straightforward as possible and provide information sessions and telephone support for those needing assistance in completing the form.

### **Screening of applications by the Staff Review Committee**

In response to the RLA's concerns, LAO will modify the role of the Staff Review Committee in the revised Implementation Guidelines. The Staff Review Committee will triage applications. Applications that raise no quality concerns for the Staff Review Committee will be identified and referred to the Director General for processing. In those cases where an application raises quality concerns, the committee will document their concerns. The matter will then be referred, via the Director General, to the Peer Review Committee for in detailed assessment.

### **Peer Review Committee**

LAO welcomes the RLA's suggestion that the Peer Review Committee meet on a regular and ongoing basis to assist in the review of applications, complaints and concerns. However, LAO views this role as supplementing, not replacing or supplanting, the five year standards reassessment process.

The RLA has proposed that the Peer Review Committee be composed exclusively of private bar lawyers. This, the RLA suggests, can help ensure the committee is truly perceived as a peer review committee, its recommendations seen as credible, and the standards applied reasonably. LAO supports this direction with the following caveats:

- a) In order to avoid the perception of bias (a committee composed solely of lawyers evaluating the work of colleagues with whom they may, or may not, be closely associated) the names of applicants under assessment will not be disclosed to the members of the Peer Review Committee and materials will be anonymized.
- b) A non-voting LAO staff member will chair the committee ensuring compliance with policy and process and maintaining LAO's accountability for the standards implementation.
- c) The composition and structure of the PRC will be piloted with functional evaluation initiated after 12 months.